

Small Business, Enterprise and Employment Act 2015

Statutory Guidance for Departments

Determining whether it is appropriate to make provision for review

Introduction

1. This guidance is to assist departments in implementing the new duty in the Small Business, Enterprise and Employment Act 2015 (“the Act”) which requires the inclusion of review provisions in secondary legislation that regulates business or voluntary and community bodies¹. It is aimed at policy makers, analysts, and lawyers developing new legislative proposals that fall within the scope of the duty.
2. This guidance sets out the test to be employed in circumstances where departments think that it may not be appropriate to include review provision. It must be taken into account by any Minister making such a determination.
3. Guidance on other matters related to review provisions can be found in the Better Regulation Framework Manual.

Legal background

4. The Act places a statutory duty on UK Government Ministers to either include review provisions in secondary legislation that regulates business², or else publish a statement that it is not appropriate in the circumstances to do so³.
5. The Act provides two examples of circumstances where a minister may determine that a review is not appropriate: where conducting a review would be disproportionate to the economic impact of the relevant regulation, or where a review would be undesirable for particular policy reasons⁴.
6. It also gives the Secretary of State the power to publish guidance (this document) about the factors to be taken into account in determining whether it is appropriate to make provision for review⁵. This guidance must be taken account of by any Minister making this determination.

¹ This guidance uses the term “business” to cover both businesses and voluntary and community bodies.

² Subject to the exclusions at section 28(3) which are for; tax legislation or legislation related to tax, legislation about procurement, legislation about giving grants or financial assistance by or on behalf of a public authority, legislation which will have temporary effect and legislation which is already contains a review provision, and the carve out at section 29(3) for legislation which regulates business or voluntary or community bodies which are controlled or are acting on behalf of a public authority.

³ See Section 28

⁴ Section 31(2)

⁵ Section 31(3)

Policy Objectives

7. The Government's policy objective is that regulations should remain in force only where they remain necessary, where they are having the intended effect, and where any associated costs are minimised. This objective is to be delivered through a robust system of regular review of regulations, underpinned in legislation through statutory review provisions.

8. Implementation of this policy should, over time, mean that the vast majority of secondary legislation that regulates business will be subject to regular review, except where it is not proportionate to do so.

Test to be applied

In accordance with the Government's policy, a review provision should be included in all secondary legislation that regulates business other than in exceptional circumstances where the potential benefits of doing so are clearly outweighed by the potential adverse effects.

Applying the test : benefits

9. The benefits of keeping regulations under review that should be considered by departments for all new regulations include :-

- providing assurance that the regulation remains effective in delivering the original intended policy outcomes, in line with the original policy assumptions;
- considering the implications of any unintended consequences of the regulation for its overall effectiveness and for its impacts on business;
- considering the implications of changes in markets, technology, society, or environment, or changes in related legislation or policies;
- ensuring that the enforcement of the regulation is consistent with better regulation principles and relevant statutory obligations (including the Regulators Compliance Code, and the Growth Duty);
- for international and EU-derived regulations, ensuring that the implementation of the regulation does not adversely affect the competitiveness of UK businesses;
- identifying where there may be opportunities to improve the effectiveness of the regulation, for example through simplification of guidance to reduce business compliance costs, or through changes that improve the balance of costs and benefits to business across the regulation as a whole; and
- ensuring that lessons from the implementation of the regulation (including assumptions used in the initial appraisal) are fed back into the design and implementation of future policy interventions

10. The incidence and scale of these benefits are unlikely to be known at the time a regulation is made. For example, although there may be an assessment of risks associated

with a new regulation as part of the original appraisal, it is unlikely to be possible to judge unintended consequences in advance. Departments should work on the assumption that all the potential benefits listed will apply, except where there is good evidence to suggest that there is no possibility of a specific benefit arising.

Applying the test : potential adverse effects

11. The potential adverse effects of keeping regulations under review that should be considered by departments include :-

- the costs associated with monitoring the impacts of the regulation and carrying out reviews from time to time (further discussion at paragraphs 21 and 23 below).
- keeping the regulation under review would adversely affect the ability to achieve a specific policy objective

Applying the test : specific factors

12. This section provides further guidance on the approach to be taken in considering specific factors relevant to the assessment of benefits and adverse effects as part of the balancing test.

Scale and uncertainty of impacts

13. The benefits of the review provision are likely to be dependent on the scale of the impacts of the regulation on business.

14. For measures where those impacts are limited – for example regulatory measures that are treated as “low cost” within the administrative Fast Track arrangements – the benefits of a review provision are likely to be lower than for measures whose impacts are larger. But each measure should be considered on a case by case basis, taking into account the nature of the impacts on business and that impacts may change over time.

15. When assessing the scale of impacts on business, Departments should take into account both the aggregate economic impact on business, and the impact relative to the characteristics of the businesses affected. For example :-

- a regulation that has a relatively small impact on an individual business, but which affects a large numbers of businesses, is likely to have a large aggregate impact when measured across the economy; but
- a regulation that has a large impact on very small numbers of businesses may not be significant in overall economic terms, but could be significant for those businesses (for example because many of the businesses are small, or because the regulation has affected their competitive position)

16. When considering the scale of impacts on business, departments should also :-

- focus on the gross costs and benefits, rather than the net cost (regulations with a small net cost may nevertheless have significant costs and benefits);

- take into account both impacts that can be quantified or monetised, and other impacts that cannot where these are significant for the overall policy objectives; and
- have regard to standard approaches to appraisal and evaluation of impacts, as set out in the Green Book and Magenta Book respectively

17. Departments should also take into account the uncertainty or risk associated with the estimated impacts. The benefits associated with a review provision are likely to be higher in cases where the assumptions underpinning the assessment of impacts on business, and policy outcomes, have a significant degree of uncertainty attached – for example because it is not possible to pilot a particular approach, or because there are no comparable activities that can be used to inform the estimates.

