

<b>Title:</b> Alternative Dispute Resolution proposals <b>for civil cases</b>  <b>IA No:</b> MoJ 066  <b>Lead department or agency:</b> Ministry of Justice <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>
	Date: 2 February 2012
	Stage: Response to Consultation
	Source of intervention: Domestic
	Type of measure: Secondary legislation
<b>Summary: Intervention and Options</b>	Contact for enquiries: Jeremy.tagg@justice.gsi.gov.uk 020 3334 3159
	<b>RPC:</b> RPC Opinion Status

Cost of Preferred (or more likely) Option (figures all rounded to nearest £0.5 million)				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£4.5 million	£2.5 million	- £0.5 million	Yes	OUT

#### What is the problem under consideration? Why is government intervention necessary?

Civil cases are allocated to the small claims track, fast track or multi-track based on features including financial value and case complexity. Currently, the Civil Procedure Rules (CPR) allow judicial discretion to move complex cases into higher value tracks, but not to move simple cases of higher value into lower value tracks. As the small claims track financial limit of £5,000 has not been changed for many years, an increasing number of simple cases with value greater than £5,000 are being allocated to the fast track, when they could be appropriately dealt with in the small claims track. Cases proceeding in the small claims track would involve lower fees for court users, and a more efficient use of court and judicial resources.

#### What are the policy objectives and the intended effects?

The proposal will increase the small claims threshold, meaning higher value claims will in future fall within the small claims track. This should result in lower court fees charged to court users including businesses for the cases that move to the small claims track, with quicker and simpler processes which need less input from legal services providers. Overall judicial and court efficiency should also improve. Judicial discretion will still apply at the case allocation stage, meaning only cases that can appropriately be dealt with in the small claims track should be treated as a small claim.

#### What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Following consultation, the proposed options are:

**Option 0:** Do nothing (base case).

**Option 1:** Increase the small claims track limit from £5,000 to £10,000.

The preferred option is Option 1. Several other options and proposals were considered at consultation stage. These are detailed in the Evidence Base.

#### Will the policy be reviewed? It will be reviewed. If applicable, set review date: April 2014

Does implementation go beyond minimum EU requirements?	N/A			
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO2 equivalent change in greenhouse gas emissions? (Million tonnes CO2 equivalent)	Traded: 0		Non-traded: 0	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Date: 2 February 2012

# Summary: Analysis & Evidence

# Policy Option 1

Description: Increase the small claims track limit from £5,000 to £10,000

## FULL ECONOMIC ASSESSMENT (all figures rounded to nearest £0.5 million)

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £ 0	High: £9.5 million	Best Estimate: £4.5 million

COSTS (£m)	Total Transition (Constant Price)	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Minimal	£0	£0
High		£1 million	£9.5 million
Best Estimate		£0.5 million	£4.5 million

### Description and scale of key monetised costs by 'main affected groups'

HMCTS could see a potential reduction in fee income of between £0 and £1 million per year, based on current fee levels, depending on the volume of cases moving to the small claims track after judicial discretion is applied, and on whether cases that move are more likely to require a hearing when treated as a small claim. Future changes to the HMCTS fees regime may affect the final figure.

### Other key non-monetised costs by 'main affected groups'

Claimants and defendants may be worse off if case outcomes are perceived as less just as a result of fewer court, judicial and legal resources being devoted to cases moved to the small claims track, or if they would prefer the experience of the fast track process. Some legal costs would no longer be recoverable, which would make winning parties in particular worse off. There may be a reduction in the demand for legal services as there is more self-representation in small claims.

BENEFITS (£m)	Total Transition (Constant Price)	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Minimal	£0	£0
High		£2 million	£19 million
Best Estimate		£1 million	£9 million

### Description and scale of key monetised benefits by 'main affected groups'

The allocation fees and hearing fees for small claims are lower, which would generate a benefit to claimants of between £0 and £1 million per year based on current fee levels, depending on the volume of cases moving to the small claims track after judicial discretion is applied, and on whether cases that move are more likely to require a hearing when treated as a small claim. HMCTS would benefit by an equivalent amount (between £0 and £1 million per year) through a reduction in costs, given fewer court and judicial resources are used in small claims track cases.

### Other key non-monetised benefits by 'main affected groups'

In addition to lower HMCTS fees, claimants and defendants may benefit if they are able to reach case resolution quicker as a result of the proposal, and may also benefit from shorter hearing times. Since parties may be more likely to represent themselves in the small claims track, legal fees may also be lower as a result of the proposal.

