



# **Impact Assessment Case Histories -**

**A practical guide on how to  
interpret better regulation  
framework principles and rules**

December 2016

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## Foreword

During the last parliament, the Regulatory Policy Committee (RPC) scrutinised over 1,200 impact assessments (IAs) supporting regulatory proposals and issued over 2,000 opinions. During the first reporting year of the business impact target (BIT), May 2015 to May 2016, 149 different regulatory provisions came into force, with the RPC validating the impacts of 129 of these.

Given the breadth of policy interventions covered by the Better Regulation Framework, we recognise that applying its rules can be challenging for policy teams and analysts. This 'case histories' document sets out, using practical examples drawn from RPC opinions, how the RPC applies the better regulation framework rules and principles. It also sets out the RPC's approach to the level of analysis that it expects to see presented in impact assessments, and covers specific technical issues, such as the criteria against which to assess whether impacts are direct or indirect.

In this new version of RPC case histories, we have sought to incorporate key methodological issues that have arisen recently, whilst also including some long standing case studies where we believe that the issue is still relevant under the BIT. With the BIT still being relatively new, there are inevitably some areas where we do not yet have case studies. We will look to fill these in over time. It is intended that case histories will be updated regularly to ensure that it reflects new issues or complexities soon after they arise.

We hope we have captured many of the issues relevant for departments and where they have sought further clarity on how the RPC applies the framework rules. If you have comments or suggestions on how to improve the document further, please contact us at [regulatoryenquiries@rpc.gsi.gov.uk](mailto:regulatoryenquiries@rpc.gsi.gov.uk)

The document is structured as follows:

**Part I: Introduction.** This sets out some background information, the aim of the document, advice on how to use it and how the RPC applies [recommendations](#) when scrutinising evidence presented in impact assessments.

**Part II: Impact Assessment Evidence Base.** This is the main part of the document and relates to specific issues of better regulation methodology underpinning the BIT. It sets out examples that help clarify how the RPC applies the rules in the Better Regulation Framework Manual (BRFM). It is structured in the following way:

- Problem under consideration
- Options
- Constructing reliable estimates of costs and benefits
- Business Impacts Target (BIT) methodology
- Non-qualifying regulatory provisions
- Methodological issues where regulators are involved\*
- Small and Micro Business Assessment
- Wider impacts

\* Please note that this presently covers issues relating to departmental IAs rather than submissions from regulators. The latter will be covered, as the number cases submitted from regulators builds up, by a further RPC case histories document in 2017.

**Part III Post Implementation Reviews (PIRs).** This sets out how the RPC will be assessing post implementation reviews and how it will be applying the framework and other cross-departmental guidance in this area.

## Part I: Introduction

### i. Structure and aim of the guide

This document is aimed at readers with some experience of IAs and the better regulation framework, and assumes a degree of familiarity with the Better Regulation Framework Manual and [The Green Book](#). When using this document you may sometimes find it useful to also have a copy of these documents at hand.

This document is designed to be of assistance in the writing of IAs and in the assessment of proposals for BIT purposes. However, it is important to recognise that no two proposals are identical. If you have particularly complex issues regarding the better regulation framework, you are advised to discuss them with the RPC secretariat and/or the Better Regulation Executive (BRE) before submitting an IA.

### ii. How to use the guide

There are a number of key documents and guides that the RPC applies when scrutinising impact assessments. These documents would also be of help to departments when developing IAs and PIRs.

#### Core documents and guidance

- [RPC recommendations](#) - To provide further clarity, the Committee has set out seven [recommendations](#) based on the common themes emerging from the scrutiny of IAs.
- Better Regulation Framework Manual - This manual contains guidance for compliance with the regulatory framework, designed to put the Government's better regulation principles into practice.
- [The Green Book](#) - HM Treasury guidance for public sector bodies on how to appraise proposals before committing to a policy, programme or project.

#### Supplementary literature

- [Supplementary guidance to green book](#) - The Green Book is supplemented by a number of more technical documents which relate to specific policy areas, such as the environment, transport and crime.
- Guide For Conducting Post Implementation Reviews – produced by the Cross Government Evaluation Group (August 2015).
- [Magenta book](#) - This is the HM Treasury guidance for how to carry out an evaluation of an existing policy, programme or project. This is equivalent to the Green Book, but

relates to ex post evaluation and is, therefore, also of particular relevance for post implementation reviews.

This case histories document has been structured in such a way that the order in which methodology issues are discussed follows the order of analytical steps that departments need to consider when developing an impact assessment. The document can, therefore, be used as a source of reference for a specific methodological issue rather than be read cover to cover. The table below may help indicate potential linkages between various methodological issues.



Issue Matrix	Problem under consideration & options			Preparing reliable estimates		Methodology issues affecting Business Impact Target and scope classification											SMB	NPV	
	Problem / rationale	Linking options to problem	Non-regulatory options	Counterfactual	Proportionality	Direct / indirect	EU / international	Non-compliance	Fees and charges	Financial systemic risk	Pro-competition	Enforcement	Primary / Secondary	Regulators cost recovery	Permissive regulation	Mix of reg & dereg	Gross/ net profit	SaMBA	Wider & non-business impacts
Problem/ rationale		✓																	
Linking options to problem	✓		✓																
Non-reg options	✓	✓		✓															
Counterfactual																			
Proportionality	✓									✓									
Direct/ indirect				✓			✓					✓	✓	✓		✓			
EU / international				✓															
Non-compliance																			
Fees and charges																			
Financial systemic risk																			
Pro-competition	✓	✓		✓	✓	✓												✓	✓
Enforcement																			
Primary / secondary					✓	✓													
Regulators cost recovery		✓	✓	✓	✓														
Permissive regulation						✓													
Mix of reg/dereg					✓														
Gross / net profit					✓	✓													
SaMBA	✓	✓			✓	✓													
Wider impacts	✓	✓		✓	✓														

### iii. How does RPC assess the quality of analysis and evidence?

The RPC assesses the quality of the evidence and analysis supporting regulatory and deregulatory proposals, and validates the estimates for the equivalent annual net direct cost to business (EANDCB). Departments are expected to develop and present their proposals in line with the [RPC recommendations on scrutinising IAs](#). It is on this basis that the RPC will assess the quality of evidence and analysis in impact assessments. Specifically, the table below sets out the key areas that the RPC scrutinises to establish whether an impact assessment is fit for purpose. Red text indicates that the issue makes the submission 'not fit for purpose'. Note that the table refers to proposals submitted via a full IA route only.

For further guidance related to the RPC process and related requirements please see an [RPC slide pack](#) on the Whitehall portal.

**Table 1: Key areas of analysis RPC will scrutinise to ensure proposals are fit for purpose**

Recommendations / Route and Stage		Don't presume regulation is the answer	Take time and effort to consider all the options	Make sure you have substantive evidence	Produce reliable estimates of costs and benefits	Assess non-monetary impacts thoroughly	Explain and present results clearly	Understand the real cost to business and civil society of regulation (base for BIT classification)	Seek to minimise the burdens on small and micro businesses
Full route	Consultation stage IA	Rationale for intervention and market failure must be set out and scale of the problem explained. All of the realistic/feasible options, including alternatives to regulation must be considered and assessed to an appropriate level of detail.	All major impacts of the proposal to be identified. Clear analysis of the scale of the problem and likely impacts to inform meaningful consultation with stakeholders.  RPC may highlight areas where the department should seek more evidence from consultees.	All impacts must be described to an appropriate level of detail.	The terminology and analysis must be clear and accessible.	Full monetisation is not required...  ...but RPC must normally be able to confirm BIT status.	A sufficient SaMBA must be included providing: <b>1)</b> Information on the numbers of small businesses affected. <b>2)</b> Initial consideration of applying exemption and mitigation. <b>3)</b> Discussion of how much of the policy objective might be sacrificed by applying a full exemption; and how much of the overall cost to business is expected to fall on small businesses.		
	Final stage IA	In addition to the above, the chosen option should be narrowed down by the final stage and justified.	Impacts on business must be presented in a way that enables RPC to validate that the EANDCB figure is a robust best estimate of the likely direct impact on business or civil society organisation.  RPC will also comment on the assessment of non-business impacts.	All impacts should be described thoroughly and clearly.  This could only affect the colour of the opinion if it relates to BIT assessment.	RPC must be able to follow the calculations for the EANDCB.  Presentation more generally can be commented upon.	RPC must be able to confirm the BIT status and the EANDCB figure.	A sufficient SaMBA must be included with analysis on: <b>1)</b> Final assessment of the number of small businesses affected. <b>2)</b> Fuller consideration of the impact of applying an exemption and mitigation, to support the decision being taken, including: <b>3)</b> An assessment of the proportion of the benefit of the policy that would be sacrificed by applying a full exemption; and the proportion of the overall cost to business expected to fall on small businesses. If no estimates are provided, explain why this is not possible/proportionate.		

## Part II: Impact Assessments

The aim of this section is to provide practical advice on the key building blocks of an impact assessment and highlight RPC expectations on the type and quality of analysis expected. Where such expectations differ significantly between consultation and final stage IAs, this is noted and explained throughout the text, as far as it is possible to do so.

### Section 1: Problem under consideration

#### 1.1 Establishing the problem and rationale for regulation

One of the first aspects of a consultation stage full IA the RPC concentrates on is the department's answer to the question: *"What is the problem the proposal is seeking to address?"* The RPC would expect departments to:

- (i) **articulate clearly the evidence for there being a problem that needs addressing**  
*and*
- (ii) **the evidence that this problem will not be corrected by market forces alone.**

Both [the Green Book](#) and the BRFM provide detailed guidance on the types of issues that can affect the ability of markets to allocate scarce resources efficiently. Both documents also highlight that equity concerns and other social welfare objectives can act as drivers for government intervention. The Green Book states: *"this underlying rationale is usually founded either in market failure or where there are clear government distributional objectives that need to be met."*

The RPC recognises all these arguments. The RPC finds it preferable if the problem being addressed can be established and articulated using these types of conceptual frameworks. Whatever the identified problem is, evidence should be presented as to its existence and its scale, drawing a distinction between perception and reality where the two diverge.

The RPC expects the chosen option to be supported by the analysis. It does not consider that a decision to go ahead with a proposal based on a "ministerial preference" rather than a sound economic rationale, supported by robust evidence of the problem, is sufficient to justify such a policy choice. **Where a department has not, at consultation stage, clearly identified the existence of a problem the RPC reserves the right to issue a red opinion.**

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Potential  
red point

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Potential  
red point

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**Retrofitting components to HGVs to reduce vulnerable road user casualties (Consultation Stage, Red) (RPC15-DfT-2327):** The costs and benefits were set out well, especially for a consultation stage IA. However, this indicated that the costs of proposal would be greatly in excess of the benefits to society. The IA recognised this but stated that the preferred option had the “potential to increase safety of vulnerable road users in line with Ministerial imperatives to increase road safety”. The RPC does not comment on policy decisions, but considered that on this occasion the Department has provided insufficient justification for choosing an option with such a large negative NPV.

**Ballot thresholds in important public services (Consultation Stage, Red) (RPC15-BIS-2402):** In this case the IA did not explain and present the rationale for the proposals in a straightforward and logical way. The RPC did not consider that the IA provided a clear enough basis for consultation. The Department’s description of the problem was extremely limited and essentially relied on the statement that “important public services can have far reaching effects on significant numbers of ordinary people”. While that is clearly the case, the RPC expected more evidence/discussion on this point for a measure of this kind, e.g. better assessment of the costs and disruption caused, and its impact on the economy. The Department stated that industrial action can raise serious equity considerations and put the provision of public services at risk. In this instance, the RPC felt that the Department needed to provide further evidence on the existence and likely scale of this effect. ([Opinion](#))

## 1.2 Linking the options to the problem

Once the problem has been established the second question to answer is “*how does each of the proposed interventions address the problem?*”

**The RPC expects departments to explain how, or how not, each of the options presented will provide a partial or complete solution to the problem(s) identified.** This should involve discussing and comparing the twin priorities of achieving the objectives of the intervention, providing a solution to the problem, but also doing so in a way that limits the costs to business and civil society organisations as well as maximising any benefits. **Where the link between the problem identified and the impacts of the options is not clear, the RPC reserves the right to issue a not fit for purpose opinion at consultation stage.**

Potential  
red point

**Gender pay gap (Consultation Stage, Red) (RPC15-GEO-2384):** the proposal was to consult on ways of introducing a requirement for businesses with more than 250 employees to report on their 'gender pay gap'. The Department, in its initial submission, explained that the gender pay gap can be explained by a variety of factors, has reduced over time and is zero/negative for people below the age of 39. The initial submission did not explain sufficiently why introducing a requirement to report on pay by gender could lead to an increase in the speed of the reduction of any pay gap. In a later submission, the Department explained that the intrinsic aim of the policy was to make businesses reflect on internal factors that might contribute towards a pay gap. The reporting requirement was mainly a tool to ensure that businesses are actually undergoing such a review of their internal practices. The later submission received a 'green' rating by the RPC.

The RPC looks for a clear statement in the IA on which of the options discussed is preferred or being taken forward, and a clear justification for this choice. **In most instances, this will be on the basis that the appraisal suggests that such an option is likely to be the one with the highest net present value (NPV), ie the most net beneficial or least net costly to society as a whole.**

The RPC also recognises that there will be cases where departments can justify recommending a policy option that does not necessarily have the highest NPV. For example, this could be the case when the existence and scale of non-monetised benefits can be clearly demonstrated.

However, as mentioned earlier, departments should remember that appealing to ministerial priorities is not, on its own, a sufficient justification for choosing a policy option not supported by the appraisal and evidence, and hence could result in a not fit for purpose opinion issued by the RPC.

Potential  
red point

**Paediatric First Aid (PFA) in early years provision (Consultation Stage, Red) (RPC15-DfE-2356):** The Department's proposal was a response to a coroner's recommendation, a 103,000 signature petition, a subsequent parliamentary debate and a national review, following a tragic incident in a nursery class. The Department stated that "*the national review has shown that parents would welcome additional reassurance that their children are safe through increased paediatric first aid provision*".

Initially, the Department provided no assessment of the possible health and safety benefits of the proposal. There was no information on the number of health incidents and, therefore, the level of risk under the existing PFA requirements. There was no assessment of how much the proposal might lower these risks. The IA was, therefore, rated as not fit for purpose on the basis that it did not identify satisfactorily a fundamental impact of the

proposal. In addition, without any assessment of the above benefits, it was difficult to understand fully the rationale for the proposal or how the options compare, and its justification for a preferred option to address the problem.

Subsequently, the Department addressed satisfactorily all comments made by the RPC and proposed to use the consultation to strengthen its assessment of possible impacts.

***Additional examples in relation to problem identification and policy justification:***

**Ex-military aircraft occupant placard (Final Stage, Red) (RPC12-DFT-1371(2)):** This proposal required ex-military aircraft to display a placard explaining that the aircraft is not certified under international airworthiness requirements. The IA failed to demonstrate that there was currently any lack of safety awareness among passengers travelling in such aircraft. Indeed, responses from stakeholders suggested this was not a problem. As the IA was submitted before limitations were placed on RPC ratings of final stage IAs, the IA received a red rating for this and other reasons. A revised IA was submitted addressing other concerns but not the rationale issue. As the problem did not relate to direct costs to business the IA received a green rating, but with highly critical comments on the quality of the analysis.

**Sheep identification – electronic slaughter tag (Consultation Stage, Red), (RPC13-DEFRA-1721):** This proposal introduced mandatory use of electronic identification (EID) slaughter tags, and electronic reading by markets and abattoirs. The preferred option would result in a net benefit to business because the benefits to markets, keepers and abattoirs, due to the reduced cost of reading animals, is greater than the costs to farmers who will need to purchase more expensive electronic tags. The original IA suggested that it was thought that commercial pressures would drive the take up of EID tags for lambs intended for slaughter, but that this did not happen. The RPC asked for a clearer explanation of the market failures which had been identified as preventing these commercial drivers from taking effect. This resulted in a red-rated RPC opinion of the consultation stage IA. A revised IA was submitted; it explained that the marketplace had not driven the use of the EID slaughter tags because of competition for trade, and fear that it would divert sales direct to abattoirs away from livestock markets. The revised IA received a green-rated RPC opinion.

## Section 2: Impact assessment options

### 2.1 Non-regulatory options to regulation

The Government’s Principles of Regulation state that *“in many instances alternatives to regulation are more effective, such as simplifying existing regulation, giving clearer information to consumers or developing voluntary codes of practice”*. Therefore, the RPC expects departments to consider non-regulatory options (also commonly known as “alternatives to regulation”) and analyse their viability and effectiveness. A lack of such analysis is likely to result in a not fit for purpose opinion from the RPC at consultation stage.

A summary of RPC expectations by stage and type of impact assessment process is presented below.

Potential  
red point

**Table 2: Non-regulatory options - RPC expectations by stage and type**

Domestic	Consultation stage	<ol style="list-style-type: none"> <li>1. Discussion of non-regulatory options with the same level of detail as all other options, explaining clearly the incentives and potential costs and benefits.</li> <li>2. Clear explanation of legal requirements and/or the economic rationale why alternatives to regulation might not be viable.</li> <li>3. Monetisation of non-regulatory options as far as possible and proportionate. If full monetisation is not feasible, provision of assumptions about potential uptake and effectiveness drawing from the experience in other sectors and the literature.</li> <li>4. Test of the assumptions during consultation.</li> </ol>
	Final stage	<ol style="list-style-type: none"> <li>1. Update of assumptions from consultation responses.</li> <li>2. Monetisation of all options as far as possible and proportionate.</li> <li>3. Clear explanation of why regulation is favoured. For example, why was a</li> </ol>



		voluntary approach, say resulting in half the costs to business but delivering 60% of the policy benefits, seen as an inferior approach?
EU/International	<ul style="list-style-type: none"> <li>▪ Clear explanation of whether and why a regulatory approach by the UK is required to fulfil the EU obligations.</li> </ul>	

The RPC would like to see more assessments and more monetisation of costs and benefits for non-regulatory options. RPC analysis shows that, in 2014, only one in two domestic regulatory measures submitted via a full track route discussed non-regulatory options. In addition, only one in eight quantified and monetised non-regulatory options fully.

Where a department is proposing to regulate, the RPC will look for analysis outlining why alternatives to regulation are not viable or will not be effective in achieving the policy objective. Where possible and proportionate, this analysis should include quantification.

At consultation stage, the focus of the impact assessment should be to present a suitable set of options, including non-regulatory alternatives, and to identify and explain costs and benefits of all options in a comparable way. At final stage, the focus should be on monetising the impacts as much as feasible and proportionate, to support any recommendation for a regulatory approach. Where non-regulatory approaches are currently in place, their effects should be fully assessed as part of the ‘do nothing’ option. The RPC acknowledges that non-regulatory options are not feasible in all cases. The RPC recognises that the scope to implement the policy via different options might be particularly limited with international measures or the transposition of EU directives.

