

BIS | Department for Business
Innovation & Skills

MERGER FEES

Impact Assessment

MARCH 2012

Title: Merger Fees IA No: BIS0334 Lead department or agency: Department for Business Innovation and Skills Other departments or agencies:	Impact Assessment (IA)		
	Date: 27/09/2011		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries: Taslim Dharssi (020 7215 6888)			

Summary: Intervention and Options	RPC: AMBER
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Cost of Preferred (or more likely) Option				
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
£0m	- £22.8m	£2.6m	No	NA

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

The fees charged to business for the regulatory clearance of mergers do not cover the full cost to the competition authorities of operating the merger regime. The shortfall is being met by general taxation. The aim of the merger regime is to prevent anti competitive mergers which benefits consumers. Businesses that notify their mergers and receive regulatory clearance also benefit from the certainty that their merger does not raise competition concerns and therefore will not be investigated at a later stage when integration has occurred. Given limited Government resource and at a time of deficit reduction, Government intervention is necessary to recoup a greater level of the costs of operating the merger regime from the merging parties that use the system and benefit from it.

What are the policy objectives and the intended effects?

The policy objective is to recoup a greater level of the costs incurred by the competition authorities in operating the merger regime thereby reducing the burden on general taxation, while limiting the impact on smaller mergers.

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

The following options were considered and consulted on in order to meet the policy objectives:

Option 1: Do nothing – The current level of fees would remain unchanged.

Option 2: Increase the level of fees payable within each of the three existing fee bands to achieve greater cost recovery.

Option 3: Increase existing merger fees and introduce an additional higher fee band for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million to achieve greater cost recovery.

Option 3 is the Government's preferred option as it achieves a greater level of cost recovery and requires larger companies to bear a greater burden of the reduced public subsidy as a result of increased fees.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2015

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 No	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A	Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Neal

Signed by the responsible SELECT SIGNATORY:

Date: 15 March 2012

Summary: Analysis & Evidence

Policy Option 1

Description: Increase existing merger fees and introduce an additional higher fee band for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million to achieve greater cost recovery.

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	2.1	17.7
High	0	3.2	27.6
Best Estimate	0	2.7	22.8

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

Introducing a new merger fee band and increasing the level of fees within the current fee bands to achieve greater cost recovery, based on a £9 million cost of merger control and assuming the number of mergers qualifying to pay a fee is the average of the past 3 years, is estimated to result in an additional cost to business of approximately £2.7 million per year. The low and high estimates are based on the lowest and highest number of mergers qualifying to pay fees in the last 3 years.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	2.1	17.7
High	0	3.2	27.6
Best Estimate	0	2.7	22.8

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

The Government will benefit from an increase in income from the increased merger fees. The additional benefit to Government is estimated at £2.7 million per year, equal to the additional cost to business as it is a transfer from business to Government. The low and high estimates are also equal to the low and high estimate of the additional cost to business.

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

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

It is assumed that merger control will cost £9 million per year over the coming years based on estimates from the OFT and CC. The number of mergers qualifying to pay fees within each of the fee bands is estimated using the average number of fee paying mergers in the last 3 years. The cost of merger control depends on the number of mergers investigated. There is a risk that the actual cost of merger control and the number of mergers qualifying to pay a fee will be different to the estimate and will therefore affect the level of cost recovery achieved. There is also a risk that increasing merger fees may deter merger notifications and have a chilling effect on merger activity, though it is also recognised that merging businesses will face many costs including legal, banking and investment services, restructuring of assets, marketing and rebranding - the merger fee will form a very small part of those costs.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 2.6	Benefits: 0	Net: -2.6	No	NA

Evidence Base (for summary sheets)

Problem under consideration

1. The fees charged to business for the regulatory clearance of mergers do not cover the full cost to the competition authorities of operating the merger regime. This shortfall is met by general taxation. The aim of the merger regime is to prevent anti competitive mergers, this benefits consumers. Businesses that notify their mergers and receive regulatory clearance also benefit from the certainty that their merger does not raise competition concerns and therefore will not be investigated at a later stage when integration has occurred.

Rationale for Intervention

2. Given limited Government resource and at a time of deficit reduction, Government intervention is necessary to recoup a greater level of the costs of operating the merger regime from the merging parties that use the system and benefit from it.

Policy Objective

3. The objective of the policy is to reduce the burden on the public purse that partially funds the operation of the merger regime, while limiting the impact on smaller mergers. HM Treasury's Fees, Charges and Guidance also states that Government policy is that the cost of regulating should be charged on the regulated and set at a level that achieves full cost recovery.

Description of options considered

4. The options identified at consultation stage were designed to achieve full cost recovery either by increasing the fees in the current fee bands or by increasing fees and introducing a new higher fee band. However, consultation responses noted that this would make merger fees in the UK higher than in any other EU Member State and argued that it fails to acknowledge that the merger regime delivers a public benefit as well as a service to businesses that 'use the system'. The options considered here to meet the policy objectives are the same with respect to the fee bands as those in the consultation document, but consider both an increased level of and full cost recovery.
 - Option 1: Do nothing – The current level of fees would remain unchanged.
 - Option 2: Increase the level of fees payable within each of the three existing fee bands to achieve full or a greater level of cost recovery.
 - Option 3: Increase the level of the fees payable within each of the existing fee bands and to introduce an additional fee band for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million to achieve full or a greater level of cost recovery.