Key assumptions/sensitivities/risks	Discount rate (%)
It is assumed that HMCTS resources and resource utilisation will not change as a result of the proposal, and that efficiency gains will be translated into reduced waiting times and fees for court users. Estimated impacts are based on current fee levels, which may change in future. The volume of cases that will move to the small claims track as a result of the proposal is unknown, as is the number that will require a hearing in future. A greater volume of cases treated as small claims will increase the magnitude of the identified impacts. It is assumed that the court and judicial resources allocated to a case are driven by the track in which the case proceeds, resources are lower in the small claims track, and that the proposal would have no impact on case outcomes or the volume of cases being pursued through the civil courts in aggregate.	3.5%

## BUSINESS ASSESSMENT (Option 1) (figures rounded to nearest £0.5 million)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: £0 Benefits: £0.5 Net: £0.5 million	Yes	OUT

# Evidence Base (for summary sheets)

## 1. Introduction

- 1.1 This updated Impact Assessment reflects the comments and feedback received following the Ministry of Justice consultation paper: *Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system*<sup>1</sup>. The consultation paper detailed a number of proposals for reforming the way in which the civil justice system delivers its services in England and Wales. The proposed reforms are designed to improve the experience of those using the justice system by improving processes and channelling cases towards the most appropriate services for resolution.
- 1.2 The consultation paper sought public views on proposals to provide a more streamlined, responsive and efficient civil justice system that better supports users by preventing the escalation of legal problems or disputes. Where judicial intervention is required, the proposals seek to ensure that courts are able to offer a range of quick and efficient services that meet the needs of the court user whilst delivering an effective and proportionate route to justice.
- 1.3 This Consultation Response stage Impact Assessment updates the original Consultation stage Impact Assessment submitted on 31 March 2011 and details the preferred option following the consultation process.

## Background

- 1.4 There were a number of proposals contained within the Consultation stage Impact Assessment, with the overall objective of improving the efficiency of court services to ensure that cases are resolved through the most appropriate route, including mediation.
- 1.5 Following the consultation process, we have decided to proceed with the following proposal:
  - The small claims track limit of £5,000 will be raised to £10,000 in order that more claims are dealt with under the small claims procedures (subject to the suitability of the case, as determined through judicial discretion).
- 1.6 A number of other options were put forward as part of the consultation process. However, after considering the consultation responses received, it has been decided not to take these forward to implementation stage at the current time. The proposals not being pursued at this time are outlined below.

## Automatic referral of all defended small claims to mediation

- 1.7 Under this proposal all defended small claims would be referred to mediation, helping to fulfil the key objective of developing a civil justice system that enables people and businesses to deal with their problems quickly, effectively and at proportionate cost. The key premise underpinning this proposal is that mediation can often be cheaper and quicker than resolving the issue in court and also that the success rate for mediation is high.
- 1.8 The majority of respondents who were in favour agreed that there were real benefits to litigants in that it would promote early settlement and reduce unnecessary delay and excessive cost. This reason was cited by a number of respondents, including businesses/commercial organisations, the advice sector, legal profession and mediators/mediation service providers. The judiciary supported automatic referral as long as it was not compulsory mediation but referral to a mediator to obtain information on mediation and undertake mediation as appropriate, citing the success of the HMCTS Small Claims Mediation Service. Other respondents agreed that this proposal would help alleviate pressure on the judiciary and the civil justice system as a whole, so that the courts could concentrate on cases that genuinely need to be there. Furthermore, even if cases did not settle, the points of the dispute would be narrowed, thus speeding up the subsequent court or settlement process.

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<sup>1</sup> Published on 31 March 2011 and closed on 30 June 2011 – see [www.justice.gov.uk/consultations/consultation-cp6-2011.htm](http://www.justice.gov.uk/consultations/consultation-cp6-2011.htm).

- 1.9 Those against the proposal tended to assume that automatic referral meant compulsory mediation, and since not all cases were suitable for mediation, no degree of compulsion should be introduced.
- 1.10 The consensus is that automatic referral to small claims mediation should be introduced on the basis that it is not compulsory mediation, but referral to a mediator/mediation service provider. However, the details of how the existing mediation service should be expanded, and who should provide it, have yet to be finalised. Once the delivery model has been agreed a separate Impact Assessment will be undertaken and published at that time.

**Introduce mandatory mediation information sessions for all defended claims in the fast and multi-tracks with a value up to £100,000, to increase parties' awareness of mediation as an option for settling their dispute.**

- 1.11 Respondents had a number of reservations about taking this proposal forward. In particular, there were already pre-action protocols, which parties ought to follow and if properly complied with, there would be no need for parties to incur the additional expense of attending mediation information sessions. The judiciary already have powers under the Civil Procedure Rules (CPR) to make relevant costs orders, should it be determined that one or both parties have not seriously considered the use of mediation or negotiation in order to settle their dispute. The CPR already provide the court with the authority to encourage ADR, including mediation, at various stages of the litigation process in all relevant cases and therefore the introduction of mandatory information sessions would add little value, whilst imposing additional costs on the parties.
- 1.12 However, it is recognised by both mediators and legal professionals that there remains a lack of knowledge about the use of ADR and mediation as a mechanism for resolving disputes. It is therefore recommended that the provision of information about mediation should be more strongly embedded into the pre-action protocols, making consideration of mediation a fundamental part of the revised pre-action requirements. We will consider the effectiveness of mediation information delivered by various means, including telephone, face-to-face, web and hard copy formats at various stages of the pre and post issue process. We also plan to work with the Law Society to better reinforce the role of the legal profession, when discussing options with their clients, to explain whether mediation or some other ADR procedure may be more appropriate than litigation, since this is already stated in the 'client care guidance' of the Solicitors Code of Conduct (Rule 2.02(1)(b)).