## 2.2 Broader issues departments should consider in the analysis of options

### 2.2.1 The relationship between regulatory and non-regulatory approaches

The RPC expects departments to show awareness and provide clear analysis of the relationship between non-regulatory approaches and regulatory ones. The effectiveness of regulation might depend on the level of voluntary schemes already in place. Existing forms

of self-regulation or co-regulation might make new regulation partially redundant as the benefits of such new regulations would be reduced.<sup>1</sup>

Departments should consider how the position might evolve over time. Are businesses currently thinking about a voluntary approach and should it be included in the counterfactual? Would the introduction of statutory regulation stifle voluntary efforts by business?

### **2.2.2 Incentives**

While there might be some degree of substitutability between regulatory and non-regulatory approaches, the incentives involved can be very different. For example, self-regulation could be imposed by dominant players in the market to stifle entry and competition and standards set by industry voluntarily could, therefore, be stricter at times.<sup>2</sup>

Many non-regulatory options are based on building appropriate incentives for the parties involved. Government has greatly increased its analysis of behavioural responses to incentive schemes, for example by setting up the UK Behavioural Insights Team (UKBIT) in 2010. Analysis by BIT and results from other academic research in the field of behavioural economics are increasingly being used for policy making and the design of regulation.<sup>3</sup> The principles arising from this research extend beyond regulatory policy. Departments should make use of such sources when analysing the potential outcomes of non-regulatory approaches, and the incentives involved, when more standard forms of data are not available.

### **2.2.3 Set of non-regulatory approaches considered and justification for regulation**

Departments should not only consider formal non-regulatory options, such as voluntary codes of practice or industry standards, but also analyse to what extent recent developments and market mechanisms could at least partially address the issue. Such mechanisms could be, amongst others, the strengthening of consumer awareness and pressure from new technologies. These should be taken into account in the counterfactual.

Departments should avoid assuming as standard that non-regulatory options produce lower uptake than regulation and that they, therefore, lead to smaller costs to business while delivering a smaller net benefit to society. While this might be true in many instances, it should be grounded in evidence rather than just asserted. Departments should also explain

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<sup>1</sup> Examples are agreements between employers and unions, where employment relations are largely achieved through agreement between the two parties, or similar more informal approaches in workplaces without unions. It appears that the principle of such agreements could be applied in other spheres.

<sup>2</sup> The potential anti-competitive effect of both regulation and self-regulation if it favours incumbents at a cost to new entrants should be considered in impact assessments in general.

<sup>3</sup> The report "Regulatory Policy and Behavioural Economics" commissioned by the OECD provides a useful overview on the use of behavioural economics in regulatory policy: [http://www.oecd-ilibrary.org/governance/regulatory-policy-and-behavioural-economics\\_9789264207851-en](http://www.oecd-ilibrary.org/governance/regulatory-policy-and-behavioural-economics_9789264207851-en)

why the delivery of a smaller part of the policy objective at the benefit of a reduced cost to business is not acceptable.

By definition, the RPC does not, usually, see cases in which a non-regulatory option is taken forward. Below are some cases which included a good analysis of non-regulatory options.

**Employers in Great Britain, with at least 250 employees, to publish mean and median 'gender pay gap' figures, mean and median gender bonus gap figures and a table with the breakdown of the number of males and females by salary quartiles (RPC-GEO-3023(4))**

These regulations will require companies with more than 250 employees to publish the following figures annually: (a) mean and median gender pay gaps; (b) mean and median gender bonus gaps; and (c) the number of men and women in each quartile of the company's pay distribution.

The Government previously pursued alternatives to regulation. In particular, since 2011 the Department encouraged large employers to voluntarily publish gender pay gap information through the *Think Act Report* initiative. However, only 5 out of almost 280 employers who signed up to the voluntary initiative published the information. The Department explains that while the gender pay gap has slowly fallen over the last five years, decreasing from 19.85% in 2010 by 0.75% to 19.1% in 2015, the voluntary approach would be very unlikely to achieve the policy objective of accelerating the reduction in the gender pay gap over time.

**Material Recovery Facilities (RPC12-DEFRA-1625):** The proposal requires Material Recovery Facilities to sample the quality of their input and output material streams in a standardised way and make information on this transparent and public.

The IA does not provide an assessment of a non-regulatory approach as such, but explains clearly the pre-regulatory environment. It provides good theoretical analysis, which is backed up by consultation responses from the industry, on why existing voluntary approaches cannot address the issue at hand.

The IA explains that competitive pressure on operating costs is very high in this sector. In addition, asymmetric information in this market means that buyers of recycled material cannot verify the quality at the point of purchase. The pressure on costs means that businesses properly assessing the quality of their produce are often at a competitive disadvantage due to increased costs, while the buyers' inability to verify quality means that any quality signal cannot be seen as credible in the absence of mandatory, standardised sampling and reporting requirements. ([Opinion](#))

**Community right to buy into renewable electricity developments (RPC14-DECC-2027):** This final stage IA is, in general, very detailed and provides a lot of evidence. It assesses the cost and benefits of the primary legislation enabling government to introduce a legal framework in which individuals in the community are guaranteed the opportunity to purchase a stake in a renewable electricity development.

The Department explains how it has worked closely with industry to develop a voluntary framework to facilitate shared ownership. It explains that the government intends to stay with the voluntary approach, but wants to be ready to intervene if a review shows that progress under the voluntary scheme is insufficient. The IA assesses the incremental costs and benefits associated with taking up these powers against three scenarios for the voluntary uptake. While it could be argued that the threat of legislation undermines how “voluntary” the current approach is, the Department, by providing different scenarios, made a case for the overall benefits of legislation outweighing those derived under the voluntary framework. ([IA](#))([Opinion](#))

**Tackling avoidance of the ban on exclusivity clauses in zero hours contracts (RPC14-BIS-2236):** This consultation stage IA investigates possible responses to tackle the avoidance of the ban of the use of exclusivity clauses in employment contracts which guarantee no hours (zero hour contracts). The IA presents legislative options as well as the introduction of non-statutory codes of practice. The IA takes all options to consultation and does not state any preference at this stage.

All options are considered in similar detail, although the Department explains that it has only been able to estimate familiarisation costs associated with the non-statutory code. It explains that it would assume that ongoing benefits to businesses taking up the voluntary code must outweigh ongoing costs.

The Department expects the non-statutory code to deliver a smaller proportion of the benefits associated with the policy at a lower cost to business. The evidence presented makes clear that this assertion is appropriate in this case. ([IA](#))

**Smoke alarms in private rented properties (RPC14-CLG-2266):** The proposal makes the installation of smoke alarms on each floor of private rented properties mandatory. The final stage IA sets out the long history of non-regulatory approaches over the last decades. It shows that non-regulatory approaches have been successful in achieving close to 90% coverage. The Department provides evidence and argues, given the long history of non-regulatory approaches, that a small percentage of landlords will never respond to these approaches. It further explains that these landlords often own high-risk properties.

The IA shows that increasing coverage to (almost) full coverage will result in overall benefits to society as the reduction of domestic fires comes with large benefits. In its assessment of the policy option, the Department assumes a reasonable growth in uptake in the counterfactual. By doing this, the Department shows awareness of the effects of existing non-regulatory approaches and their effect on the costs and benefits associated with the regulatory proposal. In effect, it provides a full cost-benefit analysis of the regulatory approach compared to the counterfactual of solely continuing with existing non-regulatory approaches. ([IA](#))

#### **2.2.4 Explaining why options are not being taken forward**

When a decision has been made not to take forward an option, the IA needs to explain why. This does not mean that full monetisation of costs and benefits should be undertaken for options when it becomes apparent early on in the process that they are not feasible, or will be significantly worse value for money than other options. An IA needs to contain sufficient analysis of each option to explain why it is not being taken forward. In a consultation stage IA, if options are not being taken forward without sufficient justification this is likely to result in a red-rated opinion. At final stage it is expected that a single option will be recommended, although the RPC may comment if it is not clear whether other options were considered or why they were discarded.

## Section 3: Reliable estimates of costs and benefits

### 3.1 Counterfactuals

The BRFM states (para 2.3.31): “*you must present only the costs and benefits that are additional (i.e. incremental or marginal costs and benefits) to those that would have been incurred if no action were taken (i.e. versus the baseline, counterfactual or ‘do nothing’).*” This in turn follows the principles set out in the Treasury Green Book (pages 47 and 53).

Using the wrong counterfactual is likely to result in a Red opinion both at consultation and final stage.

Potential  
red point

#### 3.1.1 Do nothing and the status quo

It is important to stress that the ‘do nothing’ is not necessarily the same as the status quo or ‘As Is’ position. The do nothing should be what would happen in the absence of the particular policy intervention being appraised. For example, if a proposal affects the number of businesses in a rapidly declining sector (e.g. mining or shipbuilding) then it would be appropriate for the appraisal to take this into account in the baseline.

Similarly, there may be other policy interventions that will happen regardless of the proposal. For example, a domestic policy proposal coming in during 2016 would have to take account of any EU directive in the same policy area that is already known to be coming in during 2018.

Departments should, however, take care in demonstrating the evidence for such adjustments to the baseline. In the case of declining or growing industrial sectors, this would involve setting out historical data on the number of businesses. In the case of other policies coming in, if there is any uncertainty over whether the policy will happen the Department will have to provide a full explanation for why it is appropriate to build it into the counterfactual. In these situations it will usually be good practice to undertake sensitivity analysis on the impact of the external policy on the option ranking and estimates.

#### 3.1.2 Constructed counterfactuals

There are some situations where it is appropriate to use a constructed or artificial counterfactual, i.e. a counterfactual that is known to be different to what will happen in the absence of the proposal. Unless otherwise stated, this guidance only applies to the calculation of the EANDCB for business impact target (BIT) reporting purposes rather than the wider impact assessment.

#### EU measures

There are two types of EU measures where it is appropriate to use a constructed counterfactual.

**Directives** - For the transposition of EU directives into UK law a counterfactual that the EU directive does not exist should be used. This is for two reasons:

First, a failure of the UK to transpose a directive would make the UK potentially subject to (very large) **infraction costs**. Although this is a transfer payment, as it is payment from the UK to overseas it would count as a cost to the UK in an impact assessment. Factoring this into the cost of the 'do nothing' option is likely to make compliance with the EU requirements the best value for money option for the UK in all IAs. However, whilst this may be strictly correct, it masks whether the underlying EU proposal represents a net benefit to the UK. Of course, the wider IA should make clear the risk of infraction proceedings, and the associated expected cost, to help inform decision-makers.

Second, it also avoids any other costs **if the UK were the only country not to implement the EU directive**.

In 2012 the DfT submitted a Civil Aviation Authority IA '**Air Navigation Order (ANO) 2009 Changes as a EASA Air Operations Regulations**' with an (out of scope) EANCB of -£9bn. This was the estimated benefit to the UK of avoiding aircraft being effectively grounded because of a failure to comply with the EU Regulation. This resulted from a counterfactual of every other country in the EU implementing the Regulation. In December 2014 the Department re-submitted the IA with the appropriate counterfactual of the EU Regulation not existing.

**Take-up of beneficial derogations** - The UK Transposition Guidance states that implementation should take full advantage of any derogations which keep requirements to a minimum. There is, therefore, an expectation that government departments will exercise net beneficial derogations, such as an option to delay the implementation of a net costly EU regulation. A counterfactual based upon minimum implementation should, therefore, assume that all net beneficial derogations are taken up. This is different to a pure 'do nothing', as taking up a derogation involves an action.<sup>4</sup>

In December 2012 DfT submitted an IA for an out of scope EU measure **Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012**. The IA included a negative EANCB, with savings resulting from taking up a beneficial derogation. Since the taking up of a beneficial derogation should have been in the counterfactual, the EANCB was incorrect and the RPC issued a Red validation statement in January 2013.

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<sup>4</sup> This position is consistent with a failure to take available derogations that would reduce the costs to business being scored as an IN under OITO/BIT. Since an IN is, by definition, a measure that increases the cost to business, the counterfactual which results in this outcome is one where it is assumed that the derogation is taken up.

### Time-limited measures

This section only considers temporary measures lasting longer than 12 months. Measures lasting less than 12 months are out of scope of the BIT.

**Please note that guidance on the assessment and scoring of time-limited measures under the BIT is currently being finalised. What follows relates only to OIOO/OITO. Paragraph 1.2 27 of the new BRFM presently states: “Treatment of time-limited measures will depend on the specific circumstances of both the measure and whether it is expiring, being revoked or extended. Please speak directly to BRE for further details if you are unsure how to score your measure”. This section will be updated once the BRFM wording has been finalised. We will also add examples under the BIT.**

The OIOO/OITO framework said that: “The expiry of a time-limited measure that has been costly to business is treated as an OUT, and the expiry of a measure that benefits business as an IN, under the OITO methodology”. This outcome is consistent with a counterfactual where the measure does not expire. Under the usual ‘do nothing’ counterfactual, the expiry itself would be in the baseline because it involves no action by government. There would, therefore, be no IN or OUT scored on expiry.

If a time limited measure is renewed or extended then only differences between the new and old measures should be scored. If the new measure is identical to the old one then, during the last parliament, the RPC would validate it as ‘zero net cost’.

**Night Flying Restrictions (RPC13-DFT-1859(2)):** The existing regulatory restrictions on night flying at Heathrow, Gatwick and Stansted were due to expire in October 2014. The department’s proposal was for a three year interim measure to allow full consideration of the independent Airport Commission’s recommendations on airport capacity for the design of the next full regulatory regime. The three year measure was effectively a rolling forward of the existing restrictions. It was, therefore, accepted that the automatic lapsing of the current regime should be classified as an ‘OUT’, which will be immediately offset by an “IN” of the same size resulting from the new regime. The measure was, therefore, classified as zero net cost overall.

It should be noted that the Department will need to demonstrate that the OUT and IN exactly offset. The Department should also consider whether there are transition or time-varying impacts (or end-period costs/benefits) that might make the above approach, which effectively assumes constant recurring costs and benefits, less appropriate.

There may be other cases where the follow-on measure is to a different regulatory or deregulatory standard than the expired measure. For example, if the follow-on measure is less regulatory, the IN from this measure would be lower than the OUT from the expired regulatory measure, leaving a net OUT.



**The Future of the Energy Company Obligation (ECO) (RPC14-DECC-2105):** The original ECO came in on 1 January 2013. ECO required energy companies to deliver carbon savings by achieving targets relating to the installation of energy efficiency measures. It was due to run until 31 March 2015. In April 2014 ECO was replaced by a policy (hereafter referred to as ECO2) which has lower carbon saving targets but runs for an additional two years, to 31 March 2017.

The expiry of ECO resulted in an OUT. The introduction of ECO2 resulted in an IN. The difference between the two was the net impact on the OITO account. In this case, the IN for ECO2 was lower than the OUT for ECO, making this a “net OUT” in terms of its impact on the OITO account.

As noted above, these constructed counterfactuals are only required for the assessment of the EANCB for BIT reporting purposes. The RPC does not mandate a particular counterfactual for the wider IA; the counterfactual should be appropriate to identify the impacts that would best inform the decision to be made. In the case of night flying restrictions, DfT did not provide a detailed assessment against the counterfactual that night flying restrictions expired without replacement, even though this was the “true” counterfactual. An assessment against such a counterfactual would have been complex and resource intensive. Moreover, it was inconceivable that there would be a scenario where there were no night flying restrictions. The decision to be informed was, therefore, a choice of possible future night flying restrictions compared to the current regime rather than *whether* to have night flying restrictions. The counterfactual was, therefore, more of a ‘do minimum’ (i.e. run on the existing arrangements) than a do nothing.

### **3.1.3 Use of standard counterfactuals – clarification of guidance in specific cases**

#### Using existing practice by business

The BRFM (2.3.45) states: “*When planning to introduce a regulatory measure, costs and benefits should assume 100% compliance, unless there is evidence of the contrary. However, differing levels of compliance should also be investigated through sensitivity analysis.*”

The counterfactual should be based upon what businesses currently do, rather than assuming they are all meeting existing regulatory requirements and going no further. In other words, where there is good evidence that compliance with existing requirements is less than 100%, or where businesses are already voluntarily going beyond existing requirements, this should be factored into the assessment of a proposal and the EANCB.

**Collective redundancy consultation: government response (RPC12-BIS-1353):** This IA provided an estimate of the savings to business from a reduced minimum period of consultation when making collective redundancies. The benefits to business were significantly over stated as the counterfactual had not been assessed accurately. The IA assumed that the current minimum period required was 'biting' in all cases, when in fact many businesses would have been doing them for that length of time, or longer, anyway. The IA was later resubmitted with significant changes to the analysis of the counterfactual, and a large reduction in the estimated benefits. The resubmitted IA received a Green rating.

### Court and tribunal judgements

While court or tribunal judgements are outside the scope of the BIT, their impacts should be included in the counterfactual.

**Working Time Directive (Holiday Pay) (RPC14-BIS-2275):** The Employment Appeals Tribunal (EAT) ruled that employers must include certain types of overtime in the holiday pay of their employees. The ruling also potentially opened up claims going as far back as 1998. In response, the Department proposed to limit the backdating of claims to two years. The appropriate counterfactual would include the EAT ruling and its associated costs. The Department's proposal reduced the scope of existing regulation (the Employment Rights Act) on business, as now interpreted by the EAT.

### 3.2 Use of assumptions and evidence

Departments should seek to provide a robust argument for their use of assumptions. Some guidance on how these arguments may look is provided below.

Where possible, assumptions made in an IA should be supported by evidence. The extent of this evidence will depend on the size and nature of the policy proposal and the importance of the assumption. Where departments wish to argue that obtaining robust evidence to support an assumption would not be proportionate they must set out what efforts have been made, or would have to be made, and why the return to that effort is likely to be low. The return, for example, could represent the possible increase in the accuracy of estimates and initial assumptions.

Highlighting the particular uncertainties or lack of data that made the use of an assumption necessary will help the RPC understand whether or not the assumption is reasonable and proportionate. In addition, simple sensitivity testing or, where the assumption is particularly important to the appraisal outcome, a break-even analysis can also be useful in demonstrating the likely return from seeking more robust evidence.

At consultation stage, it is accepted that only limited information will normally be available and the IA should focus on the key variables and how evidence will be collected. Lack of evidence will not normally result in a Red opinion at consultation stage. At final stage, lack of evidence without sufficient justification is likely to result in a Red opinion if it relates to direct costs to business.

Potential  
red point

**Community right to buy into renewable electricity developments (Consultation stage, Green) (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 done with industry on a voluntary basis with primary powers being taken as a backstop if agreement was not reached. The IA was very well evidenced, with a combination of academic papers, survey data and information provided by stakeholders. As this was a consultation stage IA, the focus was less on detailed evidence underpinning costs and benefits, and more around supporting the rationale for the proposed intervention and demonstrating how it would deliver the expected benefits. The IA received a Green opinion including positive comments on the evidence base.

