Counterfactuals

Summary and key points

This section aims to provide a guide to the use of counterfactuals in impact assessments (IAs).

Counterfactuals are fundamental to assessing the impacts of regulatory proposals. Using the wrong counterfactual is likely to result in an IA not being fit for purpose at both consultation and final stages. Impacts are highly unlikely to be appropriately identified or transparent, and the EANDCB at final stage almost certainly not robust.

The standard counterfactual in IAs is 'do nothing'. This is what would happen in the absence of the policy intervention being appraised. It is not the same as the *status quo* or 'as-is' position; it should reflect, proportionately, what might happen during the appraisal period independent of the policy intervention. This might include population trends, changes in truly voluntary activity by businesses and general market growth or decline.

There are some situations where it is appropriate to use an alternative counterfactual, i.e. one that is known to be different to what will happen in the absence of the proposal. The section sets out situations where this is applies, for example to ensure transparent reporting of the impact of (EU/international) non-qualifying regulatory provisions.

These types of counterfactuals usually involve little or no more analytical work that standard counterfactuals and sometimes much less (e.g. EU-exit measures). Where alternative counterfactuals are more challenging, this will be taken into account in assessing the proportionality of analytical requirements.

The section also covers some other counterfactual-related issues that have arisen during RPC consideration of cases, including voluntary (or otherwise) activity by businesses.

Introduction

An assessment of the impact of any policy change, including in relation to regulation, can only be undertaken against an alternative 'state of the world', scenario or option without the policy/regulatory change. This alternative state is known as a 'counterfactual' (sometimes referred to as a 'baseline'). The difference between the

costs and benefits of the policy option and those in the counterfactual represent the estimated impact of the policy option.

The Treasury Green Book sets out the standard approach to the counterfactual in economic appraisal, which applies also to regulatory impact assessments. The Green Book states: "*Understanding Business As Usual, or the status quo, provides the basis for an effective intervention. Business As Usual is the continuation of current arrangements as if the intervention under consideration were not to be implemented. This does not mean doing nothing, although it is often referred to as the Do Nothing option, but continuing without making any changes. It is necessary to work out what the consequences of inaction would be (even if unlikely to be acceptable), as it provides the relevant counterfactual to compare alternative options*." (paragraph 4.3, page 3).

Using the wrong counterfactual is likely to result in an IA not being fit for purpose at both consultation and final stage. The latter because the estimates of impact on business are unlikely to be a correct reflection of the impact of the regulation; the former because an incorrect counterfactual is likely to distort an appraisal so significantly that significant impacts are not identified correctly, and the IA, therefore, also likely to mislead consultees.

This document provides, in particular, guidance on how to approach 'standard' counterfactuals and explains when a 'constructed' counterfactual may be necessary. It also provides some guidance on other counterfactual-related issues encountered during RPC scrutiny, including the treatment of 'voluntary' action by businesses.

Please note that the guidance includes sections relating to EU measures and EU-exit measures. These are to illustrate where alternative counterfactuals have been used and may not, of course, be applicable after 31 December 2020. This will be addressed in a future update to this guidance document.

Standard 'do nothing' counterfactuals: difference to the *status quo* and static vs dynamic baselines

The standard counterfactual in regulatory impact assessments, and economic appraisal more generally, is the 'do nothing' (now commonly referred to as 'business as usual' in the Green Book). As indicated in the Green Book, 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 expected decline into account in the counterfactual. Similarly, there may be other policy interventions that will happen regardless of the proposal. For example, a domestic policy proposal would have to take account of any international obligation in the same policy area that is known to be coming in. Departments should, wherever practicable, incorporate any expected changes in their counterfactual that are independent of the policy option being

appraised. Some illustrations are provided below, based upon RPC informal scrutiny of consultation stage IAs.

Counterfactuals, baselines and uncertainty

It should be noted that a 'counterfactual' is not necessarily a single state of the world and sensitivity or scenario analysis around the counterfactual is likely to be important. It should also be noted that while the terms 'counterfactuals' and 'baselines' are often used interchangeably, they are not necessarily the same. For example, there might be more interest in a comparison against a baseline other than the counterfactual, say, in the difference between two 'do something' options, one of which might be a 'do minimum'. This is addressed further under 'alternative counterfactuals'.

Where more than one measure is being introduced at the same time, there is a particular need to be clear on the counterfactual, for example to avoid double-counting. There will also be a need to take account of any interactions between measures.