**Parties given the opportunity to choose whether the small claims hearing is conducted by telephone or determined on paper.**

- 1.13 While around three quarters of the respondents supported the general proposal, in that it would improve choice for litigants overall, there was concern that it could negatively impact on vulnerable parties, who may feel forced into using paper or phone hearings, placing them at a disadvantage, and ultimately negatively impacting on the final outcome of the determination.
- 1.14 In particular, the judiciary and a number of representatives from the legal profession raised concerns about telephone hearings, including a possible lack of judicial control of hearings and witnesses, and issues relating to presentation of evidence, which could impact on the final determination.
- 1.15 Whilst not taking forward the proposal at this time, we propose to work closely with the judiciary and legal profession to assess the potential for greater use of paper determinations, particularly in relation to lower value claims. The aim would be to align the use of paper determinations to the European Small Claims Procedure (ESCP), which applies to cross-border civil and commercial disputes where the value does not exceed 2,000 Euros. The ESCP procedure is a written one, unless the court considers an oral hearing is necessary. Rather than create a mandatory process for lower value claims, the process would remain voluntary.
- 1.16 Should there subsequently be a change in policy, requiring changes to the Civil Procedure Rules (CPR), a further Impact Assessment will be produced and published at that time.

## **Extension of the mediation agreement enforcement provisions under the EU Mediation Directive for cross-border disputes, to cover domestic disputes.**

- 1.17 Based on the consultation responses received, it has been decided not to extend or incorporate the EU Mediation Directive for cross-border disputes to cover domestic cases in England and Wales. Domestic cases will continue to be dealt with under domestic legislation.
- 1.18 The EU Mediation Directive on cross border disputes relates to certain aspects of mediation in civil and commercial matters, to allow enforcement of the content of a written mediation agreement made following a cross-border dispute, whilst maintaining the confidentiality of the agreement.
- 1.19 Given the EU Mediation Directive (2008/52/EC) did not come into force until 21 May 2011, respondents felt that it had been in place for insufficient time to assess its impact on cross-border disputes. Consequently, it was too soon to consider extending it more widely to cover domestic disputes.
- 1.20 The judiciary felt that the introduction of such provisions would introduce an unnecessary layer of rules and overcomplicate matters. Mediators suggested a review of current domestic law, in consultation with the mediation and legal profession, to determine whether anything further is needed.
- 1.21 It is therefore proposed to continue to assess whether further provisions are required for domestic disputes. Should this be decided in future, there will be further consultation, which would include a separate Impact Assessment discussing any specific proposals. It is anticipated that any future consultation would be unlikely to be published until 2014/15.

### **Problem under consideration**

- 1.22 Civil cases are allocated to the small claims track, fast track or multi-track based on features including financial value and case complexity. Currently, the Civil Procedure Rules (CPR) allow judicial discretion to move complex low value cases into higher value tracks, but not to move simple cases of higher value into lower value tracks. While simple high value cases can be moved to lower value tracks if the consent of the claimant and defendant is achieved, it is typically more cost effective for all parties for cases to be allocated to the higher value track (compared to the processes through which consent would be gained).
- 1.23 As the small claims track financial limit of £5,000 has not been changed for many years, an increasing number of simple cases with value greater than £5,000 are being allocated to the fast track, when they could be appropriately dealt with in the small claims track. Increasing the limit so that more cases fall within the value of the small claims track should result in lower fees for court users in the cases that move to the small claims track, and a more efficient use of court and judicial resources. As judicial discretion will continue to apply, it is assumed that only those cases for which the small claims track is appropriate would be allocated to the small claims track: more complex cases would continue to be allocated to higher value tracks using existing judicial powers.

### **Economic Rationale**

- 1.24 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistribution reasons (e.g. to reallocate goods and services to the more needy groups in society).
- 1.25 Increasing the small claims track limit so that simple higher value cases fall within the small claims track would be justified on efficiency grounds, given a lower level of court, judicial, and legal resources are required for small claims. It is assumed that as judicial discretion will continue to apply at the case allocation stage, only cases that can appropriately be dealt with as small claims in terms of both value and complexity will proceed under the small claims track in future. On this

basis, it is assumed that the proposal would have no impact on case outcomes, or on the volume of cases pursued. The proposal is therefore expected to provide efficiency gains, and to improve economic welfare overall.

#### Affected stakeholder groups, organisations and sectors

1.26 These proposals are likely to affect the following sectors and groups:

- *Claimants*: Claimants will be required to proceed under the new processes.
- *Defendants*: Similarly, defendants will be required to proceed under the new processes.
- *Legal professionals*: The changes will affect any claimant and defendant solicitors dealing with claims that fall within scope of these proposals.
- *Her Majesty's Courts and Tribunal Service (HMCTS)*: HMCTS case allocation should improve as a result of the proposal, and HMCTS costs should fall overall.
- *The Judiciary*: The judiciary will be better able to allocate cases in the future, and moving cases to the appropriate track should result in a more efficient use of judicial resources.