#### Familiarisation costs

Assumptions are often made about the length of time it takes for businesses to familiarise themselves with changes to, or introductions of, regulations. In some circumstances

familiarisation costs can be significant, both in terms of the proportion of the total costs they account for and in absolute terms. In other cases, familiarisation costs will be trivial. The level of scrutiny the RPC will apply to any “time taken” assumption will clearly be different in these two scenarios. In the former scenario the RPC would expect to see the explicit thinking, or even consultation responses, that lead to the “time taken” assumption. In the latter scenario if the figure sounds reasonable, and perhaps errs on the side of caution, it would be unlikely to become the central focus of RPC scrutiny.

## Section 4: Business Impact Target (BIT) methodology

As with OITO, the Business Impact Target (BIT) will use the Equivalent Annual Net Direct Cost to Business (EANDCB) as its metric. The EANDCB measures only the direct costs and benefits to business or voluntary/community bodies. It focusses on those impacts immediately felt by those businesses directly impacted by the regulatory change. The aim of this section is to highlight some of the key methodological issues that could affect calculation of the EANDCB and hence the BIT.

### 4.1 Guidance on direct versus indirect impacts

The need to distinguish between direct impacts and other (indirect) impacts can prove challenging. This section provides further information to help guide this.

In early 2015, the Department for Business, Innovation and Skills (BIS) and the RPC commissioned an independent research project, which aimed to:

- set out the different definitions of direct and indirect impacts in the literature;
- present a microeconomic framework for thinking about the treatment of direct impacts within the OIOO/OITO system; and
- develop some criteria that could be used to help officials classify direct and indirect impacts.

The research, which was undertaken by Brian Titley Consulting Ltd, was commissioned in the context of the OIOO/OITO rules that operated within the last Parliament but is also relevant to the methodology for the BIT.

This guidance builds on the findings of this research project. A summary of practical steps and criteria to distinguish between direct and indirect impacts of regulation on business is presented below.

#### 4.1.1 Definition, criteria and practical steps to distinguish between direct /indirect impacts

Only direct impacts on business should be scored for inclusion in the BIT.

A direct impact on business is defined as:

*“an impact that can be identified as resulting directly from the implementation or removal/simplification of the measure”.*<sup>5</sup>

Subsequent effects that occur as a result of the direct impacts are indirect. These are not scored in the BIT but could be included in the net present value of the policy to society as a whole.

There is no clear economic definition of direct and indirect effects and there is no such distinction in the HM Treasury Green Book. It is often difficult to judge when economic impacts on business are direct or indirect and where the boundary lies between the two. The following section provides guidance to assist departments in distinguishing between direct and indirect effects, along with some examples from the previous parliament. However, this will always be a matter of judgement and, therefore, this guidance should not be treated as definitive.

### Step 1- Identify the broad type and scope of the regulatory measure

Departments should consider whether the anticipated impacts are consistent with the type of measure being proposed. For instance, an impact is more likely to be direct if it:

- bans, restricts, liberalises, increases or decreases the cost of a particular activity; and/or
- displaces or restricts specific business activities designed to maintain or create sales, e.g. product differentiation and promotional activities.

In addition, if the impacts fall on those businesses subject to the regulation and accountable for compliance, they are more likely to be direct than impacts on businesses further down the supply chain.

#### **Banning of Inducements to Make Personal Injury Claims (RPC14-FT-MOJ-2125):**

This proposal banned lawyers from offering claimants financial inducements, or similar rewards, in return for making a claim. The objectives were to discourage weaker personal injury compensation claims from being made and to prevent claimants from being misled by offers of inducements which do not materialise in practice. The IA estimated that the policy would result in a reduction in the overall volume of claims. However, the IA asserted that the subsequent reduction in income to lawyers would be a result of behavioural change on behalf of the claimant, and therefore should be considered to be indirect.

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<sup>5</sup> Better Regulation Framework Manual

The RPC rejected the behavioural change argument and concluded that the reduced volume of claims would be a direct impact of the regulation. This is because the proposal introduces a direct ban on an activity, resulting in a loss of profit to business. The ability of lawyers to attract customers, who would have used their service in return for an inducement, has now been banned. The lost profit to solicitors from a reduction in these cases should, therefore, be considered to be a direct impact of the proposal.

See also case study 'Standardised Packaging of Tobacco Products'.

## Step 2 - Distinguish between first round and subsequent impacts

Immediate and unavoidable (first round) effects of a measure in the affected market are more likely to be direct. This could involve a shift in either the supply curve (e.g. due to a change in production costs) and/or demand curve (e.g. from removing a restriction on purchasing a product) or a regulated change in the market price<sup>6</sup> (e.g. imposing a minimum price which moves price away from the market clearing price).

Subsequent effects in the regulated market beyond the immediate implications of the measure are likely to be indirect. These effects occur subsequent to the adjustment to a new equilibrium immediately following the measure. For example, it could be the result of:

- a significant reallocation of resources;
- product and/or process innovation by existing businesses;
- the creation of new firms/institutions; and/or
- productivity gains due to changes in business models or working practices.

**Proposed changes to Part L of the Building Regulations 2013 (RPC11-CLG-1130):** The policy amended the building regulations to increase energy efficiency standards. The measure imposed a cost on builders, but was beneficial to the eventual occupants of buildings because of lower heating costs. As the lower costs would be an automatic result of the more efficient buildings and not require a change in behaviour, they were considered to be direct. The policy was, therefore, considered to be zero net cost under OITO, as the energy savings to non-domestic consumers were expected to exceed the costs to developers. ([IA](#)) ([Opinion](#))

**Amendment to the Energy Act 2008 Powers to Implement and Direct the Rollout of Smart Meters (RPC10-DECC-0558):** Smart meters are a new form of gas and electricity meter that provide the customer with more information about their energy use. The smart meter also provides the supplier with more information, allowing for more targeted tariffs. The policy

<sup>6</sup> This effectively shifts part of the supply curve.

was to mandate the roll out of smart meters. If smart meters result in more efficient use of energy, this could have large benefits for business users. However, these benefits were considered to be indirect because they result only if business customers choose to act on the information and change their behaviour, rather than as a direct result of having a smart meter. This case is purely about giving customers more information on which they can choose whether or not to act. The required behavioural change was, therefore, considered to be an indirect effect.

### Step 3 – Identify whether the impact is a partial equilibrium or general equilibrium effect

Next, departments should reflect on whether economists would consider the impact to be a partial equilibrium or general equilibrium effect. Partial equilibrium effects occur in the regulated market. General equilibrium effects are in related markets and/or the wider economy, coming from first round effects in the regulated market that are sufficiently large to result in changes in other markets. Therefore, cost, price and/or quantity effects that occur in related markets or the wider economy as a result of changes in the regulated market are second round, general equilibrium effects and, therefore, indirect and non-qualifying against the business impact target.

### Step 4 – Consider whether the direct impact is counter-intuitive

A final consideration is whether the net direct impact on business is counter-intuitive. For example, can it be supported by relevant market data and/or a defensible “theory of change” specifying the steps between the regulatory measure and the anticipated impacts?

An example of this would be a regulatory measure that is widely agreed to be detrimental to business being assessed as having direct net benefits. This would provide *prima facie* evidence to look again at the direct/indirect classification. However, departments should not, of course, seek to define policy objectives in a way that is intended to influence the classification of the impacts into direct or indirect.

**Standardised Packaging of Tobacco Products (RPC12-DH-1229):** This proposal aims to reduce tobacco consumption by mandating the standardisation of tobacco pack colour, shape and the removal of all branding except brand name in a standardised type face. In this case, the impact of the loss of profit to manufacturers and retailers is direct as it: restricts economic activity from use of branding, prohibits a form of promotional activity; and has a reduction in cigarette consumption of cigarettes as its primary objective. If loss of profits was considered as an indirect cost, this would score as net beneficial to tobacco companies (due to ongoing savings in the production of packaging), which would be a counter-intuitive outcome. ([Opinion](#))

## Step 5 – Consider whether the impact is ‘pass through’

When a regulatory burden is placed on businesses they have to decide how to respond. They may increase prices, cut wages, reduce investment or reduce dividends. The EANDCB metric is an attempt to capture the burden on business of regulation. If a mechanism exists that enables some or all of this burden to be passed on to other businesses and/or consumers, this subsequent effect is generally regarded as being indirect for the purposes of the BIT. The BRFM (paragraph 1.9.45) states that pass through should be excluded from the calculation of the EANDCB. The first round impact of the regulatory change, for example the compliance costs to business, is the direct impact of the regulation. The second round impact, after pass through (such as higher prices to consumers) would be an indirect impact of the regulation. Only the direct impact should be included in the EANDCB. Without this rule, any increase in regulatory requirements on business could potentially score as zero on the basis that the cost is ultimately borne by consumers in the form of higher prices.

### Examples of the normal application of pass through

**Reforming the regulatory framework for employment agencies and employment businesses (RPC14-BIS-2150):** It was expected that employment agencies would pass these costs on to their customers (i.e. organisations wanting to hire workers). The direct impact is on employment agencies; the indirect impact is on hiring organisations. Note that this had an impact on the size of the EANCb because some of the hiring organisations were in the public sector and, therefore, not in scope of OITO.

**The future of the energy company obligation (ECO) (RPC14-DECC-2105):** This proposal involved, during the first year, a scaling back of regulatory requirements compared to the existing ECO policy and, therefore, reduced costs to energy supply companies. The Government expected that energy companies would pass on these savings to their customers and the energy companies appeared to have agreed to this. However, the department provided further information which explained that there was no legal requirement, or anything that had regulatory force, for energy companies to pass on these cost savings to consumers. The pass through of business costs to consumers was, therefore, confirmed as indirect.



**Plastic carrier bags charge (RPC14-DEFRA-2124(2)):** This proposal required large retailers to charge consumers five pence for each carrier bag. The policy was expected to result in a substantial reduction in the number of carrier bags that would be used. Since the existing cost of the carrier bags was, in effect, being passed on to consumers in the form of higher prices, the department's initial analysis suggested that, because retailers would pass on the savings from fewer carrier bags to consumers in the form of lower prices, this would not be a direct benefit to retailers. However, it was confirmed that the direct impact was on retailers and this was reflected in the EANCB (although the measure, as regulatory, was zero net cost under OITO). Note that there was also another pass through issue, in that retailers were expected, though not required, to pass on the net revenue from the sale of carrier bags to local good causes. However, as the latter would be civil society organisations, this had no impact on the EANCB. ([IA](#))

### Exceptions to the normal application of pass through

There are a very few exceptions to the rule on pass through. As noted above, one might be where the pass through is mandatory, (i.e. backed by regulatory force). Another possibility (example below), is where the business experiencing the initial impact of regulation/deregulation acts only as a conduit. For example, following a Regulatory Framework Group discussion it was agreed that when a cost is paid by an agent on behalf of a principal, this should be considered to be a direct cost to the principal, not a cost to the agent that is passed through.

**HM Land Registry local land charges (RPC13-FT-BIS-1925):** Land charges are currently set at the local authority level. The proposal is to standardise them at a level below the current average. Most customers will be better off, but a minority will see their fees rise. These fees are normally paid by conveyancers on behalf of their clients. Initially, this was considered to be a direct cost to conveyancers that was passed on to clients (who were a mix of individuals and businesses). Following RFG discussion, it was agreed that this should be considered to be a cost to clients since they are ultimately responsible. Conveyancers were simply paying on their behalf. Note that this measure was out of scope of OITO as it related to fees and charges but the issue was relevant to its fast track status. ([IA](#))

### 4.1.2 Other direct / indirect issues

#### New Entrants

Costs and benefits to future businesses entering a market were previously sometimes seen as indirect impacts on the grounds that these businesses do not yet exist and any estimates would, therefore, also be somewhat speculative. However, this meant, for example, that deregulatory measures (e.g. simplified guidance), which mainly benefit new entrants, could

easily be net costly in OITO terms because of the familiarisation costs to existing companies. This approach was reviewed and the methodology clarified. It is now clear that impacts on new entrants should be treated in the same way as impacts on existing businesses if they arise in the context of normal business 'churn'. However, any estimates relating to the number of new entrants would normally be accepted only in respect of official data relating to historical turnover (churn) of businesses in the particular industrial sector. Any costs or benefits that are highly speculative would normally still be considered indirect, particularly if they assumed an increase in the rate of entry of new businesses as a result of a proposed change.

**Revocation of the Construction (Head Protection) Regulations 1989 (RPC12- HSE-1286):**

The policy simplified regulations regarding head protection on construction sites. This was first considered to be a deregulatory IN because transition costs to existing businesses were direct, while benefits to new entrants were indirect. Following the change to the methodology this was reconsidered and validated as an OUT. ([IA](#)), ([Opinion](#))

Discretionary action

Where businesses are given an option to act, questions often arise as to whether the impact of their actions is direct or indirect. If considered indirect, then just about any deregulatory measure would be treated as having indirect impacts. So the principle is that where the regulation was the main barrier preventing the business from acting, and this is supported by evidence, then the impact can be considered to be direct. When both the removal of the regulation and other factors are required, for example innovation to take advantage of a new freedom, then impacts are considered to be indirect.

**Legislative Reform (Industrial and Provident Societies and Credit Unions) Order 2011**

**(RPC11-HMT-0869):** This policy allowed credit unions to increase membership and offer more services. It was clear from the evidence provided that the affected businesses wished to grow and were prevented from doing so only by the regulations. The costs and benefits to firms of expanding were, therefore, considered direct and in scope of OIOO. ([IA](#))

**Orphan works (RPC11-BIS-1063):** Orphan works are copyrighted works whose author is unknown. This policy allowed the use of orphan works, subject to certain safeguards. One of the main expected benefits of this policy was from new businesses being created to take advantage of newly-available material. As these benefits would arise only as a result of innovation from business, they were considered to be indirect. (Note that there were other direct benefits to existing users of orphan works and, therefore, the policy overall was still an OUT.) ([IA](#)) ([Opinion](#))

**Extending the primary authority scheme (RPC11-BIS-0899):** The primary authority scheme allows a business operating in multiple local authority areas to nominate a primary authority to co-ordinate all local authority enforcement activity relating to that business. The policy extended the scheme. As the scheme resulted in a reduction in the level of regulatory activity a business was required to undertake, the impacts were ruled to be direct. There have been a number of other policies to extend the primary authority scheme, all of which have been treated in the same manner. (See also deregulation). ([IA](#)) ([Opinion](#))

**Gambling Act 2005: triennial review of stakes and prize limits (RPC13-DCMS-1459):** There is a limit on the maximum value of stakes and prizes used in gaming machines. The policy increased this limit, allowing businesses to make greater profits from higher value machines. As it would be reasonably straightforward for businesses to move to higher-value machines it was accepted that the regulation was the only thing that prevented businesses from gaining these benefits. The benefits were, therefore, considered to be direct. ([IA](#)) ([Opinion](#))

## 4.2 Guidance on the calculation of profit for the purposes of determining the impact on business

### 4.2.1 Gross v. net profit methodology

When assessing the impact of a regulatory or deregulatory proposal on business, departments can use either:

- a gross profit measure. This essentially requires any change in demand for a product or service to be multiplied by the difference between the wholesale and retail price<sup>7</sup>.  
Or
- a net profit measure. This would involve a further step of deducting certain business expenses, such as employment costs, running costs and/or the cost of financing and depreciation/amortization.

In IAs of measures expected to have impacts on business profits, departments most commonly appear to use the gross profit measure. This simpler method often provides a reasonable and proportionate estimate of the impact. However, departments have occasionally used a net profit measure (see box below).

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<sup>7</sup> For measures with a large impact on the market price, movements in price should also be taken into account wherever possible.

**RPC14-FT-DFT-2242(2) The Electrically Assisted Pedal Cycles (Amendment) Regulations**

**2015:** This measure increase permitted power and top speeds and remove restrictions on weight and the use of three-wheeled EAPCs. In calculating increased profits to retailers, the Department calculated the increase in gross profit (sales revenue less purchasing costs), but then deducted employment and capital costs. Due to a lack of clarity surrounding the appropriate approach, in what was a new and technical issue, the RPC validated the EANDCB of -£0.6 million but noted that *“the methodology for determining any change in business profits would benefit from further consideration by the relevant cross-Whitehall methodology groups.”*

As a result, the RPC asked the Cross-Whitehall Group on the Economics of Regulation and the RFG secretariat to consider the criteria for judging which measure is appropriate. The outcome was that if the costs or savings are a direct and unavoidable part of realising the change in profit they should be deducted, resulting in a net profit approach.

The key consideration for departments in deciding which method to use is, therefore, whether the change in business costs is unavoidable and incremental.

The change in costs would be unavoidable if it was a direct effect on business. When calculating the impact on profit, generally only first round effects in the regulated market should be included in the calculation of the cost to business, second round effects in the regulated market or effects in other markets are likely to be considered to be indirect impacts. If a business incurs a cost as a direct result of the proposal, i.e. there is no separate business decision to change the level of labour or capital, a net approach would generally be more appropriate.

In addition, if there is a clear and unavoidable impact on business costs, then the impact on profits should reflect the incremental change attributable to the measure, i.e. the change in marginal costs multiplied by the change in sales.

As noted above, it is more common for departments to use a gross profit method in impact assessments. However, it would generally be more appropriate to use a net measure of profit if there is an incremental impact on costs that is clear and unavoidable. In either case, departments should clearly communicate the rationale and justification for using their preferred method to the RPC.

**Devolving Sunday Trading Rules (RPC15-BIS-FT-2411).** The Sunday Trading Act 1994 limits Sunday trading hours of certain large stores in England and Wales to a single period of six hours between 10:00 hrs and 18:00 hrs. The proposal was to devolve powers to local areas (e.g. city mayors and/or local authorities) permitting them to determine retail opening hours. In its confirmation of the proposal as deregulatory, the RPC flagged up the need for the Department to demonstrate that its method was calculating the additional profit to

large stores was appropriate. In subsequent discussion with the Department, it was clear that the Department planned to adopt a 'net profit' approach by deducting variable labour costs from the additional gross profits of large stores. (It was already agreed with the Department that other variable costs, such as heating and lighting, should be deducted.) On the basis that the additional labour costs were an unavoidable consequence of taking advantage of the longer opening hours, and not a separate business decision, these costs met the RFG secretariat criterion. It was, therefore, appropriate to deduct them and use a net profit measure.

**Psychoactive Substances Bill (RPC15-HO-2379):** This measure introduced a general ban on the sale, import, export and production of products with psychoactive effects. The IA set out that this would reduce the sales of certain retailers, both online and through retailers known as 'head-shops'. The original IA used a net profit approach, offsetting the total sales lost with reductions in costs such as wages and rent. This received an initial review notice from the RPC on the basis that the loss in profits had not been calculated correctly. The RPC believed that, in this case, a gross profit measure should be used because the change in costs could not be directly attributed to the sale of psychoactive substances. In particular there was no clear evidence that costs would be reduced.