Impact of voluntary action

The need to take account of voluntary action (i.e. independent of the proposed measure being appraised) in the counterfactual arose, for example, in the following cases (impact assessment title in brackets):

- the likely effect of Natural England's encouragement of landowners to agree to voluntarily surrender burning consents (*Amendment of the Heather and Grass Burning (England) Regulations (2007)*); and
- trends in the uptake of smart meters (*Smart Meter Policy Framework: post-2020*).

See also later section on 'voluntary' action by business.

Changes in the relevant population

The need to take account of changes in the relevant population (independent of the proposed measure being appraised) in the counterfactual arose, for example, in the following cases:

- inclusion of household growth modelling in the baseline (*Consistent municipal recycling collections in England*);
- taking account of possible changes to the number of eligible carers, for example resulting from the UK's ageing population (*Carer's leave).*

Market growth/contraction

The need to take account of changes in the market (independent of the proposed measure being appraised) in the counterfactual arose, for example, in the following cases:

Ending the Sale of Energy Drinks to Children (RPC-4302(3)-DHSC). The proposal is to ban the sales of energy drinks to children under the age of 16. The

Department revised its scenarios to reflect current evidence, including that there had recently been two new entrants to the market. The Department assumed a growth rate of 2 per cent and undertook further sensitivity analysis on impacts considering different market growth rates.

- Trends in drone use, e.g. whether the problems (such as airport disruption) described under the *status quo* could increase significantly. (*Introduction of police powers and stop and search for drone misuse, RPC-4365(1)-DfT*).

Departments will wish to provide evidence and/or strong reasoned argument for making (or not making, where appropriate) any adjustments to the baseline. For example, in the case of declining or growing industrial sectors, departments will wish to set out historical data on the number of businesses. In the case of other policies coming in, if there is 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. Where there is particular uncertainty over what might happen in the counterfactual, and especially where this could affect the EANDCB and/or the option choice, it will be important to undertake **sensitivity analysis**, varying the key assumptions in the counterfactual.

Trade agreements

There might be particular uncertainties in the counterfactual for measures implementing trade agreements, given that this would depend upon developments not just in the UK but also in the trading partner and potentially in international trading rules.

Impact assessment of the EU-Vietnam Free Trade Agreement (EVFTA) on the UK (RPC-4328(1)-DIT). The IA assesses the impact of the EU-Vietnam FTA (EVFTA) agreement, which is intended to eliminate most tariffs between the EU and Vietnam and to reduce the non-tariff barriers that businesses face in the trade of goods and services. The Department uses a baseline in which the UK continues to trade with Vietnam under World Trade Organisation (WTO) rules and Most Favoured Nations (MFN) terms, while Vietnam continues to trade with the UK under the Generalised Scheme of Preferences (GSP). The baseline also includes the elimination of tariffs agreed in existing trade agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The RPC was content with the baseline and welcomed the Department's detailed description of it. Given that economic growth in Vietnam is likely to ultimately undermine its eligibility for preferential trading arrangements afforded to developing countries, the IA would have benefitted from a qualitative discussion of the impact on the baseline of Vietnam not qualifying for the GSP in the future.

Alternative counterfactuals

There are some situations where it is appropriate to use an alternative counterfactual (these are sometimes called 'constructed' or 'artificial' counterfactuals), that is known to be different to what will happen in the absence of the proposal. This would be where a standard 'do nothing' counterfactual would not meet framework requirements (for example, for reporting of the impact of EU non-qualifying measures) and/or not best inform the decision to be taken.

It should be noted that although a 'constructed counterfactual' sounds complex and resource intensive, these types of counterfactuals usually involve no more work that standard counterfactuals and sometimes much less. For example, for EU-exit measures quantitative analysis against a *static acquis* counterfactual (explained below) is much easier than against a do nothing counterfactual. For EU or other international measures, any meaningful IA would proportionately assess the impact on UK business of the international obligation, rather than simply report the impact as zero on the basis that businesses will have to comply regardless of any implementing domestic regulation. Using an alternative counterfactual that the international obligation does not exist (explained below) would, therefore, simply involve a different presentation of the *existing analysis* in the summary sheets of the IA. Analytical requirements would be proportionate, balancing what is necessary to support a decision and framework requirements, and taking account of scale of impact, information availability etc.

Factors that are likely to justify the use of a non-standard counterfactual are summarised in the box and subsequent 'flow diagram' below. These are explained in more detail further below.

Exceptions to the standard do nothing counterfactual: overarching principles/criteria

Note: these criteria will often be overlapping.

