

Case histories guidance on the assessment and better regulation framework¹ treatment of the impacts of 'permissive' legislation

Summary

Regulatory changes are permissive in nature where they allow, but do not force, businesses to do something. This document provides guidance to the assessment and framework treatment of these cases, particularly in relation to:

De minimis

- impacts of permissive measures should be monetised where it is proportionate to do so;
- where it is not proportionate, it may be reasonable for the EANDCB for BIT reporting purposes to be considered as zero, provided the Department can demonstrate the overall direct benefits are likely to outweigh the overall direct costs on business; and
- this would not mean the measure should automatically be considered as meeting the *de minimis* criteria, for example if the non-monetised impacts are potentially significant.

Familiarisation costs, impacts on businesses who choose not to take advantage of the permissive regulation and impacts on businesses in related industries

Departments should also proportionately consider potential impacts on businesses who choose not to take advantage of the permissive regulation and any impacts on businesses in the wider sector/related industries. Wider impacts are likely to be indirect but RPC criteria should be applied to see if there are any direct impacts on other businesses affected, for example familiarisation.

Direct/indirect

Permissive measures can result in significant net direct benefits to business. If the absence of the permissive legislation is effectively the only thing 'holding back' businesses from doing what they would otherwise do, then, other things being equal, the benefit is more likely to be direct.

Where *a number of things need to happen* before the benefit could be realised, and it is not automatic that these will occur, then, other things being equal, the benefit is more likely to be indirect. This might typically be the case for permissive changes which are intended to allow new and innovative markets to develop.

The appropriate assessment and framework treatment of permissive measures can be difficult to determine and, in these cases, departments are strongly encouraged to seek advice from the RPC secretariat and/or BRE prior to submission.

¹ In relation to the better regulation framework for the 2017-19 parliament.

Background and introduction

Previous better regulation framework guidance described ‘permissive changes’ in the following way: “*Regulatory changes are permissive in nature where they allow, but do not force, businesses to do something. If there is a reasonable expectation that business will adopt these changes only where they lead to net benefits for business, the analysis in the RIA can assume that benefits are at least equal to costs, even if it is not proportionate or possible to quantify or monetise the benefits.*”² RPC case histories reflected this by including the following in a short section on permissive regulation: “*...If possible, the costs and benefits to business of taking up the newly allowed action should be monetised...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.*”³

However, both guidance documents were produced in 2016 and, most notably, they pre-date the introduction of the *de minimis* threshold of +/- £5 million EANDCB. BRE and the RPC agreed that it would be helpful to produce new guidance on permissive legislation, particularly covering its relation to the *de minimis* threshold.

Permissive legislation and *de minimis*

As described in the previous RPC case history guidance, permissive legislation can often be presented as having a ‘*no worse than zero net cost*’ overall direct impact on business. This is because permissive legislation means that businesses are not required to do anything in response to the legislation and they would only choose to do so if the benefits at least matched the costs.

It should be noted, however, that whilst this is true for the business taking advantage of the permissive regulation it is not necessarily true for impacts across all businesses. A business taking advantage of a new freedom can result in negative impacts on other businesses. For example, a large supermarket being able to open for longer on a Sunday is likely to affect the sales of nearby convenience stores. Departments will need to consider any such potential impacts in their assessments and, where they are direct, take these into account in its assessment of the EANDCB, where it is proportionate to do so. (See also later section on ‘*wider impacts and impacts on businesses who choose not to take advantage of the permissive regulation*’).

² Better regulation framework manual, July 2016 – now withdrawn.

³ December 2016 volume (pages 33-34): <https://www.gov.uk/government/publications/rpc-case-histories-december-2016-volume>.

The *de minimis* threshold, below which a measure would be non-qualifying against the business impact target, is +/- £5 million equivalent annual net direct cost to business (EANDCB). The key aspect here is that the threshold is symmetrical. This means that it is insufficient to establish that a measure will have a ‘*no worse than zero net cost*’ direct impact on business. The Department would additionally have to establish whether the:

- benefits to business from the permissive legislation are direct and, if so:
- whether the benefit (less the cost to business necessary to achieve the benefit) is within the *de minimis* threshold.

As noted above, departments should also proportionately consider any direct impacts on businesses not taking advantage of the permissive regulation.