## 4.3 Other issues

### 4.3.1 Permissive Regulation

A permissive regulation allows businesses to do something they previously couldn't, but does not force them to do so. In these situations, a key issue for departments is to establish the likely level of take up. If possible, the costs and benefits to business of taking up the newly allowed action should be monetised. Where the benefits can be shown to exceed the costs, it can normally be assumed that at least some firms will take up the new opportunity. Where the costs are shown to exceed the benefits, it can be assumed that no firm will take up the opportunity and there will, therefore, be no additional cost or benefit. Where it is not possible to monetise the costs and benefits, it is reasonable to assume that, for any business taking up the opportunity, the benefit will be at least equal to the cost. The measure would then be scored as zero.

There may be exceptions to the logic outlined above. For example, where taking advantage of a permissive measure is costly but provides some competitive (first mover) advantage. In such a situation and in the absence of coordination, other firms' best response might be to take up the new option, even if it is net costly (compared to the situation where no firm changes their behaviour). Hence, in this instance a permissive measure could be net costly

to business overall. Departments should consider whether this particular circumstance applies to their proposal.

#### Application of permissive regulation to civil society organisations

A similar logic to the above can be applied to civil society organisations, such as charities. Here it can be assumed that civil society organisations would only take advantage of a new option if they consider it the most cost effective way of delivering their objectives.

#### **Access to intermediary services by descendants of adopted people (RPC14-FT-DfE-2042):**

This measure increased the number of people eligible to use adoption agencies, to facilitate contact of an adopted person with their birth parent. The OITO section of the RTA put this forward as a permissive measure: "[adoption] *agencies can supply the service if they wish and can also charge, therefore, by definition, they will only do so if the benefits to them are at least equal to the costs*". This argument lends itself more readily to businesses, where benefits take the form of revenue or profit. The RTC set out the reasoning for why it can also be applied to charitable organisations. This was: "*While these agencies may feel obliged to provide the service requested, often without charge, it is reasonable to assume that this will be of benefit to them in terms of furthering their objectives*". In the opinion following the validation IA for this measure the RPC accepted that the benefits to voluntary adoption agencies of the proposal will at least equal the costs. ([IA](#))

#### **4.3.2 Enforcement and compliance levels**

Normally, an IA should assume 100% compliance when calculating the costs and benefits of regulation. However, if a department has specific evidence that compliance is unlikely to be 100% then it should use that evidence to potentially assume a lower level of compliance. When a department assumes low levels of compliance, it should still set out the potential costs and benefits of full compliance.

#### **Construction (Design and Management) Regulations 2015 (CDM 2015) (RPC13-HSE-1824):**

this was an EU-driven policy to improve health and safety in construction. HSE took the view that its existing outcome-focused approach meant that the more prescriptive EU regulations would have no benefits. There was also a widespread acceptance across the EU that the directive was flawed and needed changing. HSE, therefore, assumed 12 per cent compliance and provided evidence to support this. ([IA](#))

#### **The Transfrontier Shipment of Waste (Amendment) Regulations 2012 (RPC12-DEFRA-1648):**

This proposal included a number of elements intended to improve the ability of public bodies to monitor and regulate effectively the movement of waste. The impact on businesses of any increased detection of non-compliance was considered out of scope. The only elements of the proposal that were thought to impact on compliant businesses were an

increase in fees and charges with no change in the scope of regulation. On this basis, the proposal was assessed as being outside the scope of one-in, two-out. ([Opinion and IA](#))

### 4.3.3 Proposals containing both regulatory and deregulatory elements

Under the BIT, net beneficial regulation scores in the same way as deregulation. However, there are two particular reasons for why policy proposals containing both regulatory and deregulatory measures require careful scrutiny. First, regulatory measures on their own would score x3 under OI30 but only effectively x1 if part of an overall net beneficial package. Departments should, therefore, demonstrate clearly that the regulatory and deregulatory elements are logically part of the same package of reforms. Second, regulatory measures (unless low cost) would not qualify for the fast track. Deregulatory cases with regulatory elements will normally only qualify for the fast track if it can be shown that the regulatory element is necessary to deliver the deregulation or if the whole proposal is, in any case, low cost.

**Reforming the regulatory framework for employment agencies and employment businesses' (RPC14-BIS-2150):** the employment agencies case included both deregulatory (redefining employment agency to exclude job boards) and regulatory (prohibiting employment agencies advertising jobs exclusively overseas) elements. A much smaller number of organisations would be affected by the regulatory element. The RPC opinion, therefore, accepted that the policy package could be seen as deregulatory overall. The net cost of the regulatory element could be deducted from the net savings to business from the deregulatory elements to leave a likely net OUT. Having a regulatory component did not, therefore, automatically classify a measure as zero net cost under OIOO/OITO. ([IA](#))

### 4.3.4 'Resources used in complying with regulation'

In order to comply with regulation, businesses may feel the need to buy services from other businesses. This can take different forms. These may be "pure administrative costs", such as having to use the services of legal firms. In these cases it is clear that society's resources are being absorbed into activity to comply with regulation. Alternatively, there will be instances where, as with the first category, businesses need to purchase services/products from other businesses, but where the service/product may be under-provided by the market. Possible examples include insulation and financial advice.

In the first case, it is absolutely clear that the benefits to service providers, such as legal firms, should not be included in the EANDCB. The EANDCB should only consist of the cost to businesses subject to the regulatory requirement. The RPC considered whether there should



be any different treatment in respect to the second type of case. The benefits to society of the additional provision, e.g. reduced carbon emissions or better use of financial advice, should, of course, be reflected in the NPV. However, it was agreed that the benefits to providers should also here not score in the EANDCB. The key principle is that, if a regulation imposes a cost on business, then that cost should be scored in the BIT. If these costs are a benefit to other businesses, this should not be scored, otherwise the true cost of regulation is not being captured.

The best way to understand the RPC's position on this is that the resources of the providers, e.g. legal firms, are being used solely to comply with regulation. In the absence of the regulation, there is a potential saving to society from resources previously devoted to regulation being available for productive use elsewhere in the economy.

**Enabling digital by default (RPC13-MOJ-1867):** this measure simplified the process of applying for lasting power of attorney, which resulted in a loss of income to solicitors. The RPC was clear that loss of income to solicitors (whether direct or indirect) resulting from deregulation or simplification of regulation should not be counted as a cost to business as it removed the 'inefficient use of resources'. ([IA](#)) ([Opinion](#))

**Amendments to the Pension Schemes Bill (private sector defined benefit transfers) (RPC14-HMT-2212):** the proposal required employers to pay for independent financial advice for employees who are moved from a defined benefit to defined contribution pension scheme. The Treasury had counted the additional income to independent financial advisers (IFAs) as a direct benefit, offsetting the costs to employers. The RPC decided that the income to IFAs was simply the equivalent of the compliance cost to employers and should not be used to offset it. By way of illustration, the RPC noted that if an employer had its own in-house financial advice service, and could use it to meet the requirement; it would seem perverse to conclude that the regulatory requirement had no net cost to that business.

**Abolition of the tax disc (RPC13-DfT-2127):** this measure abolished the paper tax disc which was displayed in vehicles to show that the owner had paid vehicle excise duty. These discs were obtained through post offices. The EANDCB did not include lost revenue or profit to the Post Office because this benefit came from providing a service that businesses (and individuals) needed to comply with regulation.



## Section 5: Non-qualifying regulatory provisions

The statutory and administrative exclusions from the BIT are presented at annex 1 of the BRFM. Measures covered by these exclusions do not score against the BIT. **Statutory exclusions** refer to measures that are defined by the SBEE Act (2015) as not being regulatory provisions. These include regulations changing the level of regulator fees/charges where there is no increase in regulator activity and regulations in connection with the giving of financial assistance by, or on behalf of, a public authority. **Administrative exclusions** are set by the Secretary of State using powers granted under the SBEE Act. These are listed as exclusions A to J in the BRFM, with K and L1-4 being additional exclusions relating to activities of regulators. Unlike statutory exclusions, measures covered by administrative exclusions are regulatory provisions. However, in common with statutory exclusions, they do not score against the BIT and are termed '**non-qualifying regulatory provisions**' (NQRPs).

Departments may wish to refer to flowchart 1.1.A on page 13 of the BRFM for a 'decision tree' guide to working through the potential application of BIT exclusions to their policy.

Departments are still required to produce an EANDCB for NQRPs and this figure needs to be validated by the RPC. The aim of this section is to provide examples of how the RPC has treated cases covered by exclusions under OIOO/OITO and the BIT. (Note that we do not have an example as yet for every one of the exclusions under the BIT.)

### Statutory exclusions

#### 5.1 Fees and charges

A measure changing the level of regulator fees/charges with no change in 'regulator activity' would fall under the statutory exclusion 'tax, duty, levy or other charge'. This would be the case even if the increase in the fee went beyond full cost recovery. Any cost associated with the fee increase, such as administrative or familiarisation costs would also not score against the BIT.

**Enhanced court fees (RPC13-MOJ-1958):** the proposal was to charge certain users of civil courts a fee that, for equity reasons, went beyond full cost recovery in order to fund other areas of the civil courts system that do not recover costs. HMT considered this and agreed that it was likely to be classified by ONS as a tax. The policy was therefore considered part of the 'managing public money' framework and not the better regulation framework. ([IA Opinion](#))

A fees/charges measure that involved a **change in regulator activity** would, however, be a QRP. For example, if a measure involved an increase in the number of inspections, the cost

to business of these additional inspections would score against the BIT. This cost would include the time spent by businesses on the additional inspections and, if the regulator recovers inspection costs, the fees charged business to cover the cost to the regulator of the additional inspections.

## 5.2 Grants or other financial assistance on behalf of a public authority

The example below illustrates the application of the BRFM Q&A relating to when a regulation replaces an out of scope policy intervention.

### **Legislation for devolution of adult education budget data requirement (RPC16-DfE-3454).**

The proposal extends the requirement on public further education (FE) providers to gather and provide to government data on learners to private and voluntary FE providers. Private and voluntary providers are currently required to provide this data as a condition of their grant funding. The proposal is designed to ensure that the Secretary of State will continue to receive the data on learners once the adult education budget is decentralised. The existing requirement is not a regulatory provision because it falls under the ‘grants or other financial assistance on behalf of a public authority’ statutory exclusion. Under the BRFM Q&A, where an existing measure outside (within) the scope of the BIT is replaced by an immediate successor measure that is within (outside) scope, the EANDCB should take account of the cost to business of the immediate successor measure. On this basis, even though the proposal moved the requirement within scope of the BIT the impact on business was scored as zero.

The example below illustrates the relationship between regulatory impact assessments and economic appraisals of government spending decisions.

### **The Education (Master’s Degree Loans) Regulations 2016 (RPC16-DfE-3455)**

The Government announced in 2014 that it was introducing postgraduate degree loans for the academic year 2016/17, similar to those currently existing for undergraduate degrees. This would require the introduction of regulations affecting employers so that repayments of the loan could be collected through the PAYE system. The Department’s IA focussed on the costs and benefit to business of these regulations. The IA explained that the Master’s product itself was a spending decision and that these decisions are assessed through a separate appraisal and scrutiny process, and was, therefore, not included in the scope of the IA. The regulations enabling repayment of the loans were, however, within the scope of the better regulation framework. This was clear from the listing of examples of measures that would not fall with this exclusion, which included “*obligations on employers regarding deductions from payroll to facilitate repayment of student loans*”.

### 5.3 Regulation of activities that are not business activities

The examples below illustrate how measures regulating only the public sector are not subject to the better regulation framework.

**Trade Union Bill (BIS-3002).** The IA for this proposal originally included a measure requiring public sector organisations to report on trade union facility time. The assessment of this measure was subsequently moved into a separate IA on the basis that the measure only regulated the public sector. The separate IA was not subject to the better regulation framework and was, therefore, not be submitted to the RPC for scrutiny.

Similarly, the Cabinet Office IAs on '**Prohibition on deduction of trade union subscriptions from wages in the public sector**' (CO-3186) and '**English Language Requirements for Public Sector Workers**' were also withdrawn from RPC scrutiny on this basis.

The DfT measure increasing the **penalties for using a hand-held mobile phone while driving** was originally submitted to the RPC as a non-qualifying regulatory provision under 'fines and penalties'. This IA was withdrawn from RPC scrutiny on the basis that it did not regulate business, noting that it would also affect only non-compliant businesses.

### 5.4 Acting on behalf of a public authority

The provision of public services by the private sector falls under this statutory exclusion.

**Paediatric First Aid in Early Years' Provision (RPC15-DfE-3001(3)).** The proposal required newly qualified early years staff have a PFA or emergency first aid certificate before they can be included in adult/child ratios. In calculating the EANDCB, the Department excluded about 45 per cent of the overall cost, which relates to provision of early years free entitlement for 2, 3 and 4 year olds. This was excluded on the basis that it is private sector provision of a public service, which falls under the statutory exclusion 'acting on behalf of a public authority'.

## Administrative exclusions

### 5.5 EU and international measures

#### Types of EU measures

EU measures fall into two broad categories. First, EU obligations that are transposed into UK law through domestic legislation. These are usually EU Directives but there are also a small number of EU Regulations that are given effect into UK law this way. Second, EU measures that become law in Member States without any need for government action. These are directly applicable EU regulations. The vast majority of these are technical or have low cost, such as minor import tariff changes.

The RPC will typically see impact assessments relating to the first category. For the large majority of directly applicable EU regulations, there is no decision to be made and, therefore, impact assessments are usually not required. There may, however, be decisions to be taken on how a directly applicable regulation is enforced, such as the appointment of a competent authority, which require domestic legislation. In these cases, an IA will normally be submitted to the RPC that covers this particular element.

#### Treatment of EU measures in the Better Regulation Framework

The BRFM sets out framework requirements for EU measures. These differ to those for domestic measures as:

- BIT requirements only apply where the measure “goes beyond minimum EU requirements” (so called “gold plating”<sup>8</sup>);
- where the measure goes beyond minimum EU requirements, it is not eligible for the fast track;
- EU Transposition Principles apply; and
- Common Commencement Date and SaMBA requirements do not apply.

The measures that do not go beyond the minimum or remove existing ‘gold plating’ are non-qualifying for the BIT. If these measures qualify for the fast track, no EANDCB validation is required. NQRPs measures that go down the full route require an EANDCB figure to be validated. As noted above, all measures that go beyond minimum EU requirements are in scope of the BIT.

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<sup>8</sup> This is defined in the EU Transposition Guidance.

For these measures, two EANDCBs will be required: one relating to the gold plating part of the measure, which will be scored for the BIT, and one relating to the rest of the measure, which will be reported but not scored for the BIT. The same applies to measures that remove gold plating and implement other EU requirements in a minimum way, unless it qualifies for the fast track. In the latter case, the measure will be treated in the same way as if the measure only removes existing gold plating. The requirement then is to produce an EANDCB figure for the removal of the gold plating, to be scored in the BIT.

#### Why are EU measures treated differently to domestic measures?

Measures that implement EU measures in the minimum way that is compliant with EU law are out of scope because departments have no discretion over this – as a rule of thumb, to ‘do nothing’ would lead to the UK being infracted for not fulfilling its legal obligation to transpose EU legislation into UK law. It would, therefore, seem unfair to punish or reward departments (through an IN or an OUT on the BIT account) for this. Similarly, impacts relating to where implementation goes beyond the minimum necessary should be scored because the department is exercising its discretion in doing this. This provides departments with an incentive to avoid gold plating EU law, thus contributing to achieve overall government deregulatory objective.

The requirement to produce an impact assessment for out of scope EU measures, in order for the RPC to validate the EANDCB figure, reflects broader government interest in recording the regulatory impact of measures that originate from the EU.

#### Impact assessment methodology for EU measures

The BRFM provides some guidance on the assessment of EU measures. The impact should be assessed in the same way as for domestic measures. There is, however, an exception to this in relation to counterfactuals (or baselines) for the calculation of the EANDCB for certain EU measures. This is explained in the [‘Counterfactual’ section](#) of this guidance.

The assessment of directly applicable EU regulations conforms to the standard approach for counterfactuals. In a pure ‘do nothing’ scenario, the directly applicable EU regulation comes into force in the UK. This should, therefore, be assumed in the counterfactual.<sup>9</sup> The BRFM states that ‘directly applicable European Regulations that don’t require any domestic implementation are outside of the framework’ (paragraph 1.9.2).

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<sup>9</sup> There is an argument that directly applicable EU regulation should be treated the same way as EU directives, i.e. the EU does nothing. This would be consistent with trying to identify the full impact of EU regulation. However, given that impact assessments are not usually carried out for directly applicable EU regulation, since there is no decision to inform, it would not be possible to provide anything near complete coverage of these measures.

### 5.5.1 'Gold Plating' (Going beyond minimum requirements)

Where measures are gold plated, as defined in the Transposition Guidance, the difference between the level of the domestic regulations and the level required by the EU/International regulations is treated as an IN.

**Payment Surcharges (RPC12-BIS-1461):** The policy was to ban businesses from charging excessive surcharges for use of debit cards as this was seen as a kind of hidden charge. This was an EU driven policy, but was implemented early. The measure was treated in a similar way to a temporary measure, being considered an IN with a value of its full EANCB, but only for the period between domestic implementation and the implementation date required by the EU. Note that at consultation the costs were not monetised so the IA referred to the policy as 'zero net costs'. ([IA \(Consultation\)](#))

**Transposition of Seveso III Directive into UK Law through COMAH Regulations 2015 (RPC14-HSE-2036):** In December 2014 the RPC validated an out of scope EANCB of £3.59 million for the minimum implementation of the Directive and an IN of £0.1 million for the "reviewing and testing of external emergency plans", which was not required by the Directive.

### 5.5.2 Existing Higher Standards

EU regulation will often be passed in an area already covered by domestic regulation. If the existing standards are higher than those set out by the EU and are maintained, then this is considered to be gold plating. Relative to a do nothing counterfactual that existing standards are maintained, there are no additional costs and benefits. On this interpretation of the framework, the measure would, therefore, score as zero.

**The Motor Vehicles (Driving Licences) (Amendment) (No.?) Regulations 2012 ("the UK Regulations") [EPILEPSY] (RPC12-DfT-1533):** Proposal 4 (relating to "seizures because of physician directed change or withdrawal of medication") reduced the period after which individuals could resume driving from 12 months to 6 months. The EU minimum standard had been reduced to 3 months. By retaining at above 3 months the policy was gold plating, but this was not scored as an IN as it involved no direct cost to business relative to the higher standards being maintained.

However, whilst the RPC accepts that this is consistent with past interpretations of the Framework, it is strongly of the view that IAs should include an assessment of the costs and benefits of maintaining UK standards at a higher level than new EU minima. Where it is

proportionate to do so, this should be in EANDCB terms (although this will not score against the BIT).

