Regulatory Policy Committee

RPC short guidance note on issues around defining a ‘business’

Summary

If there are difficulties in defining what a ‘business’ is for the purposes of an impact/BIT assessment, particularly in terms of *differentiating between businesses and commercial activity by individuals*, departments are recommended to:

- consult the terms in the better regulation framework guidance past and present, as presented above; and

- consider whether the entity would be counted as a business in official government statistics, notably BEIS *Business Population Estimates.*

On *location of economic activity*, departments should:

- continue to follow long-standing appraisal practice that the assessment of impacts on business should be in terms of the location of the economic activity being in the UK, i.e. a ‘GDP-approach’;

- where relevant, proportionately consider any impacts on UK shareholders of overseas companies who might be affected by a measure, but only as part of the overall cost benefit analysis and not the business impact target assessment; and

- where issues such as the location of internet companies cause particular difficulties or uncertainties for the impact assessment, seek early advice from the RPC, BRE and/or HMT Green Book team.

Where there is uncertainty over whether an entity is in the *public or private sector*, departments are recommended to:

- consider whether the ONS classifies the economic activity as public or private sector; and

- seek advice from BRE and/or RPC secretariat where the boundary between public and private sector impacts is particularly unclear, for example where individuals/organisations provide services to both the public and private sectors, or where there is uncertainty over the application of BIT statutory exclusions, such as ‘*acting on behalf of a public authority*’.

More generally, for cases where defining a business is particularly complex, departments are advised to seek advice from BRE and/or RPC secretariat.

Background

The RPC thought it might be helpful to produce a short guidance note on issues associated with defining a 'business', for potential use by departments in preparing impact assessments. It summarises what is generally understood and commonly practised by departments in this area. **The note adds no new framework or RPC 'rules' on how to define a business.**

What existing guidance says

Framework guidance does not define in detail what a 'business' means although the better regulation framework (BRF) guidance refers, under '*definitions under section 27 of the SBEE Act 2015*', to 'business' "*taking its natural meaning. Includes different legal forms (sole traders, partnerships, companies)*" (page 29). The Act lists the type of organisations that are considered to meet the definition of a voluntary and community body.[1] The old (now withdrawn) BRF Manual (July 2016) did include 'business' in the glossary, defined as: "*an undertaking that engages in business activities, irrespective of legal form. Includes sole traders, partnerships, and incorporated companies, and businesses not registered in the UK but which operate in the UK. Unless specified otherwise, "business" also refers to voluntary or community bodies*."

Statistical definitions

There is no single database in the UK which contains details of every active business. The Government's statistical business register, the Inter-Departmental Business Register (IDBR), contains all businesses operating VAT and/or PAYE schemes. The BEIS publication *Business Population Estimates (BPE) for the UK and the Regions* takes data on the businesses on the IDBR and adds estimates of the number of very small businesses unregistered for VAT or PAYE. BPE reports 5.9 million private sector businesses at the start of 2019.[2] This can be broken down, for example, into sole proprietorships, companies and ordinary partnerships, and by UK countries and region. BPE is the only official source for data on the total business population for the UK and is a National Statistics publication. The BPE data are consistent with the definition of a business in the current and previous framework guidance.

Departmental impact assessments generally use the BPE to inform its estimates of businesses affected by regulatory proposals, as appropriate.

Potential issues arising from RPC scrutiny

[1] http://www.legislation.gov.uk/ukpga/2015/26/section/27
[2] https://www.gov.uk/government/statistics/business-population-estimates-2019

There are three dimensions to defining a business that have, or have potential, to cause difficulties for departments in their impact assessments.

Location of economic activity

It has been long-standing appraisal practice that the assessment of impacts on business should be in terms of the location of the economic activity being in the UK, i.e. a 'GDP-approach'. This matches the BPE, which counts businesses located in the UK, and the BRFM definition which included "…*which operate in the UK*."