Some permissive measures can result in significant benefits to business and these can be direct benefits. Where a department self-certifies a permissive measure as *de minimis* but where the net direct benefit to business exceeds £5 million EANDCB, the measure would be incorrectly classified as non-qualifying against the BIT and the department would be foregoing an OUT. The case below illustrates this potential concern.

Enabling the bulk transfer of contracted-out pensions rights without member consent to new schemes that have never been contracted-out.’ (DWP case, February 2018)

http://www.legislation.gov.uk/ukxi/2018/234/pdfs/ukxi0d_20180234_en.pdf

This DWP IA/*de minimis* assessment was on a proposal that would enable the bulk transfer of certain contracted-out pension rights without member consent to new schemes under specified conditions. The Department assessed that businesses taking strategic action (i.e. involving mergers, acquisitions or takeovers) that are now able to bulk transfer would directly benefit from efficiencies from merging their schemes into one. This benefit was described as not negligible but was not otherwise quantified. This was due to a lack of information on which schemes/businesses would benefit from the proposed change and a judgment that attempting to collect this information would be disproportionate. The Department classified the measure as ‘zero cost’, and therefore *de minimis*, on the basis that it was permissive and, therefore, imposed no additional burden on business.

BRE and the RPC were concerned that the approach taken could potentially result in such measures being incorrectly classified as non-qualifying against the BIT when they had a net direct benefit to business exceeding £5 million EANDCB. The Department agreed to provide further information to explain why it was not proportionate to monetise the benefits.

Following discussion in relation to the above case, BRE and the RPC secretariat agreed the following general principles:

- benefits of permissive measures should be monetised where it is proportionate to do so;
- where it is not proportionate it may be reasonable for the EANDCB for BIT reporting purposes to be considered as zero, provided the Department can demonstrate the overall direct benefits are likely to outweigh the overall direct costs on business; and
- this would not mean the measure should automatically be considered as meeting the *de minimis* criteria, for example if the non-monetised impacts are potentially significant.

Permissive legislation and proportionality

Permissive legislation differs from standard deregulation in that it does not reduce existing requirements on business but rather allows, or makes it easier for, business to undertake types of economic activity. This presents difficulties in trying to quantify impacts. First, a key area of uncertainty will be the take-up, i.e. estimating how many businesses are likely to take advantage of the permissive regulation. Second, it is more straightforward to assess what it costs business currently to comply with a regulatory requirement and, therefore, the saving to business were that requirement removed. By contrast, estimating the benefit to business from being able to undertake an economic activity they would not otherwise have been able to is likely to be more difficult. Other things being equal, it might, therefore, be more proportionate not to monetise permissive changes compared to other types of measures. Departments might find the RPC guidance on proportionality a helpful guide.⁴

Permissive legislation and direct/indirect

There is an occasional misconception that impacts on business from permissive legislation will always be indirect because such impacts depend upon businesses *choosing* to take action in response to the measure, i.e. the permissive legislation does not *impose* any impacts on business. This is incorrect; RPC guidance on direct/indirect impacts does not include behavioural change or whether an action by business is voluntary as criteria, in themselves, for determining whether an impact is indirect.⁵

A potential factor in determining whether the benefits to business from taking advantage of permissive legislation are direct is *whether anything else needs to happen* (other than

⁴ <https://www.gov.uk/government/publications/proportionality-in-regulatory-submissions-guidance>

⁵ <https://www.gov.uk/government/publications/rpc-case-histories-direct-and-indirect-impacts-march-2019>

the business choosing to take advantage of the measure) for these benefits to be realised. (This corresponds to the 'number of steps in the logic chain'/first round vs second round impacts in the RPC direct/indirect guidance).

As a rule of thumb, if there are a number of dependencies before the benefit could be realised, and it is not automatic that these conditions would be satisfied, then, other things being equal, the benefit is more likely to be indirect. This is more likely to be the case for permissive changes which are intended to allow new and innovative markets to develop. (Even if impacts are deemed to be direct, there could be an issue of how to attribute them when more than one regulatory intervention is required and to avoid any double counting). In contrast, if the absence of the permissive legislation is effectively the only thing 'holding back' businesses from doing what they would otherwise do, then, other things being equal, the benefit is more likely to be direct.

These judgments can be difficult and, as indicated for example in the spaceflight case (see annex 1), the RPC would be happy to discuss these issues with the department prior to submission of the final stage IA. Departments should also be guided by the RPC's guidance on direct/indirect impacts. Annex 1 provides examples of the application of direct/indirect to permissive measures.