**Implementation of Directive 2013/30/EU on the safety of oil and gas operations and on updating UK oil and gas legislation (RPC14-HSE-2078):** This consultation stage IA, submitted in April 2014, included present value estimates of the costs in relation to “enter or leave notifications” and “onshore combustible gas storage”. These policy elements went beyond the minimum EU requirements but were out of scope because they maintained existing UK standards.

**UK implementation of the EU Accounting Directive: Chapters 1-9 (RPC14-BIS-2166):** The UK required small companies to produce 17 disclosure notes. The EU consolidated and harmonised its existing directives, with the result that the minimum number of disclosure notes required by the EU was reduced to eight. The policy proposal is to use member state flexibility to have additional disclosure notes, so that five of the UK’s existing disclosure notes, which are not now required by the EU, can be retained. The UK’s implementation of the Directive will, therefore, reduce the number of disclosure notes from 17 to 13. This reduction lowers existing UK regulatory standards and qualifies as an OUT. The retention of the additional five disclosure notes goes beyond the minimum requirement of the Directive and, therefore, represents gold-plating. However, it did not represent an IN, on the existing interpretation of the framework, as it involves no additional burden relative to existing UK standards. The reduction in disclosure notes from 17 to 8 was estimated to save business about £18 million each year. The reduction from 17 to 13 accounted for about £8 million each year, leaving a “foregone saving” of about £10 million each year by retaining the five disclosure notes.

### 5.5.3 Accidental or inadvertent gold plating

Occasionally, an EU policy may be implemented in a way which is thought to be the minimum and for it to later transpire that it was not. If the policy was originally implemented before the BIT, then the removal of the inadvertent gold plating scores as an OUT. However, if the gold plating occurred during the BIT, then the overriding principle that an OUT cannot exceed the original IN applies and no OUT is scored.

**Proposed route for specific seafarer certification for operating on workboats less than 500 gross tons (RPC13-DFT-1760):** The existing certification route for seafarers working specifically on workboats did not allow them to work on vessels over 200 GT. As a result, seafarers had to follow the International Convention for the Standards of Training, Certification and Watchkeeping (STCW) for unlimited qualifications. The proposal was to introduce a new certificate which would allow seafarers to work on workboats of up to 500 GT. The growth in the size of workboats was not anticipated at the time the original regulatory obligation came in and, therefore, no 'IN' was ever scored. The Department was claiming an OUT. This was accepted as an OUT on the basis that the underlying regulatory obligation (the STCW Convention) pre-dated OIOO. Had the underlying regulation come into force during OIOO/OITO an OUT could not have been scored. ([Opinion](#))

#### 5.5.4 Early implementation of EU/International measures by less than 12 months

EU and International measures implemented early are in scope of the BIT. Only the costs and benefits that occur during the period of early implementation will be scored. This is true for any period length, including those less than 12 months.

**Implementation of Chapter 6 EU transparency Directive – Country by Country Reporting (RPC14-HMT-2237):** This proposal aimed to increase global standards of transparency in the extractives sector by requiring companies to report publically on the payments they make to governments in all their countries of operation. The proposal was a European Directive to be implemented 11 months in advance of the deadline set by the EU. Because of ambiguity in the guidance, there was uncertainty as to whether or not the 11 month early implementation of the EU directive was out of scope of OITO under the guidance on time-limited measures (BRFM paragraph 1.9.26). The RPC agreed that early implementation of EU directives, even if less than 12 months, are still in scope of OITO. ([Opinion](#))

## 5.6 Measures implementing (non-EU) international agreements

### 5.6.1 Treatment of international agreements in the Framework

Where the implementation of an international agreement goes beyond minimum requirements, this would be in scope of BIT (unless it was non-qualifying under a different exemption). This is consistent with the approach to EU regulation, where going beyond minimum implementation is considered to be gold plating. Where implementation of an



international agreement is in line with the minimum necessary, this would be out of scope of BIT.

As with EU measures (and NQRPs more generally), there is a requirement for departments to have an EANDCB figure validated by the RPC even if they are going no further than minimum requirements, although this will not be scored against the BIT.

### 5.6.2 Defining minimum requirements

A key issue with international agreements is that, compared to EU measures, there is less likely to be a clear minimum level of implementation. This might simply be due to the lack of a clear description or it might reflect that what constitutes a minimum could vary across countries. However, paragraph 1.5.16 of the BRFM states: *“Even where there is no clearly prescribed minimum requirement in an international agreement, it is the department’s responsibility to show that it is doing the minimum that would be acceptable to meet the UK’s obligations. This should include, for example, consideration of whether any, less costly, options could meet the UK’s obligations and what other countries are doing to meet the international commitment.”*

#### **“Enhanced Transparency of Company Beneficial Ownership” (RPC13-BIS-1990(2))**

##### **implemented a key part of a G8 agreement (known as the “Trust & Transparency”**

**measures:** The G8 agreement principles and Action Plan required companies to "...obtain and hold their beneficial ownership and basic information, and ensure documentation of this information is accurate". The UK’s proposed implementation to have a central registry of company beneficial ownership information was not mentioned as a specific requirement in the G8 agreement. To demonstrate that the UK’s implementation did not go beyond the minimum required by the international agreement, the RPC asked the Department to provide:

- the specific nature of the international commitment;
- what other G8 countries were doing to meet the commitment;
- how the individual policy proposals of the UK Action Plan corresponded to the specific commitments in the G8 agreement.

After providing this information, and in line with the G8 agreement providing no clear level of implementation that could be regarded as being a minimum level of compliance, the RPC accepted that the proposal, was, therefore, entirely out of scope of OITO in accordance with the then paragraph [1.9.9 iii] of the BRFM.

The requirement to show that unnecessary costs to business have been minimised is consistent with paragraph 1.5.15 of the BRFM which states: “Regulatory Impact Assessments

for measures required to implement international commitments and obligations must show how better regulation principles, have been considered in the implementation of these measures.”

## 5.7 Price controls

The example below illustrates how a revision to an existing price control is excluded from the BIT. Note that the introduction of a new price control would be a qualifying regulatory provision.

### **Teaching Excellence Framework (RPC16-BIS-3339)**

This proposal meant that higher education institutions (HEIs) meeting defined criteria demonstrating high quality teaching would be allowed to increase their fees beyond the current government imposed caps in line with inflation. The proposal was estimated to benefit HEIs by £1.1bn each year. However, the proposal was classified as an expansion of an existing price control and, therefore, a non-qualifying regulatory provision.

The examples below relate to the same policy area. The first a price control under OITO; the second under the BIT.

**MoT fee review (RPC13-FT-DfT-1836):** the maximum amount a firm can charge is fixed by legislation. The proposal was to increase this maximum. This was considered a regulated price rather than a fee or charge because it was charged by businesses and not an enforcement body, and because it was a maximum rather than a set level. However, the measure was still out of scope of OITO as it represented a periodic adjustment to an existing scheme (the changes were in line with inflation). This was a fast track out of scope proposal so no full opinion was published.

Note that ‘periodic adjustment’ is no longer a specific exclusion under the BIT.

### **MoT fee revision (RPC16-DfT-3477(1))**

The proposal would increase the maximum fees that testing stations can charge for an MoT test. This was a consultation stage IA that received an IRN. Although the measure would loosen an existing price control, and therefore be beneficial to garages, the analysis of the impact on owners of business vehicles was insufficient, including those operated by small and micro businesses. The Department also incorrectly classified the measure as not being a regulatory provision on the basis that it was a fee/charge. The measure should have been classified as a non-qualifying regulatory provision on the basis that it is an amendment to an existing price control.

## 5.8 Fines and penalties

When calculating the EANDCB of a policy, any costs that are incurred as a direct result of **non-compliant activity** should not be included. It would also not normally be included in the NPV. This applies both to costs from non-compliant activity that is now prevented (e.g. lost revenue from prevented theft) and to costs of punishments (e.g. fines). These impacts should, nevertheless, be discussed within the IA and monetised where appropriate.

### 5.8.1 Settlements without admission of guilt

When a court finds against an actor it is assumed that they are non-compliant. When an actor chooses to settle without an admission of guilt it should not necessarily be assumed that they are non-compliant. Where evidence is available that a proportion of settlements are an attempt by businesses to avoid court costs or reputational damage of fighting a case, and that in a proportion of these cases firms are not non-compliant, this should be reflected in the IA.

### 5.8.2 Insurance

Businesses often have insurance against liability. Any costs these firms are forced to pay as a result of non-compliance, including legal costs, are ultimately passed on to insurance companies. This is best understood by separating the transfers into costs and benefits. There is a cost to the business as a result of non-compliance; this should not be included in the EANDCB. Insurance company payments result in a benefit to the business and an equal cost to the insurance company. This cost is not included in the EANDCB because it is indirect (see pass-through) and is not included in the NPV because it is a transfer and not a true resource cost.

## 5.9 Pro-competition

Regulatory provisions promoting competition that result in an increase in the net direct burden on business are non-qualifying. This is providing they meet the four tests listed under 'definitions' in the exclusion (page 111 of the BRFM).

If a measure is not solely about promoting competition, then, where possible, costs and benefits related to the pro-competition elements should be separated and scored against the BIT. When it is demonstrated that it is not possible or proportionate to separate them, then the non-pro-competition elements may be treated as non-monetised and, therefore, scored as zero.

**The regulation of payments networks (RPC13-HMT-1877):** the department claimed that the proposal was out of scope of OITO on the grounds that the regulation is for pro-competition purposes. The RPC rejected this assessment on the grounds that some elements of the objectives are focused on consumer protection. This was the basis of a red-rated opinion because the BRFM stated that departments need to identify, and score for OITO, any impacts not related to the pro-competition purpose of the measure. In the revised IA, the department emphasised the pro-competition nature of the proposal, explaining how the objectives and policy has evolved over time. The RPC concluded that, although a small aspect of the proposal remained in scope of OITO, it would be too difficult, and therefore disproportionate, for the department to monetise it. In line with the BRFM at that time, the proposal was classified as zero net cost under OITO. ([IA](#))

**Order-making power for quicker switching of service providers (RPC16-BIS-3442):** The proposal was to provide a power to legislate via secondary legislation to impose contractual terms for consumers to be able to switch suppliers within a set timescale. On re-submission, the Department provided an assessment against the four pro-competition tests. *“Promotion of switching and active engagement by consumers”* is listed in the Better Regulation Framework Manual as a type of measure that falls within the pro-competition exclusion and the Department’s proposal was clearly of this nature. As a pro-competition measure with a net burden on business, the RPC verified the proposal as a non-qualifying regulatory provision.

## 5.10 Misuse of Drugs Act and National Minimum Wage

Regulatory provisions that implement changes to the classification and scheduling of drugs under the Misuse of Drugs Act 1971, or to the National Minimum Wage hourly rates, where these follow the recommendations of the relevant independent advisory body are non-qualifying.

**Amendment to the National Minimum Wage regulations 2015 - increase in NMW rates (RPC15-BIS-2382):** The IA was for the annual update of NMW rates. The large majority of the policy was out of scope of the BIT as it followed the recommendations of the independent Low Pay Commission (LPC). However, the Government had chosen to deviate from the LPC’s recommendations with respect to the minimum wage for apprentices. As the Government raised this part of the minimum wage by more than the LPC’s recommendation this element was in scope of the BIT and scored as an IN.

## 5.11 Systemic financial risk

Measures that specifically address financial systemic risk are NQRPs. Financial systemic risk is defined in the BRFM (page 114).

**Wheatley review of LIBOR: implementation (RPC12-HMT-1603):** following revelations of manipulation of the London Interbank Offer Rate index HMT proposed a number of amendments to how LIBOR would be calculated. As LIBOR is referenced in a huge number of financial contracts it was accepted that there was a systemic risk to the financial system and regulations to increase confidence in LIBOR were, therefore, out of scope of OITO. ([IA](#))

**Alternative investors fund managers directive (RPC12-HMT-1674):** the proposal was to implement an EU measure regulating alternative investment funds. HMT proposed to gold plate the measure by not taking advantage of a derogation exempting smaller funds. While it was clear that the measure overall related to financial systemic risk, it was not clear that the specific area that was gold-plated did. This part of the measure was, therefore, covered by neither the EU nor Financial Systemic Risk and so was in scope of OITO. (Treasury subsequently amended the policy to take up the derogation).

## 5.12 National Living Wage

**Amendment to the National Minimum Wage Regulations 2015 - introducing a national living wage (RPC15-BIS-3140):** The proposal introduced, from April 2016, a national living wage into the existing national minimum wage framework. This was set at £7.20 per hour and applied to those aged over 25 years. At the time of RPC opinion, the Government had not yet decided the categories of non-qualifying regulatory provisions but this was subsequently confirmed as a NQRP.

Annual increments to the NLW that follow the LPC recommendations will also be non-qualifying. Any deviation from the LPC recommendations will, however, be a QRP (in line with the approach to the NMW).

## 6 Enabling/Primary Powers

### **Background**

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.

### **Introduction**

This section describes how the RPC applies the 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. It also covers some potential issues that departments may find helpful to note.

### **Framework requirement**

Paragraphs 2.3.45-46 of the Better Regulation Framework Manual (March 2015) states: *"Where you are implementing a measure through primary legislation, or through a combination of primary legislation and secondary legislation made using powers provided in the primary legislation, the primary legislation impact assessment should quantify the total expected impact of the measure. If subsequent secondary legislation is drafted, the original impact assessment should be revised as necessary to refine the estimate of relevant impacts."* This same text is currently at paragraphs 2.3.43-44 in the new version of the BRFM.

### **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 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 for parts of the proposal at the primary legislation stage (e.g. 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 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](#) of 6 June 2014. This opinion validated an EANCB 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, BIS subsequently submitted an IA taking account of this policy change. Since this change was beneficial to pub companies, the overall EANCB was reduced slightly, to £3.3 million.

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, because substantive policy decisions will not be taken until the secondary legislation stage, 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. Two case studies are provided in the boxes below.

**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.

**Introducing registration fees for the Office for Students (BIS-3338(1))** The impact assessment supported primary legislation giving the new Office for Students (OfS) the power to charge higher education institutions fees for registration. The specific funding structure of the OfS would be set out in secondary legislation but the detail of which was not known at the primary legislation stage. The Department provided a detailed assessment, with a provisional EANDCB of £25.1 million, but this could be only indicative at the primary legislation stage. The funding structure, and associated registration fees, would be subject to consultation and a further impact assessment. The EANDCB for the whole proposal would, therefore, be validated by the RPC at the secondary legislation stage.

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 – see example in the box below.

**Approval condition where a development order grants permission for building (CLG-3165(1)).** This IA related to primary legislation providing a power enabling the Government to bring forward measures through secondary legislation allowing local authorities broader permitted development rights. The Department provided no assessment of the possible costs and benefits of the overall proposal. The IA received an IRN from the RPC. On re-submission, the Department provided a detailed discussion of possible costs and benefits and explained fully why it could go no further at that stage. The revised IA was green-rated by the RPC. The RPC classified the proposal as a qualifying regulatory provision but did not validate an EANDCB figure at that stage. The Department will submit another IA at the secondary legislation stage, for RPC validation of an EANDCB for the whole policy.



**Specific points regarding assessment that departments may wish to note**

The RPC interprets “*quantify*” in paragraph 2.3.45 of the BRFM flexibly, with an acceptance that providing an appropriate range of scenarios for outcomes, and their associated costs and benefits, may be preferable to a point estimate EANDCBs 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.

To avoid confusion, 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 reason\*) but will not be accounted for BIT purposes until the date of implementation.

(\*For information more generally on how to classify impacts as direct or indirect please see RPC case histories section ‘direct and indirect impacts’.)

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. <b>Full details and robust assessment of the whole proposal</b> (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. <b>Details and robust assessment of some of the impacts on business</b> (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. <b>Full robust assessment of the proposal as a whole is not possible</b> 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 meaningful</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. <b>But</b> identification and an <b>assessment of at least the scale of the impacts of the measure as a whole</b>, including the business sectors that will be affected, and how, <b>is provided</b>. 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><b>3. No assessment of scale/indication of likely impacts provided and no satisfactory explanation for this.</b></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 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 scored (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 but classified by the RPC at the primary legislation stage as fit for purpose but where an EANDCB figure is validated as “zero at this stage”**. Direct impacts on business to be accounted for at the secondary legislation stage implementation date(s). **The opinion will note that a further IA is to be submitted at the secondary legislation stage for validation of an EANDCB figure.**
- 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 but where the legislation is a regulatory provision – QRP but with EANDCB of zero.

(\*\*Assuming the proposal is a regulatory provision and does not fall within a BIT exclusion. These exclusions are listed and described at Annex 1 in the new BRFM.)

### When should measures be accounted for under the BIT?

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.

## Other Issues

### Qualification for the fast track

To qualify for the fast track as a low-cost regulatory measure, the gross cost of the overall policy proposal must not exceed £1 million in any year. Even if the gross cost of the impacts associated with the primary legislation is clearly less than £1 million in any year, a proposal is not suitable for the low-cost fast track route unless the department shows that the gross cost of both the primary and secondary legislation combined will not exceed £1 million in any year.

#### **Football Governance (RPC12-FT-DCMS-1780)**

The Department's assessment for meeting the low-cost fast track threshold considered only what it described as the "three direct measures" in the Bill (such as changes to the Football Association Board). It did not consider the element of the Bill relating to licensing requirements as it is "*only to introduce an enabling power for secondary legislation*". The RPC could not confirm the proposal as low cost and stated that the Department needed to provide a more detailed assessment of the likely impacts of the licensing requirements, should they be introduced through secondary legislation.

### 'Voluntary' measures

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.

#### **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 done 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. ([IA](#)) ([Opinion](#))

See also Football Governance case above, where the Department's fast track assessment stated that the preferred outcome would be that "*the threat of legislation puts pressure on the football authorities to implement their reform proposals*".

## Section 7: Methodological issues concerning regulators

Note that BIT exclusions K to L4 relate to regulator activities only and will be covered in a future RPC case histories document on issues specifically affecting regulators. In the meantime, this section covers issues relating to the activities of regulators that arose during OITO.

### 7.1 Changes in the costs of industry funded regulators

This section provides guidance to departments and regulators where regulatory proposals result in costs to regulators that are funded by industry.

The department or regulator should assume that the additional costs recovered from the industry as a result of the proposal would be a direct cost to business and, therefore, should be included in the calculation of the EANDCB figure.

#### **The appointment of small businesses appeals champions (RPC14-BIS-2021(2)):**

The Department proposed to legislate to appoint an independent SBAC within each of the non-economic regulators. This was to provide assurance to business and government that regulators are delivering against the goals relating to appeals and complaints set out in the new statutory Regulators' Code. At final stage the Department addressed a comment from the RPC that the equivalent annual net cost to business (EANCB) figure should include the costs relating to SBAC that will be recovered from business. The final EANCB figure was estimated from cost data provided by regulators and was validated by the RPC.