18. In the medium / longer term, changes in technology, markets, the environment or society can also be a significant additional source of uncertainty. Those changes may also open up a range of alternative policy interventions that may be more effective, or have lower burdens, than the existing regulation. The benefits of regular review will be greatest for regulation that is affected by social, technological, environmental or economic changes.

Scope of the review provision

19. In cases where the secondary legislation amends an existing regulation, departments when applying the test should take into account different options for the scope the review provision.

20. The scope should be set with a view to achieving the best balance between the likely benefits and any potential adverse effects of the review provision. For example, where the legislation introduces a significant new limb to an existing regulatory regime, or brings new activities into scope of an existing regulatory regime, this change may also be the appropriate scope for the review provision.

21. However in other cases it may be more appropriate and proportionate for the scope of the review provision to align with the regulation as amended (rather than purely the effect of the amendment). That would enable a single review provision to cover the existing regulatory regime including the effect of amendments, rather than reviewing the amendments individually.

Costs associated with monitoring impacts and carrying out the review

22. Departments are expected to take a proportionate approach to monitoring the impact of regulations and to the analysis required as part of the review. This means taking an approach where the costs of the data collection, analysis and review activity itself are appropriate relative to the expected benefits. The level of analysis and resources that will be required can be expected to fall along a wide spectrum: from light-touch desktop reviews to significant evaluation projects with bespoke data collection.

23. In developing a proportionate approach, departments should consider the timing of the expected impacts of the regulation, and how reviews can be tailored in to match these. Where feasible, co-ordinating the reviews of related regulations should also be considered to

reduce the associated costs. [Further guidance on proportionality, and different approaches to reviews, can be found in the PIR Guidance].

24. Where the scale of the impacts of the regulation on business are very small, identify a proportionate approach to the data collection and analysis required to carry out a statutory review is likely to be more challenging than in other cases, where the impacts are more significant. That might include regulations that have much larger impacts on the public sector but also some smaller impacts on business.

Regulatory Stability

25. Review provisions are in general fully consistent with the policy objective of maximising (where possible) stability and consistency in regulatory regimes, the delivery of long term policy outcomes, and other principles such as legal certainty. That is because they provide a transparent and robust framework for reviewing the impact of regulatory interventions, and ensuring that they are effective in delivering the intended policy outcomes without unnecessary burdens.

26. In some cases, the process of carrying out a review may also identify possible changes or improvements to the relevant regulation. The decision on whether any such changes identified should be made is a matter to be considered at the time. However for the purpose of this guidance it is reasonable to expect that such a decision would take into account the importance of regulatory stability, where that is a relevant factor.

27. Departments should therefore not conclude that the inclusion of a review provision will have an adverse effect on regulatory stability or legal certainty, unless there is clear evidence for there being exceptional circumstances which mean that this is likely to be the outcome in a specific case.

28. Such exceptional circumstances might exist where regulations related to long-term investment in infrastructure projects, where a review provision might inhibit the required private sector investment, or systemically important regulation related to financial stability are at issue.

29. Where such exceptional circumstances exist, any adverse impact on regulatory stability should be considered as part of the adverse impacts described at para 10, and balanced against the potential benefits of reviews described at para 9.

Existing plans for review

30. The existence of plans or commitments to carry out a review is not a relevant factor in considering whether it is appropriate to include statutory review provision in legislation. Where there are plans or commitments in place to carry out a review of relevant legislation, a statutory review provision should still be included (subject to the test of appropriateness set out in the legislation). In many cases, any pre-existing plans for carrying out reviews will be able to be delivered within the legal framework provided by the statutory review provision.

Stakeholder views

31. The views of stakeholders, including businesses affected by the regulation, may in some circumstances be relevant to the assessment of the benefits or adverse effects

associated with a review provision. In particular where there are different and competing views amongst stakeholders as to the likely impacts or effectiveness of the regulation, this may suggest a greater uncertainty of outcome than may otherwise be the case, increasing the potential benefits of a review.

32. However the existence of a strong supportive consensus amongst stakeholders in relation to the regulation does not in itself mean that the benefits of the review will be low and therefore outweighed by the potential adverse effects. It is possible, for example, that in cases where a regulation would benefit incumbent businesses over new market entrants, those incumbents are likely to be strongly supportive of the status quo. Even in circumstances where that was not the case, many of the potential benefits listed at paragraph 9 will continue to be relevant.

Policy commitments and presentational factors

33. In general, purely presentational factors should not be given weighting as a factor against including review provision. In particular, the inclusion of a review provision does not imply that a regulation is temporary or otherwise not intended to have long term effect. Rather, the central rationale for keeping a regulation under review is that it provides assurance that the regulation will achieve the intended outcomes that led to its introduction.

34. When introducing new legislation, Ministers may sometimes for policy reasons make political, administrative, or parliamentary commitments to maintain a certain regulatory approach over a period longer than five years. Given that such commitments are implicitly conditional on the assumption that the regulation is successful in meeting its intended policy objectives they do not remove the need to consider the range of possible benefits of a review provision.

Existing review provision in underlying legislation

35. Where secondary legislation is amending legislation which already includes a statutory review requirement, there is no need to include review provision as the effect will be that the regulatory regime overall will be subject to review. The Act⁶ provides for a general exemption for secondary legislation that amends other legislation already containing a review provision- so that such cases are outside the scope of the statutory duty.

Other policy impacts

36. Where there are other policy impacts associated with a review provision that departments consider may constitute an adverse effect, these should be fully assessed and documented, to demonstrate that these are (together with other adverse effects) sufficient to outweigh the potential benefits.

⁶ At Section 28(3)(e)