Where a standard counterfactual would:

Not meet framework requirements, other government guidance or be consistent with legal definitions of a regulatory provision under the SBEE Act 2015

- for the reporting of the impact of (above *de minimis*) EU or international origin non-qualifying regulatory provisions. (Only a counterfactual that the EU or international obligation does not exist, or that no country implements it, will correctly identify the impact of the obligation itself for framework reporting purposes).

- UK (EU directive) Transposition Guidance means that no benefit can be scored by taking-up beneficial derogations, so this take-up must be assumed in the counterfactual.

- SBEE Act 2015 requiring measures 'ceasing to be in force' to potentially score for BIT purposes, where such expiry would otherwise be in a do nothing counterfactual.

- conventional framework assumption that measures with a sunset clause are still assumed to run, and be appraised over, the full ten years.

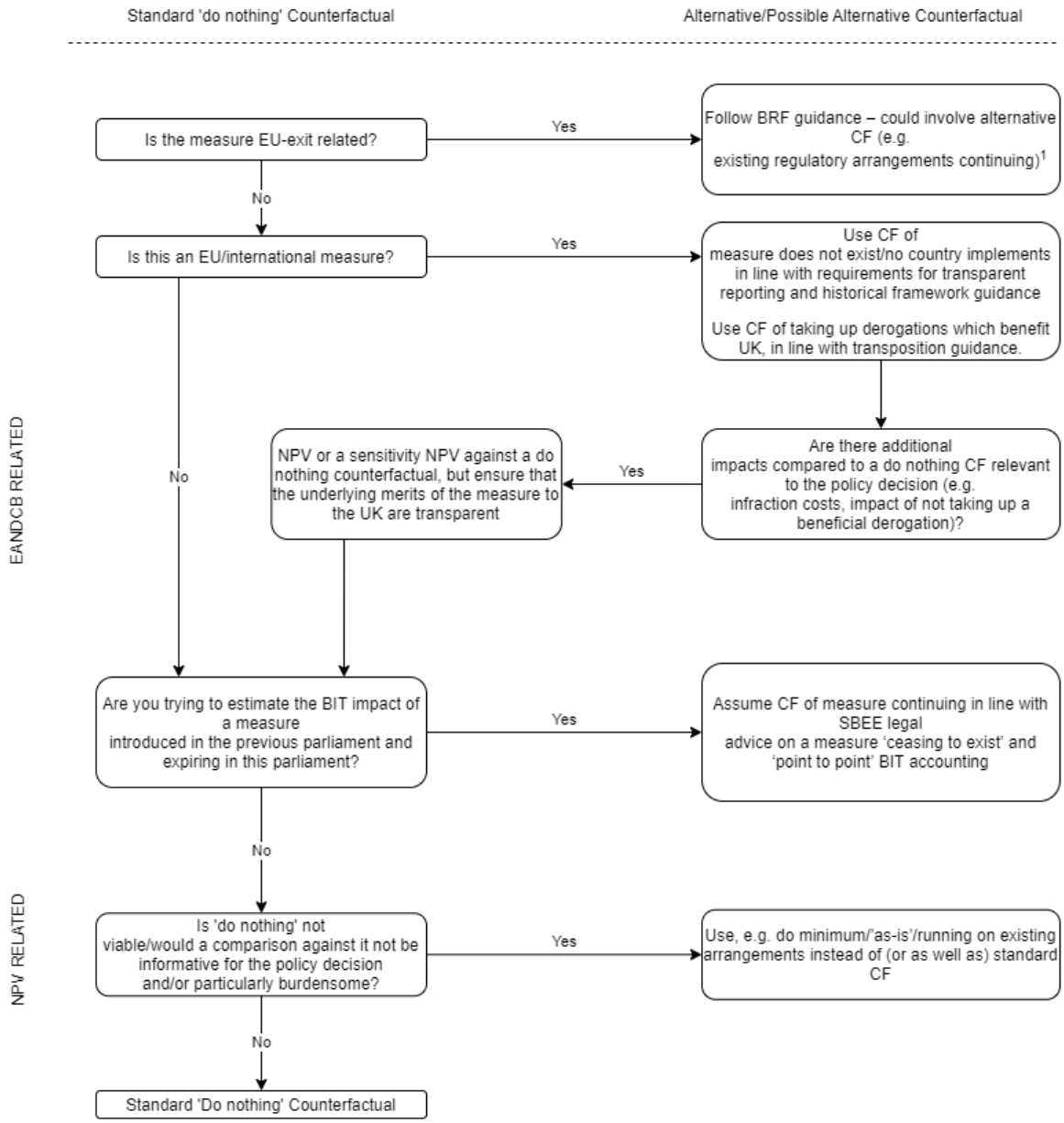
- for reporting of EU-exit measures prior to EU exit. (Previous DExEU guidance to routinely baseline IAs against the *static acquis* rather than do nothing counterfactual).