Any increase in costs that are stated as "absorbed" by regulators should also normally be treated as a direct cost to business. This reflects that, in the counterfactual, the costs to business would be lower because it should be assumed that the regulator's efficiency savings would have been passed to them (in the form of a reduction in fees/charges).

**REMIT criminal sanctions (RPC14-DECC-2076(3)):** the REMIT proposal resulted in expected additional costs to Ofgem (for illustration only as the business impact target excludes economic regulation of natural monopoly markets) due to the undertaking of a number of new criminal investigations each year. According to the department, Ofgem was not proposing to increase the cost of the licence fee to industry to recover the additional cost of investigations. However, as Ofgem is funded by industry, in effect, any increase in cost to the regulator represents a foregone cost saving to business and should, therefore, be treated as a direct cost to business and included in the EANCB. This is most obviously the case where the IA states that the regulator will pay for these additional costs through efficiency savings.

In some cases it may not be proportionate to monetise “absorbed costs”. If the impacts are very small, they may be viewed as small variations on “business as usual” costs. However, this is a very particular exception.

## 7.2 The scoring of costs to business as a result of an independent regulator complying with the requirements of a EU Directive or domestic legislation

The impacts of actions by economic regulators, such as the Financial Conduct Authority (FCA), were not in scope of OITO. However, when a department placed a requirement on a regulator to achieve specified outcomes, then the impacts of this were treated as in scope of the OITO.

**Amendment to the Financial Services (Banking Reform) Bill - restricting charges for high-cost short term credit (payday loans) (RPC13-HMT-1984):** the Government legislated to introduce a cap on the cost of payday loans, placing a duty on the Financial Conduct Authority (FCA) to impose a cap. The policy did not set out the exact level of the cap but set out the criteria the FCA should use when determining the cap (i.e. to secure protection for borrowers against excessive charges). The FCA already had the power to cap interest rates on borrowing although they had decided not to exercise that power to the point when the Government decided to legislate.

The RPC concluded that the measure was in scope of OITO and that the Treasury would need to account for the statutory duty placed on the FCA to cap the cost of payday lending. The RPC noted that for the measure to be considered out of scope of OITO, the Treasury would have to demonstrate that:

- it was inevitable that the regulator would use its existing powers in the same way for which the Government had legislated for the regulator to curb excessive payment charges by payday lenders;
- the regulator would have opted specifically to impose a cap on payday lending charges, rather than any other intervention; and
- under these circumstances the regulator would have set the cap within twelve months of the time frame set by the Treasury in legislation (January 2015).

The measure was listed as an IN of £91.3 million in the Ninth Statement of Regulation.

Changes to regulator activity could also be ultimately in response to European Directives.

**The Implementation of the EU Mortgage Credit Directive (RPC14-HMT-2144(2)):** The department's EANDCB did not include the impact on business of the Financial Conduct Authority changing its rules in order to meet the requirements set out by the MCD. The department explained that this impact was dependent on how exactly the FCA, in its capacity as the independent regulator, decided to change its rules. The Department also noted that the FCA is required by legislation to carry out its own cost benefit analysis for any changes it makes to its rules in response to the MCD.

The RPC's concern with the absence of an EANDCB for the actions of the regulator was two-fold. First, the regulator has no discretion but to meet the minimum EU requirements and, therefore, were not acting independently. Second, its inclusion would make for a more complete assessment of the cost of EU regulation.

The department explained why it was not possible to produce a robust EANDCB for the regulator action but included a summary of the FCA's own cost benefit analysis, highlighting the likely impact on business of its planned rule changes as a result of the MCD. On this basis, the IA was given a green rating by the RPC.

Given that the actions of regulators, unless falling within one of the exclusions, are in scope of the BIT, the issues in relation to the Mortgage Credit Directive should of lesser significance under the new framework.

### 7.3 Specific enforcement actions

Policies relating to specific enforcement actions are out of scope of OITO. This applies only to policies designed to deal with a specific breach, not policies relating to enforcement in general.

**Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2013 (RPC13-DfT-1849):** the IA claimed that the proposal relating to a seafarer's right to take a case to an employment tribunal on annual or additional paid leave matters was out of scope under enforcement. However, this did not meet the definition of "specific enforcement action" ("imposed on individual companies to remedy non-compliance"). The department submitted a revised IA with costs to compliant businesses scored as an IN under OITO (as it went beyond minimum international requirements). ([Opinion and IA](#))



Under the new better regulation framework, regulators have been brought into scope of the business impact target (BIT). As noted above, issues specifically relating to regulators, including the application of BIT exclusions K to L4, will be covered in a future RPC case histories document.

## Section 8: Small and Micro Business Assessments (SaMBA)

### What is a small / micro business or civil society organisation?

*Small businesses and civil society organisations* are defined in the Better Regulation framework manual as those employing up to 49 full-time equivalent employees and *micro-businesses* as those employing up to 10 employees.

### When is a SaMBA required?

A SaMBA is mandatory for all new domestic regulatory proposals that come into force after 31 March 2014, except those which qualify for the 'Fast Track'.

### When would the RPC expect to see a SaMBA?

The BRFM sets out circumstances when a SaMBA is required. However, many impact assessments would benefit from providing a SaMBA even when it is not mandatory, for example with some deregulatory and/or European and international measures. The RPC encourages the wider use of SaMBAs because this contributes further to the balanced reporting of the regulatory burden faced by small businesses.

The inclusion of a SaMBA is particularly advisable for measures which, although deregulatory and benefitting businesses overall, could affect small businesses negatively. Producing a SaMBA in cases where a policy proposal benefits large businesses at the expense of small businesses is recommended, so that alternative policy options or exemption/mitigation options are considered.

### What should a SaMBA include? What level of analysis does the RPC expect?

The default assumption for SaMBA is that where a large part of the intended benefits can be achieved without including smaller businesses, an exemption will normally be applied. Departments should think carefully about whether it is necessary to extend a measure to micro and/or small businesses at the very outset of policy development.

The regulatory requirement can be extended to smaller businesses if:

- a. any ***disproportionate burdens*** have been mitigated; and
- b. the exemption of small businesses is not viable or compatible with achieving ***a large part of the intended benefits*** of the measure.

Potential red point

The SaMBA should include sufficient analysis on both points to ensure that any decision about the exemption (or not) of smaller businesses is based upon the evidence.

**Table 3: Exemption and mitigation**

		Large parts of benefits maintained when applying an exemption	
		YES	NO
Disproportionate burdens and / or if it is viable to mitigate costs	YES	➔ Exemption should be applied	➔ Disproportionate costs to small businesses should be mitigated
	NO		➔ Neither exemption nor mitigation required

However, it should be noted that a SaMBA that does not recommend an exemption or mitigation measures is not necessarily a bad SaMBA, or not fit for purpose. There might be instances where exemption could be counterproductive or significantly disadvantageous, for example, when small businesses are actually beneficiaries of the proposal or with regulations concerned with public safety/health, consumer protection or the provision of public goods. The RPC does not make judgements on policy decisions, but only on the underlying evidence base. It is, therefore, not in the RPC’s remit to judge the policy decision of not exempting small businesses as long as the impact on small businesses has been assessed appropriately and the policy decision is informed by sufficient evidence.

Another reason why exemption might not be possible is because of “dynamic effects”, i.e. business migrating to smaller firms if they are exempt from requirements. If this is likely to be the case, departments should provide evidence and analysis of the likelihood of such effects, which will depend on the nature and structure of the market.

When full exemption is not applied, departments should consider applying partial exemption or mitigation. The BRFM lists potential examples of mitigation actions. In line with the BRFM guidance, the impact assessment should include an analysis of the impact of mitigating options proposed, their effect and their rationale. This could be either a qualitative or quantitative assessment and should include any potential familiarisation and on-going costs to business.

Where no mitigating options are proposed, say because it is considered that there is no disproportionate burden and / or such action would not be economically viable, this must be clearly evidenced in the impact assessment.

What are “disproportionate burdens”?

The economic intuition behind small businesses being disproportionately affected by regulation is that any costs resulting from complying with regulation can often be seen as fixed costs, because they do not depend on the output of the business. Since larger businesses operate on larger scale, such fixed costs are likely to make up a smaller proportion of their overall costs. An identical increase in fixed costs in absolute terms will, therefore, translate into a larger relative increase in costs to smaller businesses.

The RPC recommends that departments consider the increase in absolute and relative costs to business, but also assess whether small businesses are disproportionately affected, based on the relative increase in costs. This should be the default position, unless good reasons can be provided why such an approach might not be suitable in the specific circumstances of the proposal considered.

The working assumption applied by the RPC is that small businesses are indeed disproportionately affected by regulation, unless the SaMBA provides evidence showing otherwise. This means that where a department:

- a. does not apply an exemption or mitigation; and
- b. does not provide any evidence in the IA on whether costs are disproportionate; and
- c. does not demonstrate clearly that exemption or mitigation would not be appropriate, the IA will not be considered fit for purpose by the RPC.

Potential  
red point

What is meant by “a large part of the intended benefits”?

There is no particular threshold for the proportion of benefits that would be lost which, if exceeded, would justify not applying an exemption. Ultimately, a decision on what does or does not constitute a “large or sufficient part of intended benefits” is a policy choice.

**The RPC expects to see sound analysis backing up any decision not to exempt small and micro businesses. This could be achieved by departments providing evidence on the:**

- a. **‘policy cost’ of exempting small and micro-business. Departments should provide an analysis of how much of the policy objective would be compromised by applying full exemption to small businesses; and**

- b. impacts of not exempting small and micro-business. Departments should provide an indication of how much of the overall costs to business they expect to fall on small businesses.**

Required evidence at different stages

The RPC acknowledges that the micro level data required for the analysis outlined above, especially on policy costs to small businesses associated with specific measures, might be difficult to obtain or not exist at all. Any figures provided might not, therefore, be particularly robust.

However, departments should, at consultation stage, where possible, provide information on the areas highlighted in table 2 below. If a department does not have all the information necessary, it should explain clearly how it will aim to obtain the necessary information and use the consultation period to test its assumptions and hypotheses with stakeholders. The final stage impact assessments should provide more detailed and robust data, where possible. If such data has not been obtained, the department has to explain how it actively tried to gather the relevant information and why it was not possible or proportionate to obtain the information.

Potential red point

**Table 4: The necessary evidence base for SaMBAs**

<b>Consultation stage</b>	<p>The SaMBA should include <b>provisional indication of:</b></p> <ol style="list-style-type: none"> <li>1) <u>how much</u> of the policy objective is sacrificed by applying a full exemption; and</li> <li>2) <u>how much</u> of the overall cost to business is expected to fall on small businesses (with no exemption).</li> </ol> <p>Departments should identify how many small businesses are expected to be affected by the proposal and how much of a role small businesses play in the regulated sector.</p> <p>Since data availability might be more limited at this stage, departments may not be able to provide numerical estimates. <b>If data are limited at this stage, the SaMBA should include assumptions and hypotheses that will be tested during consultation, or at least set out how information will be obtained during consultation.</b></p>
<b>Final stage</b>	<p>The SaMBA should include <b>broader analysis describing the likely:</b></p> <ol style="list-style-type: none"> <li>1) <u>proportion</u> of the policy objective sacrificed by applying a full exemption; and</li> <li>2) <u>proportion</u> of the overall cost to business expected to fall on small businesses.</li> </ol>

	<p>Departments should identify approximately how many small businesses are expected to be affected by the proposal and how much of a role small businesses play in the regulated sector.</p> <p><b>The SaMBA should include quantitative estimates, if feasible. If no estimates are provided, departments will need to explain how they attempted to obtain the necessary information, especially during consultation, and why these attempts had been unsuccessful.</b></p>
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### ***Examples of good SaMBAs***

**Legislation to require energy suppliers to provide key, personal information on consumer bills in a machine readable format (RPC13-DECC-1962):** The objective of the proposal is to require energy providers to place a 2cm x 2cm machine readable image, such as a bar code or Quick Response (QR) code, on all domestic retail consumers' paper energy bills. When scanned by a generic reader, this image will provide access to 12 key pieces of consumption data in a manner that is easy to understand.

The Department's original final stage IA was red-rated by the RPC on the basis that the SaMBA was not fit for purpose. The Department had not provided sufficient evidence that the objectives of the proposal could not be achieved with an exemption for small and micro businesses, given the very small market share of these businesses.

On re-submission, the SaMBA provided good quantitative analysis, indicating that 10 energy suppliers are believed to be small or micro businesses, and the total market share of these 10 suppliers is estimated to be around 0.2%. Small and micro businesses are, however, expected to bear 3.2% of the costs associated with this policy – around £120,000 in total. Given that small and micro businesses hold a market share of only approximately 0.2%, but the costs imposed on them are considerably higher at 3.2%, the impact on small businesses can be seen as disproportionate.

Given the very small market share of small and micro businesses, a full exemption was applied because the vast majority of the policy benefits could still be achieved. [\(IA\)](#)  
[\(Opinion\)](#)

**Continuity of essential supplies to insolvent businesses (RPC13-BIS-3264):** When a business enters insolvency, suppliers may invoke a termination clause in their contract and withdraw their supply. Where those supplies are essential to the continuation of the business, this can have an adverse impact on the likelihood of a successful rescue of the business and on the amount returned to creditors. These essential suppliers may also threaten to withhold supplies or services unless a 'ransom' payment is made. This causes a transfer from the body of creditors of the insolvent business to the essential supplier, reducing the likelihood of a business rescue and reducing returns to the wider body of creditors.

The IA provides detailed quantitative analysis on the number of small and micro businesses affected, the reduction in benefits from exempting small and micro businesses, and the costs to small and micro businesses of the proposal. It explains that small and micro businesses can be expected to benefit from the policy at both a macro and micro level, through the following impacts:

- Improved returns to unsecured creditors generally (nearly 90% of which are small or micro businesses) of £46.69m. This benefit would be significantly reduced in the event that small and micro business suppliers were excluded from the scope of the policy, with any benefits to excluded suppliers occurring as a transfer from other businesses (up to 99% of which are likely to be small or micro businesses).
- Enhanced prospect of business rescue for small and micro businesses that are dependent on supplies and that are enabled to continue trading.
- The Department concludes that exempting small and micro businesses would significantly undermine the rationale for the policy and its benefits – and particularly the benefits to small and micro businesses. The SaMBA explains that specific guidance and information will be made available and tailored to the needs of small and micro businesses in order to mitigate potentially disproportionate familiarisation costs. The Department also explains that it will engage with representative bodies of suppliers affected.

The impact on small and micro businesses will be monitored and reported on as part of the post implementation review (PIR). ([IA](#)) ([Opinion](#))

**Review and changes to the Riot (Damages) Act 1886 (Green, Final) (RPC14-HO-2008(2)):**

The proposal is to modernise the law relating to public liability for compensation to individuals and businesses as a result of riots. It introduces a public liability cap per claim, alongside modernising elements of the process (to cover motor vehicles, introduce excess payments, and provide for “new-for-old’ replacements).

The policy is designed so that the cap will only affect larger claims which, in general, will come from larger businesses. The majority of smaller businesses will experience a net benefit from the changes as they will now be able to claim compensation for damage to motor vehicles etc. The analysis provides a quantitative assessment of the number of businesses that will be affected that are likely to be small or micro businesses. The assessment provides estimates of the overall proportion of the costs and benefits falling on small businesses. The department presents two policy options and estimates that small businesses will only face a very small portion (2%) of the overall costs falling on all businesses under the first option, and may even be beneficiaries of the policy under the second option. This demonstrates that the overall burden on small and micro businesses is unlikely to be disproportionate.

The department also explains that the proposal would not be affordable if small and micro businesses were completely exempt from the costly elements of the proposal as this would result in the net impact of the policy decreasing from £19.7m to -£49.4m in NPV terms. This is because, from the costs faced by business and individuals, the public sector makes savings and it is these savings which help to fund the additional support for business in the form of time support and replacement value. If the cap were to be removed for small businesses then, under option two, the net impact on small businesses would be positive with a present value of £2.98m. However, such a change would increase costs to the public sector resulting in a negative NPV. The SaMBA explains that this would be unaffordable and would ignore one of the objectives of the policy, which is to consider the impact on the public purse. For these reasons, the department concludes that it is not possible to remove the cap on claims for small businesses and that it is required in order to maintain the overall benefits of the policy.

By providing this analysis the department showed that small businesses are not disproportionately affected and that exemption would significantly undermine the policy benefits. In the RPC's view, the evidence presented fully justified the department not applying an exemption or mitigation procedures. ([IA](#)) ([Opinion](#))

## Section 9: Wider impacts

### 9.1 Assessment of impacts beyond business

The Green Book places strong emphasis on the assessment of impacts on society as a whole, e.g. including social, consumer and environmental impacts, as well as those on business. These impacts are captured, where they can be monetised, in the NPV. The Green Book states that *“The NPV is the primary criterion for deciding whether government action can be justified”* (page 26). The better regulation framework’s focus is on business impacts and, in itself, does not, therefore, provide the same incentive for departments to assess the wider effects of regulation on society.

The RPC believes that more could be done by departments to quantify the wider effects on society of government proposals. During 2014, only one-third of proposals provided a quantified assessment of the effects on society. Although this increased to around 60 per cent during the present parliament, there is more that could be done. Of the 24 measures that did include quantified wider effects, eight had a negative NPV. On the face of it, this would suggest that society as a whole is worse off as a result of the proposal. However, it is more likely that some beneficial impacts on society have not been monetised.

There will be some cases where it is particularly difficult to quantify fully the wider societal impacts of a policy. In these cases, it is reasonable for departments to state that is not possible or proportionate to monetise these impacts. However, departments should explain why this is the case and provide a proportionate qualitative assessment in the IA. For more significant measures, arguments on proportionality grounds may be less credible. There are a number of measures that have relatively significant costs to business, but for which the societal benefits have not been assessed robustly. One-third of measures with costs to business of over £10 million did not quantify any other impacts on society.

While RPC opinions may comment on the wider analysis, the RPC is unable to rate the fitness for purpose of a final stage impact assessment on the robustness of the assessment of wider impacts. This may also limit departmental incentives to undertake a fuller assessment of wider impacts. The box below shows an example of where the department did not monetise wider impacts but where the RPC thought the assessment might have gone further.



**Amending the law relating to dealers in scrap metal (Final, Green) (RPC12-HO-1434(5)):** Due to rising commodity prices for metal and the ease of trading anonymously, theft of metal has been increasing. This measure prohibited cash payments for scrap metal, increased reporting requirements for scrap metal dealers, and increased penalties for offences under Scrap Metal Dealers Act 1964. The proposals had a Net Present Value of -£411 million and a business NPV of -£320million. The proposals included costs to business (both dealers and customers) of compliance with the new requirements. The NPV also included costs to individuals, and public sector bodies. The only benefits that were included in the NPV were small, including the removal of a licence fee for businesses and some fee and fine income for public sector bodies.