## 2. Cost and Benefits

2.1 This Impact Assessment identifies both monetised and non-monetised impacts on individuals and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

### Base Case / Option 0

#### Description

- 2.2 Under the do nothing option, the small claims track would remain at £5,000. Simple cases with a value above this limit would continue to be allocated to the fast track or multi-track<sup>2</sup>. Judicial discretion would remain to allocate complex low value cases to higher value tracks, but not to allocate simple high value cases to lower value tracks (without the consent of the relevant parties).
- 2.3 The annual 'MoJ Judicial Courts Statistics' report details the time taken from the issue of a small claim to the hearing. In 2010 this took 31 weeks and the average duration of a small claims hearing was 79 minutes. Under the do nothing option, hearings would continue to be face to face and take place in the County Courts, in judges' chambers. For fast and multi-track cases there was an average of 50 weeks between issue and trial, and hearings took an average of 3 hours and 53 minutes.<sup>3</sup>
- 2.4 The 'do nothing' option is compared against itself and therefore its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

### Option 1 – Increase the small claims track upper financial limit from £5,000 to £10,000

#### Consultation responses

- 2.5 The original proposal in the consultation document was to increase the small claims track limit to £15,000. Around 65% of respondents to the consultation were in favour of increasing the small claims track limit. These included some representatives from banking and finance, the judiciary and the legal profession, and the majority of respondents from the advice sector, business and

<sup>2</sup> Money claims in the County Court are allocated to one of three tracks (small claims, fast trace and multi track) depending on the value and complexity of the claim. The small claims track is for the lowest value and simplest claims, fast track for higher value claims and the multi track for the most complex claims.

<sup>3</sup> All figures for hearing durations are derived from case samplers.

commerce, insurance, mediation and local authority sectors. A wide range of views were expressed, with the majority of respondents advocating an increase in line with or above inflation. The majority of representatives from the Judiciary and legal sectors were generally opposed to an increase unless it was in line with inflation. There was though support from the business sector in particular that the limit could be increased to £15,000 for business-to-business disputes, on the grounds that small and medium sized businesses often would prefer to avoid the more costly and complex fast track process, even when the amount at issue is above £5,000.

- 2.6 A number of respondents also specified a preferred figure for the revised limit. Of those who expressed a preference, a majority agreed with £15,000 over any alternative figure, while others favoured a lower limit of £7,500 or £10,000. Restricting the limit to an inflationary increase would suggest a limit of around £6,500 to £7,000, using CPI as the relevant inflation index. However, taking the full range of views into account, both those who favoured an increase in line with inflation or just above inflation, and those who preferred an increase to £15,000 or even higher, we propose to increase the small claims track limit to £10,000.

### Description

- 2.7 The proposal being taken forward is to increase the limit to £10,000. Increasing the limit to £10,000 is an increase greater than the rate of inflation since the time the small claims track limit was set previously, but it has been chosen to best reflect the wide range of views expressed over the consultation period, as described above.
- 2.8 We believe that the level of small claims track limit is important because it sets the expectations of court users about the track in which their case is likely to proceed. However, we also propose to amend Civil Procedure Rule (CPR) 26.7(3), which will allow the judiciary to divert simple cases of higher value to the small claims track in future. This should make it easier to allocate simple cases with value above £10,000 to the small claims track, although this is not expected to lead to a significant volume of cases moving to the small claims track, given higher value cases tend to be more complex, or otherwise require the processes of higher value tracks.
- 2.9 Based on 2010 data, increasing the limit to £10,000 would move around 4,500 cases from the fast track into the small claims track per year based on case value, as set out in table 1 below.

**Table 1: Number of defended claims allocated to track for a specified amount**

Year	Specified Claims Allocated to Track	£0 to £5,000	£5,000 to £10,000	£10,000 to £15,000	£15,000 to <£50,000	>£50,000
2009	104,282	87,698	8,186	3,141	4,195	1,062
2010	90,312	75,437	7,200*	2,970	3,176	987

\*cases allocated to track as follows: 2454 to the small claims track, 4527 to the fast track and 219 to the multi-track

- 2.10 Transferring around 4,500 cases (by value) into the small claims track would help to redress the movement of cases from the small claims track to the fast track that has taken place over the past ten years, as set out in table 2 below. Although the trend has not been constant, in the first year after the ceiling of £5,000 was set in 1999, small claims represented around 60% of all allocations to track, but since then this has fallen to around 50%. It is noted that moving around 4,500 cases to the small claims track would still have resulted in only around 50% of allocations to track being small claims in 2010.