Permissive legislation and familiarisation costs

The costs to business of taking advantage of the permissive legislation need to be netted off the resultant benefits to business, to arrive at a net figure (particularly if impacts are direct, to ensure the accuracy of the EANDCB). This includes costs to business of understanding and becoming familiar with the regulations. For businesses who proceed to take advantage of the regulations, the logic outlined above, i.e. that benefits must at least match costs, holds (with the small proviso that businesses will treat the familiarisation cost as sunk when making this decision). For businesses that subsequently choose not to make use of the regulations, this logic does not hold. In these cases, however, it might be possible to argue that the familiarisation cost is indirect on the basis that there is no requirement on such businesses to become familiar with the new regulation. Although this cuts across the above guidance somewhat, it might be a pragmatic compromise to avoid a small, counter-intuitive IN for measures that give businesses greater overall choice.

However, should businesses in related industries be effectively required to familiarise themselves with the regulations, because the activities of businesses taking up the regulation would directly affect them, then this is likely to be a direct cost to business. For example, in the spaceflight case the RPC had a potential concern around possible interactions between the space launch industry, the wider aerospace sector and the wider economy (such as on companies like *Google*). Any such impacts should be highlighted in the IA and the established RPC criteria should be applied to determine whether the impact is direct or indirect.

Other wider impacts and impacts on businesses who choose not to take advantage of the permissive regulation

As noted above, in addition to familiarisation costs, there could be other wider impacts, including on businesses who choose not to take advantage of the permissive regulation or in related industries. These impacts are likely to be indirect but should nevertheless still be addressed by the IA, where applicable. These impacts could be positive or negative. For example, development of a UK space launch capability could reduce risks to UK satellite businesses associated with being 'bumped-off' launches in other countries for strategic reasons.

On the other hand, if other businesses taking advantage of a permissive regulation would put a business at a competitive disadvantage, then that business might feel forced to also take advantage of it, even though it would prefer not to do so. This could apply, for example, to permissive regulation allowing certain businesses (for example couriers providing types of emergency transit) to go above existing speed limit restrictions. These situations are characterised by a 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 theoretically be net costly to business overall. Businesses might also take up the permissive regulation only because of demands from consumers. Permissive liberalisation of Sunday trading hours for large stores might be expected to result in lost sales for smaller stores. In general, new possibilities that are opened up by permissive regulation could result in a new equilibrium, potentially resulting in higher costs as well as benefits. Departments should consider whether these particular circumstances apply to their proposal and assess impacts proportionately.

Application of permissive regulation to voluntary and community bodies

Voluntary and community bodies (VCBs) such as charities do not, of course, exist to make profit. However, the logic that an organisation 'will only take advantage of the permissive regulation if benefits at least match costs' would also apply to VCBs, but with 'benefit' defined as furthering the objectives of the VCB.

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 Department 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 Department set out the reasoning for why it can also be applied to charitable organisations: "*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.

Annex 1: Permissive legislation and direct/indirect

The example below is where the benefits from the permissive legislation were considered by the RPC to be direct.

Simplification and expansion of the Primary Authority scheme (RPC3041(2)-BIS)

Primary Authority is a voluntary scheme enabling businesses to have a single source of advice and point of contact ('primary authority') for their local regulatory system. This particular proposal was one of a number of measures simplifying or extending eligibility criteria for the scheme, opening it to a wider range of businesses. Although businesses would have to choose to have a primary authority, the committee considered the benefits to such businesses as direct.

Around 5 per cent of businesses eligible for primary authority had already joined the scheme. As the benefits per business for the proposed extension were expected to be lower than for businesses operating across local authorities under the current scheme, the Department estimated that around 1 per cent of newly eligible businesses will join the scheme, i.e. around 21,000 businesses by 2025/6. The Department used information from businesses participating in the current scheme, adjusted to reflect the likely lower level of benefit to businesses operating in a single authority area, to estimate an average benefit to each business of £7,500 each year. Once primary authorities' recovery of costs from businesses and business set-up costs were accounted for, the estimated net benefit per business was estimated at around £2,400. Taking account of a phasing in of take-up, this part of the overall proposal accounted for the large majority of the estimated equivalent annual net direct cost to business (EANDCB) figure of -£25.8 million.