The key benefit of the proposal - reducing the cost to society of metal theft – was estimated to be around £220 million a year. However, the department concluded that the extent to which crime will be reduced could not be forecast with any certainty. Tax receipts were also forecasted to rise as a result of the ending of cash payments. This second benefit was not monetised. The IA noted that *“the net present value is negative; however crime reduction benefits and increased tax receipts have not been included in the calculations which could result in a cost saving to the UK as a whole”*. NPV estimates need to be underpinned by robust evidence and in this case, given the uncertainty, it may not have been possible for the department to fully monetise the benefits. However, the department’s assessment of the wider impacts, which ultimately forms the basis for the policy, could perhaps have been developed further.

The boxes below illustrate some examples where final-stage impacts assessments received a green-rated opinion but where the RPC was particularly critical of the wider analysis.

**Wheatley Review of LIBOR Implementation (RPC12-HMT-1603):** The RPC accepted that this was out of scope of OIOO on the basis that it dealt with systemic financial risk and that department had provided a reasonable assessment of the direct impacts on business. However, the IA included only two paragraphs on benefits and, given that this was the basis for the intervention, a more detailed assessment of the possibly very significant wider benefits would have been more appropriate.

**Tackling illegal immigration in privately rented accommodation (RPC13-HO-1880(3)):** The IA provided a reasonable assessment of the direct impacts of the proposals on business and was, therefore, given a green rating. However, there were significant concerns with the wider analysis and evidence presented in the IA. These concerns included the incorrect exclusion of costs to the Exchequer in the break even analysis. The costs to the Exchequer should also have been used to provide an accurate assessment of the likely impacts of the proposals, in order to properly inform the decision-making process.

## 9.2 Valuation of wider impacts

The Green Book provides guidance on how departments should value non-market impacts, i.e. impacts that are not readily expressed in monetary terms. These include, for example, impacts on health, safety and the environment. More detailed guidance has been prepared by the relevant government departments, including unit values for use in cost benefit analyses. For example, DfT produces ‘WebTAG’ guidance on how to value improvements in transport safety.<sup>10</sup> The DfT’s guidance includes figures for the ‘value of a prevented fatality’ (VPF), as well as values for different severities of non-fatal injury. These figures are used and have been developed across government, such as by HSE in their monetary valuation of impacts on occupational health and safety.<sup>11</sup>

### Use of multipliers

The DfT valuations have also informed the Department of Health’s Quality Adjusted Life Year (QALY) framework for assessing the benefit of health care interventions. During OIOO/OITO, some DH impact assessments applied a multiplier of 2.4 to resource gains to DH. This was on the basis that each QALY was valued at £60,000 but average expenditure per QALY was only £25,000. Thus the argument was that each £1 of additional resource available to DH was ‘worth’ £2.40 in societal benefit.

The Green Book states that values “*should be expressed in terms of relevant opportunity costs*” but does not prescribe how this should be done for impact assessment purposes. It is reasonable for departments to adopt appraisal rules (such as applying a multiplier) in order to optimise their spending within a budget constraint. However, HMT have advised that the 2.4 multiplier is not, and is not intended to be, a true measure of the opportunity cost of exchequer funding. It should not be used outside of the spending optimisation context and should not be used, therefore, in regulatory impact assessments.

Potential  
red point

The box below provides an example where DH received a red rated opinion from the RPC as a result of using a multiplier. The impact assessment was subsequently revised and received a green rating.

<sup>10</sup> <https://www.gov.uk/guidance/transport-analysis-guidance-webtag>

<sup>11</sup> <http://www.hse.gov.uk/economics/eauappraisal.htm>

**Responsible Officers in the New Health Architecture; Proposals for making the explicit checking of language skills for doctors (DH-1309):** Under the Medical Profession (Responsible Officers) Regulations 2010, certain organisations are required to appoint a responsible officer (RO). The department explained that changes to NHS architecture generated the need to ensure specific bodies involved with the employment of doctors appoint ROs. Additionally, the department stated that there was increasing concern that patients might be put at risk due to inadequate language skills of some doctors. In response, the department proposed to designate the NHS commissioning board, local authorities and specific bodies involved with the employment of doctors to ensure they appoint ROs and to extend the duties of ROs to include the checking of language skills of doctors. In the impact assessment, all costs were multiplied by a factor of 2.4. As a result, the RPC opinion stated that “the IA must be amended to provide costs without the application of a multiplier”.

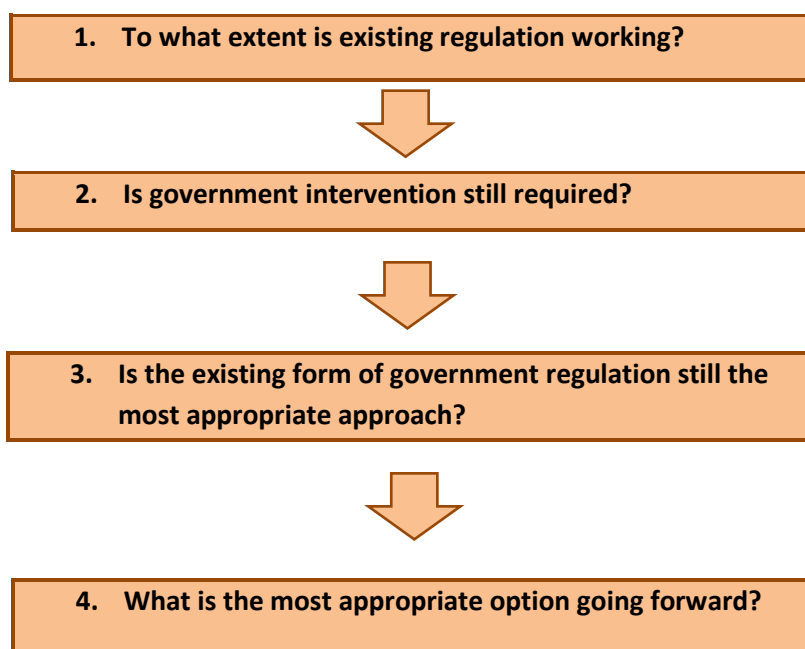
In addition, the “*Next Steps for Nursery Milk*” (DH-1179) proposal involved a transfer from business to government. DH applied the 2.4 multiplier to the resource gain to them on the basis that they could achieve this amount of benefit from it. Thus a proposal consisting largely of a transfer had a significantly positive NPV rather than, as would be intuitive, something close to zero. If the proposal had been submitted from DfE, which does not use such a multiplier, the analysis would have been quite different. **The use of a multiplier can, therefore, lead to inconsistent treatment across government and potentially encourage the placing of additional burdens on business.** In the nursery milk case, the appropriate approach would have been to not use a multiplier in the RIA but potentially use one in any subsequent DH appraisal of how to use the additional resource, reflecting the fact that this is a separate decision.

## Part III: Post Implementation Reviews

The aim of this section is to provide practical advice on the key analytical questions to consider when undertaking a post-implementation review (PIR). It outlines a proportionate approach to the evidence and analysis used to evaluate the impacts of a regulatory change, and to support a department's preferred option.

### Framework

This section is structured around the four analytical questions in the diagram below. These draw on the framework in 'Figure 6: PIR Questions' of the Cross-Government Evaluation Group guidance.<sup>12</sup> This is also presented as 'Figure 3.2B: Overview of PIR questions and possible review outcomes' in the draft new BRFM.



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<sup>12</sup> Guide for Conducting Post Implementation Reviews, August 2015.

## 1. To what extent is existing regulation working?

Whether the policy objective is being achieved is perhaps the most important question of all. The following sub-questions provide guidance on the areas a PIR should cover to address this.

### 1.1 To what extent has the policy achieved its objectives/success criteria?

*The PIR should state clearly the intended purpose of the policy, as set out in the original IA. (It is important that the PIR does not restate the purpose of the policy with the benefit of what has happened.) This is crucial to determining the ex-post impact of the policy, and hence the extent to which the existing regulation is working. Departments should assess clearly to what extent, and for what reasons, the proposal met its objectives/success criteria. In order to do so, departments should consider carefully the most adequate and proportionate choice of evaluation method. The Magenta Book and the Cross-Government Evaluation Group guidance provide discussion and advice.*

### 1.2 What have been the costs and benefits of the policy? How do these compare to the costs and benefits estimated in the original IA?

*In order to determine the ex-post impact of the policy, departments should focus on the additional effects resulting directly from the policy, i.e. the incremental costs and benefits. As noted in the Magenta Book, establishing the counterfactual, or what would have happened in the absence of the policy, is not easy given that by definition it cannot be observed, and often a large number of factors drive the outcomes that are observed. Thinking about monitoring and evaluation in the early stages of the policy design and planning process has benefits, which may include helping to establish the counterfactual. For example, implementing a policy on an initially restricted group of individuals or organisations may help estimate the counterfactual, through observing what happens to the other individuals or organisations. The case below is an example of where considering monitoring and evaluation early in the policy design and planning process would have been beneficial.*

**Post Implementation Review of the Ecodesign of energy related products regulations 2010 (Green) (RPC-DECC-3144(1)):** The Department explains that the PIR could have been improved by monitoring compliance rates, but that this could not be done in a cost effective manner. The PIR explains that given the limited scale of the expected impacts on compliance, this is a proportionate and reasonable approach. The RPC, however, highlighted that not being able to monitor the effectiveness of a policy could be an issue in the case of more significant proposals. Monitoring and evaluation should, therefore, be considered in the early stages of the policy design and planning process.

*Clarity regarding the time frame is also important because short term impacts may be very different to longer term effects, and there is likely to be a time lag between implementation and when initial impacts materialise.*

*Departments should also compare the actual impacts against the estimates in the appraisal, and explain any significant differences. For example, the department may refer to how much the EANCB has changed compared to that estimated in the IA, and explain the reasons for this change. A good PIR will consider whether any of these changes provide lessons for future IAs or PIRs. The case below would have benefited from more clearly presenting these lessons.*

**Post Implementation Review of the Sale of Registration Marks (Amendments) Regulations 2008 (Green) (RPC13-DFT-PIR-1738):**

Although the PIR was considered fit for purpose, it could have been improved by assessing further the specific impact of the ending of the contracted out tele-sales link and by bringing together lessons learned under one heading.

In the PIR the termination of the contract was credited with saving nearly £1m per year, compared with an expected saving of £847,000 in the 2008 IA. This accounted for about 80% of the overall estimated savings from the proposal. Combining all the savings together somewhat masked the fact that benefits elsewhere were substantially lower than estimated. Also, the PIR could have addressed whether ending the contract might have had a negative effect on sales. It appeared that in 2008 the number of transactions was considerably over-estimated, leading to a sharp fall in sales revenue.

### **1.3 Have there been any unintended effects?**

*The existence of unintended effects may alter the extent to which the existing regulation is judged to be working effectively. Departments should discuss fully any unintended effects. This should include a discussion of the significance of these effects for meeting the policy objectives and their implications for the department's preferred option. In this, departments should consider any unintended impacts that arise as a result of the policy itself or its implementation, and wider unexpected developments that may have had an unintended effect on the whether the objectives of the policy were being achieved. Departments should consider the extent to which such effects were reasonably foreseeable at the time the policy was implemented. The case below provides an example of where the magnitude of the impact on business was significantly affected by an unforeseeable change in market prices. Where market prices are volatile and unexpected movements could have a major impact on the achievement of policy objectives, or the costs and benefits of a policy, this should be addressed in the IA and PIR.*

#### 1.4 Have the Department clearly referenced the IA assumptions?

*The assumptions made in the IA and PIR affect the conclusions reached in the analysis. It is, therefore, important to refer clearly to these assumptions when providing a judgment on the extent to which the existing regulation is working.*

*The PIR should discuss how the assumptions made in the original IA compare to what actually happened. Departments should indicate clearly where assumptions made in the IA have been used or changed in the PIR, and why. The level of evidence that is proportionate will depend on the size and nature of the policy proposal and the importance of the assumption. Departments should also discuss whether the IA's assessment of risk and uncertainty was robust and how any limitations of the analysis in the PIR (and likely causes of such limitations) impact on the conclusions reached. The case below provides a good example of where the actual impacts were assessed clearly against those expected in the original IA.*

**Post Implementation Review of the UK's transposition of the EU Oil Stocking Directive 2009 (Green) (RPC-DECC-3131(1)):** The purpose of the PIR was to consider the impact on business of the additional oil stocking obligations introduced by the 2009 Directive.

The RPC concluded that the evidence base used in the PIR was sufficiently robust to support the Department's preferred option of renewing the regulations. The Department provided a proportionate assessment, which considered the effect of alternative approaches taken by other Member States in transposing the Directive, as well using data already gathered by the Department to compare the actual impact on business of the UK's chosen approach with the projected impact in the IA.

The significance of, and reasons for non-compliance with the Directive, as well as the supplementary policy options the Department were considering to return to compliance, should have been more clearly and extensively discussed in the PIR.

This case provides an example of where the assumptions in the IA turned out to be 'wide of the mark' because of a large unexpected movement in market prices, in this case for oil.

#### 1.5 Has there been a disproportionate impact on small and micro businesses?

*An effective regulatory regime will provide mitigations or exemptions for small and micro businesses where it is proportionate to do so. When assessing the current regulation, departments should, therefore, consider explicitly how small and micro businesses have been affected by the policy and how this compares with the impacts*

*estimated in the IA. Departments should also consider whether mitigations or exemptions were applied and whether this gave rise to any market distortions.*

## **2. Is government intervention still required?**

### **2.1 Are the objectives of the regulation still relevant? What would happen if the regulation was removed?**

*If the objectives of the regulation are no longer relevant, or if it would be beneficial to remove the regulation, government intervention may no longer be required. Departments should provide evidence that the objective is still relevant by considering what would happen if the regulation were to be removed. Relevant factors to consider include whether the problem has been solved, perhaps because behaviour has changed as a result of the policy, or the market has changed.*

### **2.2 What is the baseline against which the impacts are being assessed?**

*When considering whether government intervention is still required, departments should make sure they compare the current regulatory regime to the appropriate baseline, i.e. the position before the policy began, taking account of any subsequent changes that are independent of the policy proposal. Departments should also consider whether the baseline has changed relative to that used in the original IA, and how this affects future costs and benefits of the policy.*

## **3. Is the existing form of regulation still the most appropriate approach?**

### **3.1 What are the likely costs and benefits going forward? How likely are unintended effects in the future?**

*Having analysed the impact of the policy to date, the department should consider the extent to which it expects the costs and benefits of the existing form of regulation to change in the future. This analysis will aid the department in deciding whether the existing form of regulation is still the most appropriate approach, and will help ensure that the conclusions in the PIR relate clearly to the analysis and evidence presented in the PIR.*

### **3.2 Does evidence from stakeholders support the current approach?**

*Considering evidence from a wide range of stakeholders will help the department understand the costs and benefits of the existing form of regulation, and the extent to which the existing form of regulation is the most appropriate approach. Data collection from businesses may take a range of forms including, but not restricted to,*



*administrative data collection, consultations, surveys and qualitative research. Departments should explain clearly their choice of evidence sources, say how the evidence is proportionate and highlight any potential limitations.*

### **3.3 How effective is the implementation/enforcement mechanism for the policy? Could it be improved?**

*Improving the implementation/enforcement mechanism for the policy is one way of achieving better outcomes. Departments should provide evidence on the extent to which the chosen enforcement mechanism is appropriate. This is likely to include consideration of compliance levels and stakeholders' views on implementation. In the case of EU regulations, this may also include considering other member states' approaches to implementation.*

### **3.4 To what extent would non-statutory measures or amendments help the policy meet its objectives, reduce the costs to business and/or have other advantages?**

*To consider whether the existing form of regulation remains the most appropriate approach, departments should reconsider the extent to which alternatives to regulation could be used to achieve the policy objectives. Departments should consider whether the same objectives could be achieved through non-statutory measures and/or whether amendments could be made to reduce the cost to business, without damaging the policy objectives or increasing the overall cost to business. Departments should also consider whether the same objectives could be met through alternative measures that have additional advantages.*

## **4. What is the most appropriate option going forward?**

The questions above provide guidance on the analytical issues to consider in deciding whether to renew, amend, remove or allow to expire/replace the existing regulations. The following table, taken from Figure 10 in the Cross-Whitehall Guidance (which is also presented as Table 4.2A in the draft new BRFM), provides a summary of how the answers to these questions relate to the policy option chosen.

Option (and legislative label)	Evidence in support of option
1. Regulation should remain as is (Renew)	Q1: To what extent is the existing regulation working? <ul style="list-style-type: none"> <li>• The policy is on course to achieve most or all of its objectives and key success criteria have been met</li> <li>• Costs have been proportionate to benefits</li> </ul> Q2: Is government intervention still required?

	<ul style="list-style-type: none"> <li>government intervention is still required. (If the policy were withdrawn, the problem would return.)</li> </ul> <p>Q3: Is the existing form of regulation still the most appropriate approach?</p> <ul style="list-style-type: none"> <li>compliance levels are sufficient to support achievement of objectives</li> <li>there are no alternatives that are less burdensome to business and/or overall</li> </ul>
<p>2. Regulation should remain but implementation should be revised or improved <b>(Amend)</b></p>	<p>Q1: To what extent is the existing regulation working?</p> <ul style="list-style-type: none"> <li>The policy is achieving most or all of its objectives, and success criteria have been met</li> </ul> <p>Q2: Is government intervention still required?</p> <ul style="list-style-type: none"> <li>government intervention is still required. (If the policy were withdrawn, the problem would return.)</li> </ul> <p>Q3: Is the existing form of regulation still the most appropriate approach? Amendments could help to:</p> <ul style="list-style-type: none"> <li>achieve further benefits</li> <li>reduce costs or burdens on business and/or overall</li> <li>simplify the implementation processes</li> <li>improve compliance</li> <li>reduce unintended or negative effects</li> </ul>
<p>3. Regulation should be removed without replacement <b>(Remove or Expire)</b></p>	<p><i>One or both of the following applies:</i></p> <ul style="list-style-type: none"> <li>The policy is not, or is no longer, achieving most of its objectives or key success criteria [Q1]</li> <li>costs are disproportionate compared to benefits [Q1]</li> </ul> <p><u>AND</u> <i>one of the following applies:</i></p> <ul style="list-style-type: none"> <li>Government intervention is no longer required (the original policy objectives are no longer relevant <u>or</u> it is clear that if the intervention was withdrawn the problem would not return) [Q2]</li> <li>compliance levels are insufficient to support achievement of its objectives and are unlikely to be improved [Q3]</li> <li>alternatives to regulation can now be considered to achieve the objectives [Q3]</li> </ul>
<p>4. Regulation should be replaced or redesigned <b>(Replace)</b></p>	<p><i>One of the following applies:</i></p> <ul style="list-style-type: none"> <li>The policy is not, or is no longer, achieving most of its objectives or key success criteria [Q1]</li> <li>costs are disproportionate compared to benefits [Q1]</li> <li>compliance levels are insufficient to support achievement of its objectives and are unlikely to be improved [Q3]</li> </ul> <p><u>AND:</u></p> <ul style="list-style-type: none"> <li>Government intervention is still required to address the problem [Q2]</li> </ul>

	<p><u>AND</u>: The same or better performance could be achieved using a regulation or alternative to regulation, which:</p> <ul style="list-style-type: none"><li>• costs less [Q3]</li><li>• creates less burden on business and/or overall [Q3]</li><li>• creates fewer negative impacts [Q3]</li><li>• increases benefits [Q3]</li></ul>
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## **Addendum**

**Please note that the following section was issued separately in March 2017 and is included here for completeness.**

### **3.2 Proportionality**

The BRFM (para 1.5.17) states: *“You should ensure that the resource you invest in undertaking an RIA is proportionate. Some of the factors that should be considered when deciding what level of analysis would be appropriate include: the scale of the expected impact, stage of the policy, sensitivity of the policy and the ability and cost of doing further analysis relative to the benefits this analysis may yield. Any limiting factors in identifying robust estimates of the impact of the measure should be fully explained in the RIA.”* Section 2.2 (pages 60-63) of the BRFM provides more detailed guidance on proportionate analysis.