**Table 2: Allocations to Track 2000-2010**

Year	Defences	Small claims	Fast track <sup>4</sup>	Multi track	Total	Small claims as % of Total
2000	250,442	92,863	33,163	29,182	155,208	59.8%
2001	255,035	92,199	31,038	22,544	145,781	63.2%
2002	266,625	80,707	38,249	24,075	143,031	56.4%
2003	268,042	77,288	51,176	28,711	157,175	49.2%
2004	261,666	73,497	51,215	29,201	153,913	47.8%
2005	278,019	75,740	51,405	28,396	155,541	48.7%
2006	292,115	76,821	50,723	27,605	155,149	49.5%
2007	338,616	96,417	50,970	26,364	173,751	55.5%
2008	298,796	83,928	53,255	26,722	163,905	51.2%
2009	315,934	93,073	61,415	25,495	179,983	51.7%
2010	290,941	79,924	65,665	23,104	168,693	47.4%

**Note:** The number of allocations to track is lower than the number of defences primarily because defended cases can be settled or withdrawn before they are allocated to track, and that there may be more than one defence or allocation to track in a case.

- 2.11 In theory, there is an optimal small claims track limit. If the limit is set too low and cases go to the fast track instead of the small claims track, too many court, judicial, and legal resources would be used in relation to the value of cases, which could be resolved adequately using simpler processes and fewer resources. However, if the limit is set too high, and higher value and more complex cases fall into the small claims track as a result, this might be inappropriate and lead to worse case outcomes (e.g. in terms of perceived justice) and lower levels of court user satisfaction.
- 2.12 In addition these cases might be subject to appeal and hence require additional judicial system resources at a higher court. This may have the impact of removing any judicial system savings and could even generate net judicial system costs. Any appeals would also create additional resource costs to the parties. It is assumed that judicial discretion will continue to be used to allocate complex low value cases to higher value tracks, and hence that these potential negative consequences of raising the limit would not occur in practice.
- 2.13 It is not possible to accurately predict where the optimal limit is but, based on the response to consultation and the evidence showing that a decreasing proportion of cases have been allocated to the small claims track in the last 10 years, it is thought that £10,000 is a reasonable limit to set at the current time.
- 2.14 It has been assumed that HMCTS resources can be deployed flexibly between the small claims track and other tracks. As such the court and judicial resources which would have been attached to cases which move to the small claims track would in a sense move with those cases rather than remaining to deal with fast track and multi track cases.

## Costs

### HMCTS

- 2.15 In general HMCTS operates on a cost recovery basis in relation to civil cases, with the HMCTS fees per case covering the HMCTS operating costs per case. The proposals are considered not to impact on the court and judicial resources used per case in any of the tracks, and hence not to impact on court fees per case which apply in each of the tracks.
- 2.16 There might be some minor one-off transition costs associated with familiarisation and awareness with the new limit, but these are expected to be minimal and should only affect court managers and mediation administrators.

<sup>4</sup> Since 1999, claims have generally been allocated to the fast track which have a value exceeding the limit of the small claims track (£5,000 for most claim types) but not more than £15,000 (those with a value over £15,000 generally being allocated to the multi-track). On 6 April 2009, the upper limit was raised from £15,000 to £25,000.

- 2.17 As explained above we assume that court and judicial resources will in a sense follow the cases which move from other tracks to the small claims track. Fewer HMCTS resources are required per case in the small claims track, for example due to the different procedures used, hence small claims court fees are lower.
- 2.18 As a result of the reforms, fewer overall HMCTS resources would be needed to deal with the same volume of cases. In theory this may lead to HMCTS capacity adjustment, where in general terms benefits might stem from releasing excess capacity but capacity adjustment costs might also be incurred.
- 2.19 Alternatively HMCTS might deploy the resources freed up from these reforms to address waiting times and backlogs, including in relation to all tracks. We consider this scenario to be more realistic.
- 2.20 Under this scenario there would be no reduction in overall HMCTS resource usage, as HMCTS resources saved from the cases directly affected by this proposal (i.e. cases which switch from other tracks to the small claims track) would be used to process other cases. For each case HMCTS court fees would continue to cover HMCTS operating costs, which would remain the same per case. The impact on overall HMCTS cost recovery would therefore be neutral.
- 2.21 The remainder of this analysis considers the impacts relating more narrowly to those cases which move from other tracks to the small claims track. Indeed, the fact that HMCTS might choose to use their resource savings to reduce waiting times and backlogs should probably be regarded as a secondary impact of the reforms.
- 2.22 On this basis, there may be an ongoing impact on court fee income from this proposal. Court fees for the small claims track are below those of the fast track, reflecting the lower amount of resources used for small claims. In 2010, around 4,500 specified money claims (see footnote to table 1 above) were allocated to the fast track with a case value between £5,000 and £10,000. Under the proposal these cases would fall within the small claims track. Here, they would attract a £40 small claims allocation fee rather than the current fast track allocation fee of £220. There are also hearing fees applied when cases reach court, with the relevant small claims hearing fees being around £300 per case cheaper on average (in total around £600 on average in the fast track, £300 in the small claims track), although a number of different charges can apply to cases depending on the nature of the case.
- 2.23 At the present time only 22% of cases with value between £5,000 and £10,000 in the fast track progress to a hearing, compared to 54% of cases with equivalent value in the small claims track. One key uncertainty is whether cases that move to the small claims track would be more likely to require a hearing as a result. If the 4,500 cases that move to the small claims track become more likely to reach a hearing (if the proportion of the 4,500 cases requiring a hearing rose from 22% to 54%), this would result in HMCTS fee income falling by around £600,000 per year in total. If however the proportion of these cases requiring a hearing did not change (remaining at 22%), this would result in a total reduction in fee income of around £1 million per year. This greater reduction in fee income follows as under this scenario, there would be no offsetting fee income associated with a higher number of (small claims) hearings.
- 2.24 Overall, it is unclear whether cases that switch tracks would be more likely to require a hearing. This will depend on a number of factors, including the response to the fact that small claims hearing fees are lower, small claims hearings are typically shorter and involve fewer judicial and legal resources, cost recovery in the small claims track is generally more limited, and small claims hearings typically happen closer to allocation, compared to fast track cases. As a **'high' estimate**, we have assumed that around 4,500 cases would move to the small claims track, and that there would be no increase in the volume of hearings needed, leading to **around a £1 million reduction in fees** per year.
- 2.25 These estimates are subject to further uncertainty as not all 4,500 cases would necessarily move to the small claims track, given judicial discretion would continue to be exercised when deciding the appropriate track. For example a £7,500 claim under the proposed changes may be issued as a small claim due to its value, but the judge reviewing the case papers at allocation may feel the issues involved are complex enough to warrant allocation to the fast track. As our **'low' estimate**,