A very small number of IAs have instead sought to assess business impacts through impacts on UK shareholders. For example, in 2015 the tobacco plain packaging IA originally estimated the loss of profit to tobacco manufacturers on the basis of the percentage of the profits of multinational companies received by UK shareholders.[3] The RPC opinion on the revised IA stated that: *"The IA now provides estimates of all costs and benefits falling on UK-based businesses regardless of the nationality of the owners. This is in line with the approach agreed for economic appraisal across Whitehall."*[4]

This approach also makes sense from a regulatory point of view as UK government regulations will typically affect all businesses located in the UK; whereas UK-owned businesses located overseas will normally be affected mainly by regulation introduced by the government in which they are located.

Of course, an impact assessment should include an assessment of impacts on the market for a good or service, regardless of whether the supply comes from domestic or overseas companies. For example, even if there were no UK manufacturers of the product, the impact assessment should still proportionately consider the impact on UK consumers, through, say, higher prices, and perhaps on UK shareholders of overseas companies who might, say, experience reduced profits. However, the assessment of the direct impact on business for BIT purposes would be concerned only with UK-based businesses. It should be noted that, even where there are no UK-based manufacturers, there might be impacts on other UK-based businesses, such as importers, distributors and retailers.

Determining the location of internet companies and clarity around where online transactions are located (for example, whether it depends on the location of the server, the customer, the supplier etc) could become more important, particularly as issues like online harms or restrictions on online gambling become more frequent. There might also be additional complications where businesses make inter-company transfers or royalty payments that cross international boundaries, which might obscure the underlying

[3] This approach was more in line with 'gross national income' than GDP. GNI (previously more commonly known as gross national product or GNP) describes income received by residents of a country and is equal to GDP plus net 'property' income from abroad.
[4] RPC12-DH-1229(4), 9 February 2015.

economic value of the transaction. Departments are particularly encouraged to seek early advice from the RPC, BRE and/or HMT Green Book team where these considerations are likely to be significant factor in their impact assessments.

Differentiating between businesses and commercial activity by individuals

The boundary between individuals conducting commercial activity (e.g. selling items on eBay and car boot sales) and businesses has occasionally been a difficult issue. This has occurred most notably in relation to differentiating between householders renting a spare room and private landlord businesses. As a result of this, consideration has been given previously to establish criteria for when commercial activity by an individual could be considered to be a 'business' for One-in, Two-Out (business impact target) purposes. There were, however, difficulties in establishing such criteria and uncertainty over whether it was in any case advisable to create a new definition of a business, for what are rare cases. Any definition would also now have to be consistent with the SBEE Act 2015, although the Act does not set out in detail what are considered to be 'business activities'.

In practice, differentiating between businesses and commercial activity by individuals has been a very rare issue. The large majority of IAs appear to, at least implicitly, define a business broadly in line with the definition in the old BRFM and government statistics. Whether something would be counted as a business in the BPE would usually be a good guide as to whether it should be treated as a business for framework purposes. Where departments face particular uncertainty over whether an entity would be considered to be a business, they are advised to consult the BRE and/or the RPC secretariat.

Public or Private sector

The framework generally follows the ONS classification of economic activity into the public or private sector. Impacts on organisations classified by the ONS as public sector would not normally be eligible to be scored against the BIT. For example, when housing associations were recently reclassified by the ONS into the private sector, any impacts on them from new or amended regulation became potentially in scope of the BIT.

There have occasionally been issues around the boundary between the public and private sector. For example, there has previously been consideration of how to treat impacts on individuals/organisations that provide services to both the public and private sectors, such as GPs and dentists. There are also some specific BIT-related considerations in this area. For example, there is a statutory exclusion in relation to impacts on businesses '*acting on behalf of a public authority.*' The BRF guidance gives an example of childcare providers in receipt of funding under a legal duty of a local authority under the Childcare Act 2006 to ensure that prescribed childcare is available free of charge (page 30).

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In practice, differentiating between the public or private sector has been a rare issue in IAs. The large majority of IAs appear to follow the ONS classification, which would normally be sufficient as a guide. Where departments face particular uncertainty over whether an entity would be considered to be a business, they are advised to consult the BRE and/or the RPC secretariat.

The term ‘third sector’ is sometimes used for organisations that are seen as neither public nor private sector. This will typically include the voluntary and community bodies (such as charities) referred to above. For better regulation framework purposes, “business” is short for business and VCBs. Assessments of business impacts (e.g. for BIT and SaMBA purposes) will, therefore, need to take account of any impacts on VCBs.