This section of case histories seeks to supplement that by illustrating how the RPC applies this guidance, i.e. providing an indication of the level of analysis the RPC expects to see from departments. The RPC fully recognises the need to prioritise analytical resources in order to focus on the most important and influential measures. In the last parliament measures with EANDCBs less than or equal to +/- £1 million accounted for approximately 60 per cent of the volume of proposals within the One-in, Two-out framework<sup>13</sup> but only amounted to 0.6 per cent of the absolute value of all validated in-scope proposals.

It should be emphasised, however, that proportionality will always remain a matter of judgement because it is neither possible nor desirable to set out, in fixed terms, exactly what is a proportionate level of analysis. Each case will need to be judged on its own merits, both by departments when considering appropriate level of analysis and by the RPC when scrutinising the quality of evidence presented in an IA.

**Please note that this section deals mainly with what departments need to provide in relation to full impact assessments. RPC requirements for validations (particularly of smaller measures) and for confirmation of NQRP status are different, and generally require less resource from departments. Departments are encouraged to consider the particular type of case they are dealing with and, if in doubt, to contact the RPC to check that they are approaching it correctly.**

#### **3.2.1 Levels of analysis**

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<sup>13</sup> Excluding the 183 measures classified as ‘zero net cost’

The BRFM (2.2.4) states that *“The principle of proportionality is not used to guide whether or not an RIA should be completed for policy approval. It relates only to the scale of effort invested in the analysis required for an RIA”*.

Proportionality also cannot be used as a justification for not providing a baseline level of analysis. Impact assessments should always:

- i. explain what is the problem the proposal is seeking to address;
- ii. consider an appropriate range of options (at consultation stage), including any non-regulatory ones;
- iii. explain how each of the potential interventions would address the problem; and
- iv. provide an adequate level of analysis of the impacts of the proposal (as defined at BRFM paragraph 2.2.7). In particular, even where impacts are not fully monetised they must be described.

The principle of proportionality can be used when deciding the level of detail to be included in explaining the policy problem, options and how each option would address the problem. It can also be used when deciding whether to undertake full quantification and monetisation of all impacts. Any decision not to engage in full monetary analysis on the basis that it would require a disproportionate use of resources needs to be explained clearly in the IA, especially where this is partially or completely linked to an absence of evidence or data.

The Treasury Green Book states that *“all new policies, programmes and projects, whether revenue, capital or regulatory, should be subject to comprehensive but proportionate assessment, wherever it is practicable, so as best to promote the public interest”* (paragraph 1.1). It then states further: *“as the stages of an assessment progress, data must be refined to become more specific and accurate. The effort applied at each step should be proportionate to the funds involved, outcomes at stake, and the time available. Accordingly, in the early steps of identifying and appraising options, summary data only is normally required. Later on, before significant funds are committed, the confidence required must increase”* (paragraph 2.5).

**Testing Kits and services (revocation) regulations 2014 (RPC13-FT-DH-1829-HIV):** This policy revoked the ban on the sale of HIV home-testing kits, effectively opening up the market for their sale. This was a substantial policy proposal. As a result of the policy, businesses were able to produce and sell HIV home-testing kits, and consumers were no longer limited to only visiting a professional for testing. DH initially received two Red opinions on the basis of the lack of evidence available to underpin the estimated benefit to business. The second submission calculated an EANDCB of -£7.16 million, whilst in the final IA this was reduced substantially to -£2.81 million. In both submissions DH pointed to the substantial uncertainty around their estimates and the limited support for these estimates from stakeholders. Whilst the second submission provided more detailed evidence, with a

combination of survey data from different sources, there were significant changes to the estimated market for the product between the first and second submissions which was not explained or justified. On the basis that DH did not justify why their estimates were the 'best available', the submission received a second Red opinion. In the third submission DH clarified these changes and included evidence gathered via an online survey of the UK community pharmacy sector. This evidence allowed the Department to present robust estimates of the volume of kits that may be purchased directly by consumers in UK, resulting in a Green opinion from the RPC. The resource costs of conducting an online survey were not substantial and additional evidence was appropriate given the scale of the measure and significant uncertainty surrounding previous estimates.

The sections below set out the criteria that are relevant to help inform what might constitute a proportionate level of analysis for a policy. However, policies must be treated on a case by case basis and the SCS that signs off an IA is responsible for ensuring that the analysis it contains is proportionate.

### 3.2.2 How a policy's impacts might affect what constitutes a proportionate level of analysis

The BRFM (2.2.3) lists key factors affecting the level of analysis required, including those that relate to the policy's expected impact:

- i. *the scale, duration and distribution of expected impact; and*
- ii. *the level of uncertainty around likely impacts.*

Departments should use **the scale of a policy's likely impacts** as the most important factor in deciding what level of analysis is required. This could be measured by the expected Net Present Value or EANDCB, which capture elements of the scale and the duration of a policy. Policies that have large, widespread and ongoing effects will usually require a greater depth of analysis than ones with minor, temporary effects.

Policies that have large costs and benefits which offset one another to produce relatively small net effects, or those that impose large costs or benefits in the future but are heavily discounted, should be treated as being large scale. For policies in which the NPV is not available, the number of individuals, groups or businesses affected and the size of any impacts it will have, can be used to gauge the scale of the effects. Even for cases that have a relatively small expected NPV greater levels of analysis are expected for policies that have disproportionate impacts on specific groups.

This criterion can also be applied to deciding on the appropriate level of analysis required for individual costs and benefits. For instance, even when appraising a policy that has very large impacts it may not be a proportionate use of resources to monetise one very small

benefit. The materiality of the change should also be taken into account. For instance, ignoring a tiny cost may make very little difference to the NPV of a large measure but could change the classification of a small net beneficial measure into a net costly measure.

If there is a significant **degree of uncertainty** around the estimated impacts, or they are based on untested assumptions, then an analysis of the effects of uncertainty should be conducted. This should focus on calculating upper and lower estimates and/or making use of **sensitivity analysis**. This analysis needs to be particularly robust when producing figures, such as EANDCBs, for validation.

Potential  
red point

Example where a simpler assessment would have been proportionate.

**Proposal for new regulations on health and safety in mines (RPC14-FT-HSE-2206):** This policy implemented an independent review's advice to combine 47 pieces of health and safety legislation regarding mines into a single set of regulations. This would result in slightly reduced administrative burdens but would make little substantive difference to the operations of mines. The HSE estimated one-off familiarisation costs to the industry of around £242,000. The reduced administration costs were estimated at £1.8 million in present value terms, and a couple of other minor benefits were identified to give an OUT of £2.1 million. The department presented a huge quantity of analysis, totalling over 66 pages of material and including many technical details that were not of particular relevance. While the department received a green for the opinion, they would also have received a green for a simpler assessment that focused on the familiarisation and administrative costs.

Example where the assessment provided was proportionate.

**Speeding up cheque payments: legislating for cheque imaging – RPC14-FT-HMT-2001(2)**

This policy recast and modernised existing cheques legislation to enable 'cheque imaging' to be introduced in the UK. Under the policy, customers with cheques could either take it to their bank branch to be scanned and processed digitally, or use their mobile banking application to create the digital image of the cheque and pay it electronically. The RPC opinion highlighted the robust assessment of the costs and benefits in the IA. The cost and benefit analysis is detailed yet concise. In the IA, the department breaks down the costs and benefits to business into a number of sections, under the headings of either transitional or recurring. Each section has sufficient explanation of the impact and estimates are supported with evidence. This improves the readability and clarity of the IA. The department also highlight potential issues related to assumptions made and accuracy of estimates. The cost and benefit analysis is supported by accompanying tables detailing the breakdown of a particular cost estimate year by year. Furthermore, the IA includes sections on social and environmental benefits. Both contain a good level of detail and explanation on the nature of these benefits.

A policy may have a relatively small expected NPV but disproportionate impacts on specific groups. This would justify a relatively high level of analysis. See example below.

**RPC13-DCMS-1757(2) – Banning video on-demand content not suitable for classification by the British Board of Film Classification:** The measure banned video-on demand content unsuitable for classification. Prior to the enactment of the policy, material deemed unsuitable for classification could not be supplied in hard-copy format under the Video Recordings Act 1984. However, the Act did not apply to video-on-demand (VOD) services. The measure banned access to unclassifiable material on VOD services, bringing regulations for VOD in line with those for hard copy material. The IA had an estimated EANDCB of £0.11 million, primarily relating to lost profits for content providers. The department understood that the policy would affect small and micro businesses who were heavily involved in the digital distribution of unclassified material. However, the policy was unlikely to have significantly impacted large businesses - the IA stated that larger companies are more likely to focus on classifiable material to achieve economies of scale. Therefore, this policy may have had a relatively small expected NPV, but disproportionate impacts on certain groups.

The example below is one where the policy impact was fairly uniform. However, note that the large size of the benefit meant that a high level of evidence was also required.

**RPC11-BIS-0899 – Extending the primary authority scheme:** The Primary Authority scheme enabled businesses to have a single source of advice and point of contact for their local regulatory system. The policy made it easier for businesses operating in a single local authority area to receive tailored advice, and for smaller businesses to obtain advice through co-ordinating bodies. The scheme was voluntary, but estimated to impact 21,000 businesses by 2025. The department estimated that regulatory consistency and reliable advice would lead to an annualised net benefit of £2,400 for each business, resulting in an estimated total annual net benefit of £49.5 million by 2025. The EANDCB figure for this IA was -£23.8 million. Although the overall benefit to business was substantial, the policy had fairly uniform impacts on business and thus the level of analysis expected would, other things being equal, be less than a policy imposing disproportionate impacts on certain groups.

### 3.2.3 How sensitivity and contentiousness affects what constitutes proportional analysis



The BRFM (2.2.3) key factors also relate to the sensitivity of the policy, including:

- i. *the level of interest and sensitivity surrounding the policy; and*
- ii. *the degree to which the policy is novel, contentious or irreversible.*

Contentious policies that provoke a high level of public interest are likely to attract media attention and so require a deeper level of analysis. This is because the evidence for such policies is likely to receive a greater level of independent scrutiny. In particular, any data, assumptions or consultation evidence used should be robust and defensible.

It is likely that if any part of a **policy is contentious** or provokes a **high level of public interest** then the entire policy will come under increased scrutiny. It may not be sufficient, therefore, to provide in-depth analysis only for one cost or benefit, even if it is the only contentious impact. Additionally, even relatively minor impacts may be considered controversial in particular settings, for instance if they cause they represent gold-plating of EU legislation.

If **policies are novel** then there is likely to be less familiarity with their impacts and so more rigorous analysis may be needed. It may be necessary to focus on the less researched aspects of the policy and provide a discussion of how the novel aspects would fit within the existing policy framework.

**Irreversible policies** are likely to need a greater level of analysis because the option of future removal is not available. In particular a greater focus on the worst-case estimate and sensitivity analysis may be needed.

**Gender Pay Gap (RPC14-GEO-2384):** This policy required employers with at least 250 employees to provide information showing whether there is a difference, on average, in pay between male and female employees. This is a highly contentious policy area and accordingly received a significant degree of coverage in national newspapers. However, the Department did not explain the underlying rationale for intervention and what current problems the intervention aimed to address. The Department also did not justify why the proposal was seen as proportionate given that it estimated it would impose substantial costs on business but provided little evidence for the existence of the potential benefits. As a result, the IA initially received a not fit for purpose rating.

**RPC-3002(3)-BIS-Trade Union Bill:** The Trade Union Bill IA had a low EANDCB figure, of -£1.41 million, but had significant wider societal impacts and was a contentious policy. The Bill included a number of measures, including a 50 per cent turnout threshold for a ballot to provide a legal mandate for industrial action and a requirement that trade union or employer association members to 'opt in' to political funds by written notice. The

Department expected that the measure would result in fewer days being lost to strike action and have an overall positive impact on society. However, the policy clearly had a significant impact on trade unions.

### 3.2.4 How practical factors affect what constitutes proportional analysis

The BRFM (2.2.3) key factors also relate to practical issues, including:

- i. *the data available and the resources required to gather further data;*
- ii. *the stage of policy development; and*
- iii. *the time available for policy development.*

If the **data required** to accurately quantify or monetise the impacts of the proposal is readily available then it should be used in the analysis. This would be the case if it were either publically available or could be easily provided by businesses or other groups.

Where new data collection or extensive research is required this should only be conducted if it is cost effective. In cases where the impacts concerned are likely to be of a very small and uncontroversial nature it would be disproportionate to use excessive resources trying to quantify or monetise them. This applies equally to minor impacts of policies whose wider effects may be significant. The RPC does recognise the inherent difficulty in judging whether additional analysis is cost-effective before the impacts of the policy are known. However, broad indicators of the policy's scale are usually available and so could be used to inform a decision on proportionality. Where the IA is at consultation stage and the Department plans to use the consultation to collect key data, the IA should explain how the consultation will be used.

For policies in which **the time available for policy development** is constrained by external forces, such as the response to emergencies, only analysis that can be conducted within a few days would be expected. However, a lack of forward planning or political time constraints are not justifications for limited analysis.

**European Commission's Regulation on bus and coach passenger rights (RPC13-DfT-1163(3)):** This was an EU-driven proposal that included provisions on non-discriminatory pricing, rights in the case of cancellation and the rights of disabled passengers. The Department did not fully explore how many businesses and passengers would be affected by the proposal and did not make use of responses to the consultation to inform the final IA. For example, the exemption for drivers from the mandatory disability awareness training was objected to by 196 responses out of the 208 received. This illustrates that the **lack of use of existing and available evidence, including from the consultation**, can be a sufficient reason for the RPC to give a red opinion.

**Helping Home businesses – Amendment to the Landlord and Tenant Act 1954 (RPC-CLG-2202(3)):** The policy amended the Landlord and Tenant Act 1954 to clarify that if a home business is established or run in a rented dwelling the tenancy will remain as a residential tenancy, rather than switch to a business tenancy with greater tenant rights. Consultation evidence suggested that a very small number of landlords were likely to be affected by this change as there was already widespread knowledge of the case law rule that the tenancy is residential as long as the property remains primarily a home. The scale of the policy impact was, therefore, likely to be very small. The Department was able to estimate the familiarisation costs of the policy as £0.49 million, based on a subset of landlords taking time to read the new proposals. However, the Department explained that it would be very difficult to quantify how many individuals running home businesses would no longer have to rent private office space, or the extent to which private landlords would find it easier to rent properties. The RPC accepted the department’s claim that quantifying and monetising these impacts would require a disproportionate quantity of resources for such a minor measure.

**Introduction of permissive legislative framework for Defined Ambition pension schemes (Consultation, Green) (RPC13-DWP-1992):** The proposal explained how Government’s legislative intervention was required in order for it to create the framework which would enable the pensions market to develop new and innovative types of pension provision within the Defined Ambition (DA) schemes. By creating this space within the legislative framework, employers would be able to offer DA pension schemes to their employees and, then, collectively decide on the choice (and design) of a pension model.

The introduction of the DA framework would produce some costs for employers arising *“from the need for all current schemes to assess how the new definitions apply to them and identify themselves under the new framework”*. However, the Department expected that the proposals would be beneficial overall and stated that these would *“give employers and employees more choice and flexibility over their pension arrangements”*

The Department was, at that stage of the scheme’s development, unable to *“provide reliable information to quantify the costs or benefits of the primary proposals”*. The RPC concluded this seemed to be a reasonable assessment at that stage of policy development. The RPC advised that the Department should use the consultation to strengthen this qualitative information, where possible.

### 3.2.5 Examples of proportionate level of analysis and resourcing in impact assessments

#### Consultation stage

For consultation stage impact assessments, the RPC recognises that it may be difficult and not a proportionate use of resources to seek evidence on all potential policy options in line with the guidelines set out in the table above. Collection of qualitative evidence may be more reasonable, and the RPC considers proposals on a case by case basis. See also the case histories 'introduction' section, which gives a guide to red-rated points at consultation stage.

At consultation stage, it is accepted that only limited information will normally be available and the IA should focus on the key variables and how evidence will be collected. Lack of evidence will not normally result in a Red opinion at consultation stage provided that it is clear how the Department proposes to gather evidence before final stage. At final stage, lack of evidence without sufficient justification is likely to result in a Red opinion if it relates to direct costs to business.

Potential  
red point

**Community right to buy into renewable electricity developments (Consultation stage, Green) (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 done with industry on a voluntary basis with primary powers being taken as a backstop if agreement was not reached. The IA was very well evidenced, with a combination of academic papers, survey data and information provided by stakeholders. As this was a consultation stage IA, the focus was less on detailed evidence underpinning costs and benefits, and more around supporting the rationale for the proposed intervention and demonstrating how it would deliver the expected benefits. The IA received a Green opinion including positive comments on the evidence base.

#### Final stage

The example below is one where the final stage IA made particular good use of the consultation period to strengthen the evidence base.

**Paediatric first aid in early years' provision (RPC15-DfE-3001(3)):**

This proposal introduced paediatric first aid training into the qualification requirements for new employees to the 'early years' workforce, with the aim of increasing the number of staff trained in paediatric first aid (PFA). The department received a fit-for-purpose opinion

from the RPC at consultation stage, but this included a number of queries for the department to consider during consultation, and answer at final stage. The Department addressed the RPC's queries comprehensively in the final stage IA, and sought evidence at consultation to support specific assumptions. For example, in the consultation stage fit for purpose opinion, the RPC queried the assumption that none of the initial costs of introducing PFA training would not be passed on to businesses. Stakeholder consultation and an additional survey of further education training providers offering relevant courses and apprenticeships found that 50% of training providers already offered PFA training, and that many other providers stated that it would be easy to add PFA training to their programme. Providers that covered 29% of trainees claimed they would need funds to offer the training. Thus the department made the assumption that 29% of the initial costs of PFA training would fall on business.