we have assumed that none of the 4,500 cases would actually move to the small claims track, which is equivalent to assuming all 4,500 are complex enough to require the processes of higher value tracks, as determined through judicial discretion. Under this scenario, HMCTS would see **no change in fee income**.

- 2.26 In practice, it is expected that some cases will move to the small claims track as a result of the proposal. As the **central estimate**, we have taken the mid-point of the upper and lower estimates outlined above: a reduction in HMCTS income of around **£0.5 million per year**. In general, if fewer cases were allocated to the small claims track as a result of the proposal, the magnitude of the impacts identified would be lower. (Some cases with value above £10,000 may also move to the small claims track as a result of the proposal given greater judicial discretion will apply, although it is not expected that a significant number of cases would move.)
- 2.27 There is also a risk that the increase in the small claims track limit could impact on the level of judicial time and intervention to deal with cases formerly dealt with under the fast track process, due to an increase in litigants in person. The rules relating to recoverable costs for small claims differ greatly from those of the fast track and multi-track. In the fast and multi track successful parties are generally able to recover their costs, including the cost of legal representation from the unsuccessful party/parties. In the small claims track the costs that can be recovered from the other side are strictly limited. The proposal is likely to lead to an increase in parties acting as a litigant in person, without legal representation. However, evidence suggests that, on average, litigants in person do not generate increased operational cost for HMCTS.
- 2.28 HMCTS are not expected to face significant additional case allocation costs under the new proposals i.e. the same level of judicial discretion per case and in total will apply. Cases will be allocated to the appropriate track based on their value and complexity as now, but the proposal will make it easier for simple high value cases to be allocated to the small claims track.

#### *Claimants and Defendants*

- 2.29 The cost rules relating to recoverable costs for small claims differ greatly from those of the fast track and multi-track. In the fast and multi tracks the successful party is generally able to recover their costs, including the cost of legal representation, from the unsuccessful party. In the small claims track the costs that can be recovered from the other side are strictly limited. The proposal will therefore lead to an increase in the number of parties paying for many of their own legal costs. Winning parties would therefore be worse off if some costs are no longer recoverable.
- 2.30 In addition in the small claims track there is greater expectation that claimants and defendants would not use legal professionals and instead might represent themselves. This might generate a cost for claimants and defendants (although on average this is considered likely to be outweighed by the benefit of lower legal fees through not using legal professionals).
- 2.31 For those cases moved into the small claims track, claimants and defendants may perceive outcomes as less just given that fewer court, judicial and legal resources will be devoted to those cases, and customer satisfaction may fall. However, it is assumed that judicial discretion would mean only cases that can appropriately dealt with in the small claims track would be heard there. It is also assumed that the proposal would have no impact on case outcomes.

#### *Legal service providers*

- 2.32 There might be some minor one-off transition costs associated with familiarisation and awareness of the new limit, plus possible capacity adjustment costs. These are not expected to be significant.
- 2.33 Moving cases to the small claims track may create a reduction in the demand for professional legal services. In part, this may be due to the fact that some costs in the small claims track are not recoverable. In addition, the processes which apply to small claims track cases are different and are designed to require less professional legal input. We cannot monetise this reduction in demand as we do not have reliable information on representation in small claims cases or on the legal fees charged.

- 2.34 In general, any costs to legal service providers from reduced levels of business would be associated with gains to claimants and defendants who use, and pay for, these services.

#### *After The Event (ATE) insurers*

- 2.35 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by these proposals.
- 2.36 ATE insurance should be regarded in the same way as other services. A decrease in business for insurers, e.g. because lower risks are being covered, would be associated with a gain to those claimants or defendants who pay the insurance premium.
- 2.37 In the small claims track the costs that can be recovered from the other side are strictly limited. Therefore, the proposal is likely to result in a reduction in the amount of ATE insurance that is taken out overall, given the exposure to costs is likely to be much lower for litigants whose cases move to the small claims track. The total volume of cases is expected to remain unchanged following the proposal.