Mask the underlying merits of the measure to the UK

- impact of infraction or other costs if the UK were the only country not to implement an EU or international obligation directive.

Not be the best one to inform the decision to be taken and/or be very complex and resource-intensive

-do minimum/'as-is'/running on existing arrangements counterfactual might be more appropriate.



1. For example, prior to EU-exit, DExEU guidance was that the main comparison should be against a *static acquis*, with only a narrative against 'do nothing'

EU measures

***Note**: This section on EU measures is expected to be relevant only until the end of the EU-exit implementation period, scheduled for 31 December 2020.*

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. As an impact on government rather than business, infraction costs do not usually affect the EANDCB. However, departments will wish to consider carefully which counterfactual is most appropriate to inform decision-making.

Impact *Amendment of the Heather and Grass Burning (England) Regulations (2007)*. The UK received a Reasoned Opinion from the European Commission stating that the UK had failed to correctly apply the Habitats Directive by permitting rotational burning on blanket bog habitats. The proposal was to make it illegal to rotationally burn on deep peat on European designated sites. The counterfactual was that the UK takes no legislative action in response to a successful infraction case. This counterfactual would, therefore, include the risk/cost of infraction penalties. This would be a cost incurred by the UK government rather than UK businesses, and would not affect the EANDCB.

The RPC does not mandate a counterfactual for the wider cost benefits analysis in an IA; our recommendation is that it should be one that best informs the decision to be taken. Clearly, highlighting the risk and cost of infraction penalties is important and needs to be presented prominently in the IA. However, an IA will also need to provide clarity on the costs and benefits of the proposal itself, to demonstrate clearly whether there is a cost-benefit case for the proposal in the absence of the infraction risk.

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

The IA **'*Air Navigation Order (ANO) 2009 Changes as a EASA Air Operations Regulations*'** initially had a (non-qualifying) EANDCB 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. The IA was revised with the appropriate counterfactual of the EU Regulation not existing.

Take-up of beneficial derogations. UK Transposition Guidance has been that implementation of EU measures 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 measure. 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.

The IA ***Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012*** included a negative EANDCB, with savings resulting from taking up a beneficial derogation. Since the taking up of a beneficial derogation should have been in the counterfactual, the EANDCB needed to be revised.

International measures

EU measures are one type of international measures and the same principles should apply to non-EU international measures. UK regulations implementing other international requirements should be treated in the same way as EU measures, i.e. a constructed counterfactual where the international obligation does not exist should be used to establish the impact on UK business of the obligation.

It could be argued that the impact on business of the UK regulation is zero, or close to zero, because businesses will comply with the international obligation in the counterfactual, in order to be able to conduct their business. This may well be the case with a conventional, do nothing counterfactual. However, such an approach would fail to identify the impact on UK business of the obligation. Providing the UK regulation goes no further than the minimum requirements of the obligation[1], the EANDCB reflecting this impact would fall under the EU/international exclusion and, therefore, be non-qualifying against the business impact target.

The Merchant Shipping (Ballast Water Management) Regulations 2020 (RPC-DfT-MCA-4428(1)). The Maritime Coastguard Agency (MCA) is proposing to introduce legislation to implement the International Maritime Organisation (IMO) convention on Ballast Water Management. The proposal is aimed at reducing the threat from invasive non-native species to UK waters. The MCA's original IA presented a zero net direct cost to business on the basis that businesses will, in any

[1] It might be less clear what the minimum level of implementation is for non-EU international obligations. However, even where there is no clearly prescribed minimum requirement in an international agreement, framework guidance has been that it is the department's responsibility to show that it is doing the minimum that would be acceptable to meet the UK's obligations. The *Enhanced Transparency of Company Beneficial Ownership (RPC13-BIS-1990(2))* case includes details of what information the RPC might look for, such as setting out other countries are doing to meet the obligation.

case, comply with the IMO convention in the counterfactual, in order to be able to continue trading internationally without hindrance. It was clear, however, in this case that this was not voluntary action by business; the costs they were incurring costs were for societal, marine environmental benefit. The RPC's position was that the EANDCB should reflect the cost to UK business of the requirements of the international convention and this required the use of a constructed counterfactual where these requirements did not exist, in line with the approach for EU directives. This resulted in an initial (consultation stage) EANDCB of £7.4 million. The RPC was content that this was a non-qualifying regulatory provision given that the proposal went no further than the international requirements.

