**RPC case histories: primary and secondary legislation**

 **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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf)) at the primary legislation stage (The Small Business, Enterprise and Employment Act 2015). These were considered in the relevant [RPC opinion](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336334/2014-6-6-RPC13-BIS-1717_4_-pubs_statutory_code_and_adjudicator.pdf) 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’.)

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| **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** |
| 1a. **Full details and robust assessment of the whole proposal** (i.e. the primary legislation, and where the content of the related secondary legislation is known). | Validate costs of the whole proposal – no further submissions required for the related secondary legislation unless the policy changes. | 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. |
| 1b. **Details and robust assessment of some of the impacts on business** (e.g. where primary legislation affecting business is brought into force ahead of, and without, related regulations and/or where the impacts of some of the related secondary legislation is known and the content of (other) related secondary legislation is not known). | Validate costs of the proposals as far as possible/provided; further submission(s) required for the (other) secondary legislation. | 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. |
| 2. **Full robust assessment of the proposal as a whole is not possible** because substantive policy decisions will not be taken until the secondary legislation stage (e.g. where some details of the proposal are still to be decided/developed, say, for related secondary legislation). Uncertainty over some of the impacts of the proposal is, therefore, too great to provide a meaningful EANDCB figure for validation at the primary legislation stage. **But** identification and an **assessment of at least the scale of the impacts of the measure as a whole**, including the business sectors that will be affected, and how, **is provided**. An explanation of why a full robust assessment of the proposal as a whole is not possible is also provided.  | The RPC is unable to validate an EANDCB figure at this stage. Revised/further IA(s), supporting secondary legislation, to be submitted and validated. 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 the primary legislation stage, but not where the department simply hasn’t gathered sufficient evidence. | 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 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. |
| 3. **No assessment of scale/indication of likely impacts provided and no satisfactory explanation for this**. | 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. | 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.  |

**How the RPC applies this 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:

1. 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).
2. 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 “not validated at this stage**”. Direct impacts on business to be accounted for at the secondary legislation stage implementation date(s).
3. 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](https://www.gov.uk/government/publications/infrastructure-bill-the-community-electricity-right)) ([Opinion](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347508/2014-03-27_-_RPC14-DECC-2027_-_Community_right_to_buy_into_renewable_electricity_developments.pdf))

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”.*