#### *Distributional costs*

- 2.38 Differences in cost recovery between the small claims track and the fast track mean that the winning party (claimant or defendant) is likely to be worse off than the losing party (claimant or defendant) when cases move to the small claims track, as the winning party would no longer be able to recover their legal costs from the losing party. It has been assumed that case outcomes would not be affected in aggregate. Winning claimants might gain at the expense of the other party in relation to the speed of payment if small claims case waiting times are shorter and if small claims case duration is shorter. In 2010 the average case duration in the small claims track was 31 weeks compared to an average of 54 weeks in the fast and multi-tracks.
- 2.39 No assumption has been made about whether the distributional implications for claimants, defendants and service providers is positive or adverse, i.e. whether there is a benefit to society from a claimant (who might be an individual) losing at the expense of a defendant (who might be an insurer). It is possible that both claimants and defendants might be individuals, businesses and possibly public sector bodies. Insurers are likely to be defendants only.

#### *Wider social and economic costs*

- 2.40 Wider social and economic costs are not anticipated given the assumptions adopted, in particular that case outcomes would remain the same, and that efficiencies may be reaped. The assumptions section below considers this in more detail.

#### **Benefits**

##### *HMCTS*

- 2.41 HMCTS should incur benefits in the form of reduced resource requirements in dealing with cases that move to the small claims track. The small claims track was designed to be less formal and allow people to resolve disputes themselves without professional legal representation and with little or no recoverable costs. Moving claims to the small claims track would lower the cost to HMCTS of dealing with these cases as fewer court and judicial resources are required to deal with small claims.
- 2.42 As explained in the costs section, on the basis of current fee levels and the assumptions adopted, this suggests HMCTS costs may fall by between £0 and £1 million per year, with a central estimate of around £0.5 million per year i.e. if HMCTS fee income falls as a result of the proposal, this is the result of an equivalent reduction in costs.
- 2.43 As explained in the costs section, HMCTS are expected to divert saved resources which would otherwise have been allocated to the cases which move to the small claims track to tackle waiting

times and backlogs in all tracks. As a result there should be no overall impact on HMCTS operational costs, nor on HMCTS overall cost recovery. However the fact that more cases are being processed by HMCTS would constitute an increase in the technical economic efficiency of HMCTS resources, as a more appropriate service (with reduced resource requirements) would be provided to some cases.

### ***Claimants and Defendants***

- 2.44 Claimants and defendants are expected to benefit from lower court fees as a result of this proposal. Subject to the risks and assumptions outlined in the costs section above, in aggregate claimants and defendants in cases that move to the small claims track may benefit from a reduction in fees of between £0 and £1 million per year, with a central estimate of around £0.5 million per year, based on current fee levels and the assumptions adopted. It is assumed that the proposal would have no aggregate impact on case outcomes or volumes. It is noted that fee levels may change in the future.
- 2.45 Claimants and defendants may also benefit if they are able to reach case resolution quicker as a result of the proposal, given cases in the small claims track typically take less time to be resolved. In 2010 the average case duration in the small claims track was 31 weeks, with the equivalent duration being 50 weeks for cases in the fast and multi-tracks. Claimants and defendants may also benefit from shorter hearing times as on average small claims hearings last around 80 minutes whilst the fast track hearing average is nearly four hours.
- 2.46 The overall costs of using legal professionals should also be lower in the small claims track compared to the fast track, as claimants and defendants may be better able or more likely to represent themselves. We cannot robustly monetise this benefit because legal fees are specific to each case and are typically confidential. As outlined above, the proposal would lead to claimants and defendants paying for many of their own legal costs. Losing parties would therefore be better off if some costs are no longer recoverable from them.

### ***Distributional benefits***

- 2.47 As explained above, no assumption has been made about whether the distributional implications for claimants, defendants and service providers is positive or adverse, e.g. whether there is a benefit to society from a claimant (who might be an individual) being made worse off at the expense of a defendant (who might be an insurer). It is possible that both claimants and defendants might be individuals, businesses and possibly public sector bodies. Insurers are likely to be defendants only.

### ***Equity (fairness)***

- 2.48 Quicker payment and quicker case resolution might be associated with increased equity.

### ***Wider social and economic benefits***

- 2.49 The proposals would be associated with increased resource efficiency, given the assumptions adopted. It is assumed that the proposals would lead to a more efficient case allocation and resolution processes, with no impact on case outcomes.

### ***Risks and assumptions***

- 2.50 It is assumed that HMCTS can redeploy resources flexibly between tracks with minimal transitional costs and that total HMCTS resources saved by some cases shifting to the small claims track from other tracks will be redeployed to addressing waiting times and backlogs in all tracks.
- 2.51 It is assumed that the HMCTS operating costs per case in each of the tracks will remain the same as now, hence court fees per case would remain the same. Related to this it is assumed that court fees are set to recover court costs. The combination of these assumptions is that HMCTS overall cost recovery should remain the same.