There would only be two rare exceptions to this approach. One is where action by UK business to comply with the international obligation was demonstrably entirely voluntary, i.e. businesses would do the same if the obligation did not exist. For example, there might be a case that some businesses would take action in any case as part of corporate social responsibility policies. If so, this could be reflected in the counterfactual. The other is where the international obligation was introduced a long time before the UK regulation and there is no practical way to establish a counterfactual where the international obligation does not exist. Both instances are likely to be comparatively rare and full justification for the approach adopted would need to be provided.

As noted above for alternative counterfactuals more generally, analytical requirements would be proportionate, in particular to the scale of impact of the international requirements.

EU-Exit measures

***Note**: this section on EU-exit measures is included to illustrate an important historical further category of when a constructed counterfactual was appropriate, to help get across the concept and principles rather than providing guidance on future measures of this type*.

The Department for Exiting the European Union (DExEU) produced guidelines for departments on how to appraise EU-Exit measures, and this included counterfactuals or baselines. The guidance was for departments to routinely baseline IAs on both primary and secondary legislation against the *static acquis* expected at EU-exit. Departments should also describe what would happen if the piece of legislation was not introduced to Parliament, i.e. some qualitative assessment against a do-nothing scenario.

Nuclear safeguards regulations (RPC-4180(3)-BEIS). The Nuclear Safeguards Act 2018 created a legal framework for a domestic nuclear safeguards regime to commence after the EU-exit implementation period ends. This IA was on proposed nuclear safeguards regulations made under the provisions of this Act. The IA considers the impacts of the policy against two counterfactuals: the current Euratom

regime and a do nothing. The Department states that the current Euratom regime is not a feasible option after EU-exit but is a reference point that allows for an assessment of the proposed option relative to existing arrangements. This is the counterfactual against which the proposal is primarily assessed. The Department provides a more qualitative description of impacts against a do-nothing scenario, focussing on the risks of not introducing legislation.

This approach also made sense from a business impact target perspective. For example, where the do-nothing scenario is expected to involve significant additional net costs to business, a comparison of the proposal against this baseline would result in a large net benefit to business, despite the cost it is offsetting not having been 'scored'. The proposal would only avoid the costs in the do-nothing scenario, with little or no overall impact on business compared to the *status quo*.

Time-limited measures (crossing parliaments) and sunset clauses

This section considers only temporary measures lasting longer than 12 months. Measures lasting less than 12 months are statutorily excluded from the BIT.

The BIT system (and OIOO/OITO before it) has effectively sought to measure the change in regulatory burden on business between the start and end of the BIT accounting period covering a whole parliament. This change in burden can result from new regulations coming in, regulations being withdrawn and changes to existing regulations. It can also result from regulations 'ceasing to be in force'. When a measure that was introduced in a previous parliament expires in the current parliament, the measure will potentially count as qualifying regulatory provision with a net benefit or cost to business to be scored. (If the measure itself is net costly, its expiry would be net beneficial and vice versa). Under a pure do nothing counterfactual the measure would expire (no government action is required for this) and there would, therefore, be no impact from its expiry. The BIT treatment is consistent only with a constructed counterfactual where the measure would have continued to stay in place.

Measures with **sunset clauses** have not traditionally been seen as time-limited measures and IA practice, informed by historical framework guidance, has been that the IA for the measure should assume that the measure is indefinite and that it should usually be appraised over the standard ten-year period. Again, this is different to a pure do nothing counterfactual where, without any action to stop the sunset clause taking effect, the measure would expiry at the sunset date (say, after five or seven years).

Choice of counterfactual to best inform the decision to be taken

There might be other cases where it may be preferable to depart from a pure do nothing counterfactual. This could be where a do nothing counterfactual is not required for BIT scoring and where such a counterfactual would not be the best to inform the decision to be taken and/or be very complex and resource intensive. The

case below used a counterfactual that the existing regulatory arrangements continue, even though they would expire without government action.

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. The automatic lapsing of the current regime would be immediately offset by the introduction of the new regime, with no net impact on business.

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.