In the above case, the only thing additional to the decision by business to take advantage of the permissive measure was the acceptance by the authorities of its application. Subject to the business meeting the eligibility criteria, this was likely to be fairly automatic. The case below is where there would be an additional step before benefits to business would be realised but where the secretariat assessment was that the benefits were, on balance, still direct.

Calculation years for national minimum wage – query from BEIS

In 2019 the secretariat received a direct/indirect query from a department relating to a possible proposal that would provide employers with the possibility of changing the calculation year for national minimum wage purposes. At present, the calculation year depends upon a worker's start date and this means that the employer could

have as many as 365 different calculation years for his/her workers. Under the proposal being considered, an employer would be able to change the calculation year under certain conditions, one being that the worker gives his/her consent in writing. This could result in savings to businesses.

The secretariat noted that businesses were currently prevented in law from changing calculation years and the proposal would potentially facilitate removal of this constraint. Using the RPC direct/indirect guidance, this would point to the benefit being direct. However, in this case there was an additional step of the employer having to obtain written agreement from the worker. On balance, the secretariat view was that the benefit to business should still be treated as direct. The benefit realised should, however, take account of possible refusal by the worker to give consent and/or where the employer has to compensate the worker to get his/her consent. (Familiarisation and any other costs associated with taking up the option would, of course, also have to be netted off.) It was also noted that this treatment would avoid the measure being treated as net direct costly to business, which was counter-intuitive for a permissive measure giving employers an option which could reduce their regulatory costs.

Note that, the proposal was estimated to fall within the *de minimis* threshold and there was no formal submission to the RPC. The above advice was, therefore, an RPC secretariat assessment only.

Other permissive measures may require more 'other things to happen' before benefits to business could be realised. These dependencies could be, for example, other required regulatory interventions, innovation by businesses or technological change. The examples below are types of permissive changes which were intended to allow markets to develop. These types of measures are likely to require 'other things to happen' before benefits to business can be realised. (Please note, however, that these cases were at primary legislation stage and a position had not yet been reached where the RPC was required to decide whether the impacts of the permissive measure were direct or indirect).

Pathway to Driverless Cars: Insurance for Automated Vehicles (RPC-3522(1)-DfT)

The Road Traffic Act 1988, which requires drivers to have insurance, does not cover the use of automated vehicles (AV). The Department proposal would extend compulsory motor vehicle insurance to allow both the driver and the AV technology to be covered on the same insurance policy. The measure is permissive but would be a necessary step to allow the market for AVs to develop. It is part of a wider

regulatory programme on AVs. There is great uncertainty around the development and timing of the introduction of AVs, with the Department expecting them to reach the market only in 5-10 years' time.

The Department was able to monetise only a familiarisation cost at this stage but noted that insurers could face costs in developing and offering insurance products for AVs. These included updating IT systems, staff training, changes to insurance processes and possibly higher costs of meeting claims (although the number of claims could fall). The IA also set out several non-monetised benefits, including the ability for third parties to be compensated quickly and fairly in the event of an accident, an increase in consumer confidence in insurance products, and a simplification of the insurance process for consumers. The Department argued that, since the regulation is permissive, businesses would only incur the non-monetised if they were outweighed by the potential benefits of offering AV insurance.

Since these costs and benefits had not been monetised, the RPC opinion did not offer a definitive view on whether they would direct or indirect but did indicate acceptance of the Department's above argument around the measure being permissive.

Modern Transport Bill - spaceflight (RPC-3515(1)-DfT)

The proposal puts in place powers to develop a regulatory framework that would enable spaceflight from the UK. This includes powers to license spaceports, spaceflight operators, individual operations, vehicles and crews.

The proposal is primary legislation and the Department explains why it is not possible to provide a robust EANDCB at this stage due to high uncertainty over the nature of the secondary legislation. Nevertheless, it provides a detailed illustrative description of potential costs and benefits, including an indicative scale where possible. Benefits included lower costs and increased certainty around launch schedules for domestic manufacturers of small satellites; costs included initial approval costs for launch vehicle and spaceport operators. The IA noted that the net cost to business would be zero at worst due to the permissive character of the regulation – it assumes that for any individual business the cost of complying with the proposed framework would be exceeded by the benefits of engaging in the activity.

The RPC rated the IA as fit for purpose but noted that the IA did not make a clear distinction between the direct and indirect benefits of the proposal and that, as the policy and evidence base are developed, later IAs will need to provide a clearer description of the benefits in these terms.