- 2.52 The proposal would bring more cases within the scope of the small claims track. At allocation, judges would continue to have the power to allocate complex low value cases to higher value tracks. It is assumed that this discretion means cases valued between £5,000 and £10,000 will continue to be allocated to the fast and multi tracks where appropriate. It is therefore assumed that there would be no impact on case outcomes. Instead, it is assumed that the proposals would generate a straight efficiency gain as comparable outcomes would be achieved with fewer overall resources for the cases that move to the small claims track. No changes to allocation costs are assumed to result from the proposal.
- 2.53 It is unclear how many cases will move to the small claims track as a result of the proposal, given judicial discretion will continue to apply and complex cases will continue to be allocated to higher value tracks where appropriate. The volume of cases moving to the small claims track that will require a hearing is also unknown, and a number of scenarios are presented (as set out in detail in the HMCTS costs section above). These factors will determine the magnitude of the impacts identified. The impacts may also be affected by future HMCTS fee changes: the estimates are based on current (2011) fee levels.
- 2.54 The proposal will also allow judicial discretion to move simple high value cases into the small claims track in future. However, it is assumed that revising the small claims financial limit is also important as this is likely to set court user expectations about the track their case is likely to proceed under. Given high value cases tend to be more complex and otherwise require higher value processes, it is not expected that a significant number of cases with value above £10,000 would move to the small claims track as a result of the proposal.
- 2.55 The analysis assumes that small claims track cases would be subject to the same rate of appeals as they are now.
- 2.56 It is assumed that the court and judicial resources allocated to a case are primarily driven by the track in which the case is proceeding under, rather than the nature of the case itself. This means that cases moving into the small claims track would require fewer court and judicial resources. Fees are set to cover costs, and are lower in the small claims track reflecting the lower level of court and judicial resources required to process and resolve small claims.
- 2.57 It is assumed that the proposal would have no impact on the underlying volume of cases being pursued through the civil courts overall. It is possible that claimants might be less willing to pursue cases given some legal costs are not recoverable in the small claims track. However the small claims track is designed to minimise the need to use legal professionals and once the probability of winning a case is taken into account, the expected legal costs for claimants might be lower as a result of cases moving to the small claims track. This might generate an increased volume of cases.

## One In One Out Position

- 2.58 The One-in, One-out (OIOO) rule means that no new primary or secondary UK legislation which imposes costs on business or civil society organisations can be brought in without the identification of existing regulations with an equivalent value that can be removed.
- 2.59 The proposal contained in this Impact Assessment relates to court rules and the way in which the courts allocate work.
- 2.60 We estimate the proposal would lead to a small net benefit to business as businesses that use the civil courts are expected to pay lower fees and receive quicker outcomes as a result of increasing the small claims track limit. While we have estimated the reduction in fee income, it is difficult to quantify the impact on businesses in total because we do not collect information on whether litigants are a business or not. The names of litigants are recorded but it is not clear if they involved in the case in a personal or business capacity. Gathering this information would require individual inspection of the paper court files for each case, which is not considered proportionate. For OIOO quantification purposes, we have attributed 50% of the identified court user impacts to businesses.

- 2.61 Some legal firms and other service providers may see reduced income as a result of the proposal but it is assumed that any losses in their income would in general be associated with gains to court users who may also be businesses.
- 2.62 In summary, the proposal is expected to reduce the overall costs of going to court and the impact for OIOO has been assessed as an OUT. We have attributed 50% of the identified impacts to businesses.

### **3. Specific Impact Tests**

#### *Equality Impact Assessment*

- 3.1 An Equality Impact Assessment Initial Screening has been completed and is attached at Annex 2.

#### *Competition Assessment*

- 3.2 We do not envisage any significant impacts on competition as a result of this proposal.

#### *Small Firms Impact Test*

- 3.3 As outlined above, the proposal is expected to benefit businesses that are litigants in an affected case. Some of these businesses are likely to be small businesses. However we do not collect data on whether litigants in cases are businesses or individuals, and as such it is difficult to assess the scale of the impact on businesses (including small businesses). For OIOO quantification purposes, we have attributed 50% of the identified court user impacts to businesses.

#### *Carbon Assessment and Other Environmental Impacts*

- 3.4 The proposal is not expected to have any significant impact on noise pollution, water pollution, air quality or any other environmental factor.

#### *Health Impact Assessment*

- 3.5 The proposal is not expected to have a significant impact on lifestyle or health and social care services.

#### *Human Rights*

- 3.6 The proposal is compliant with the Human Rights Act (1998).

#### *Justice Impact Test*

- 3.7 The proposal is not expected to have a significant impact on legal aid. Impacts on HMCTS are explained in the main body of the Impact Assessment.

#### *Rural Proofing*

- 3.8 The proposal is not expected to have a significant impact on rural communities.

#### *Sustainable Development*

- 3.9 The proposal is not expected to have a significant impact on sustainable development.