Other potential issues on counterfactuals

Counterfactuals for IAs on amendments to a regulation

An IA on an amendment to a regulation should primarily identify the impact of the amendment rather than provide a revised assessment of the impact of the overall policy. The counterfactual should not be that used for the IA on the original (pre-amendment) policy. The counterfactual should be based upon the latest data available, ensuring that any lower or higher than expected outturn figures for the overall policy do not mask the impact of the amendment being appraised.

The Energy Company Obligation 3: improving consumer protection (RPC-4379(2)-BEIS). This amendment to the current Energy Company Obligation (ECO3) delivery framework was aimed at improving the quality of installations and consumer protection standards of ECO3 measures. The proposal would introduce a new quality mark framework and set of technical standards. The RPC's scrutiny at consultation stage identified an issue with the counterfactual. The Department originally estimated the cost of the proposal against the counterfactual of the cost originally estimated in the October 2018 ECO3 final stage IA. This meant that the cost of the amendment was largely offset by lower than anticipated ECO3 delivery prices and industry 'carryover'. Although the Department's approach provided a

useful updated estimate for the overall cost of ECO3, it did not transparently identify the specific cost of the amendment. The revised consultation stage used a correct counterfactual which took account of the lower ECO3 outturn delivery prices and, therefore, identified the specific impact of the amendment. The EANDCB increased from £0.9 million to £56.0 million. The final stage IA figure was £17.1 million, reflecting policy changes since consultation.

Using existing practice by business

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

Collective redundancy consultation: government response (RPC12-BIS-1353): This IA was on a proposal to reduce the minimum period of consultation when making collective redundancies. The original counterfactual assumed that the current minimum period required was 'biting' in all cases, when in fact many businesses have been consulting for longer than this and would, therefore be expected to consult for longer than the minimum under the proposal.

Where the costs of a proposal are increased because businesses are not fully complying with existing requirements, the element of the cost that relates to existing non-compliance should not be included in the EANDCB for the proposal.

Treatment of 'voluntary' action by businesses

Departments will need to make assumptions regarding existing business practice, for example the proportion of businesses that are already in compliance with the requirements of the new regulation. This will typically be based upon evidence collected for the IA. This level of business practice will usually be assumed to apply at the point the regulations come into force and remain at this level in the counterfactual during the appraisal period. Where a department assumes in its counterfactual that business practice is likely to change significantly, for example so that fewer businesses will be non-compliant by and/or after the implementation date, they will need to provide strong evidence that such a change is likely and independent of the regulation coming into force.

Where a cost on business arises from a purely voluntary action by that business, it is clear that this should not be scored as a cost of regulation. However, where

businesses take action only as a result of the 'threat' of regulation, the RPC's position has been that the cost of this action should be viewed as equivalent to a regulatory cost. For example, the primary power measure '*Community right to buy into renewable electricity developments*' was intended as a backstop to ensure that businesses engaged with a 'voluntary' scheme. The Department correctly considered the additional costs to businesses of taking part in the voluntary scheme, above those they would have incurred without the threat of regulation, to be direct impacts of the measure. The same approach should be adopted for any changes in business behaviour that arise from the pre-announcement of a policy.

In practice, it is often difficult to categorise actions by businesses as either purely voluntary or entirely resulting from the threat of regulation. For example, any reduction in the practice of withholding tips would seem likely to result from a mixture of motives, including societal and consumer pressure, as well as business reasons and the likelihood of anticipated government regulation. This will also be the case in other areas, such as the withdrawal of plastic straws. In many cases it might be impractical to try to isolate a proportion of overall cost resulting from actions taken specifically in anticipation of government regulation.

Preventing employer deductions from workers' tips (RPC-3346(2)-BEIS). The proposal is to prevent employers from making deductions from workers' tips. The IA appears to assume that there would be no further changes to business practices of handling and distributing payments for service in the absence of the proposal. The RPC opinion suggested further discussion of existing changes in tipping practices, such as online tipping facilities on website and mobile phone applications and the availability of contactless tipping options. It was noted that the proportion of employers making deductions from payments for services by card and cash appeared to have decreased significantly recently; the Government's call for evidence and consultation in 2016 may have encouraged some businesses to adjust their behaviour. The IA would also benefit from discussing how the code of practice and wider societal pressure could result in a further reduction in the withholding of tips and conducting sensitivity analysis around this baseline.

However, where government has made it clear, such as through taking a power or by specific policy announcement, that businesses must undertake a certain action otherwise they will be forced to do so by regulation, the principle is that the impact of these actions should be treated as equivalent to an impact of regulation.

Court and tribunal judgements

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