Costs and benefits of each option

Option 1: Do nothing

5. Merger fees are levied on the acquirer, or the companies in the case of Joint Venture or equal mergers that file a merger notification to the OFT. The fee level is determined by the annual UK turnover of the target company. There are three bands which have not changed since their introduction in 1990. However, merger fees are not applied to Small or Medium Sized Enterprises as defined by the Companies Act 2006. The current fee levels are shown in table 1 below.

Table 1: Merger fees

Value of the UK turnover of the enterprise being acquired	Current fees (from October 2009)
Below £20m	£30k
Between £20m - £70m	£60k
Above £70m	£90k

Source: OFT

6. The cost of operating the merger regime varies from year to year due to the fluctuation in the number of investigations conducted by both the OFT and CC, which in turn partly depends on the level of merger activity in the UK economy. The UK's voluntary notification regime provides a degree of discretion for business in deciding whether to seek merger clearance. As the regime matures and businesses become more familiar with the regime, businesses can better assess whether they need to notify a merger. This, in general, will lead to reducing merger notifications over time. The total cost of merger control includes both direct and indirect costs, such as overheads which the OFT and the CC allocate based on the amount of time devoted to merger control as opposed to their other regulatory and administrative functions.
7. Over the last few years the number of cases qualifying to pay merger fees has decreased due to the reduction in merger activity in the UK economy as a result of economic conditions and greater familiarity with the regime. Developing case law and previous OFT and CC decisions have made it easier for business and legal practitioners to determine whether a merger is likely to raise competition concerns and therefore more companies are able to use their discretion in deciding whether to seek prior clearance. These factors have resulted in the number of mergers being investigated and therefore liable to pay a fee, falling from 87 in 2007/08 to 63 in 2010/11 as shown in table 3 below. The graph below shows the number of mergers qualifying to pay a fee since 2004/05.

Graph 2: Number of fee paying mergers

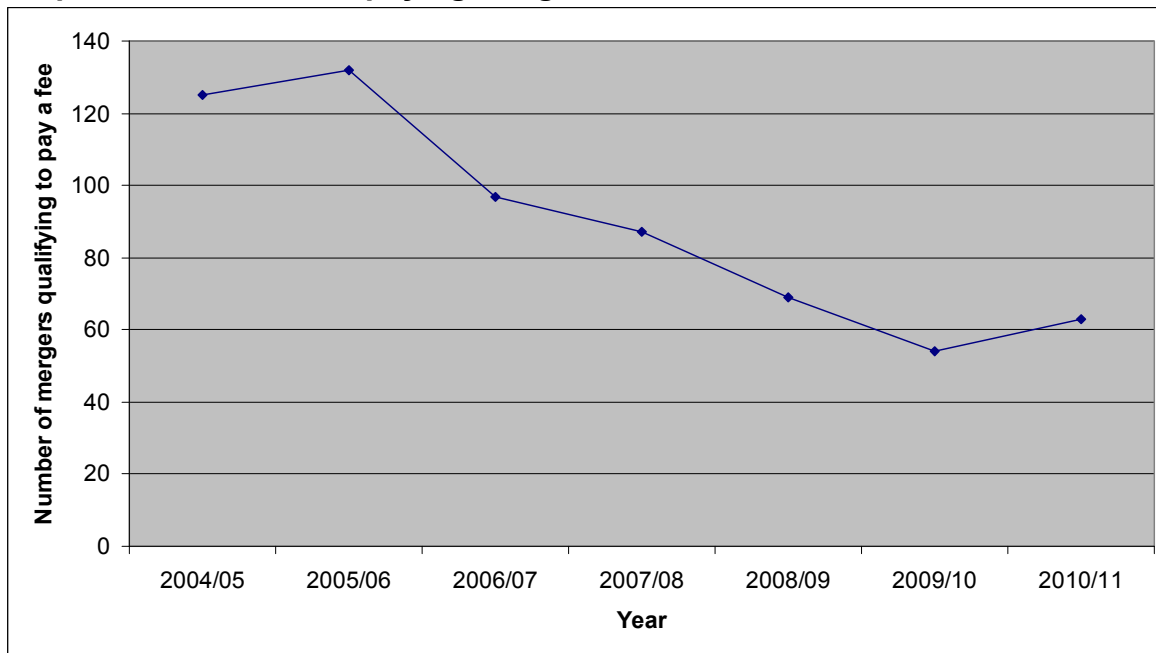


Table 3: Number of fee paying mergers by fee band

Value of the UK turnover of the enterprise being acquired	Number of cases 2008/09	Number of cases 2009/10	Number of cases 2010/11	Average
< £20m	32	26	28	29
£20m - £70m	17	10	15	14
£70m - £120m	6	7	8	7
> £120m	14	11	12	12
Total number of cases	69	54	63	62

Source: OFT

8. The fee increases applied in April 2006 were intended to achieve the full cost recovery of operating the merger regime, but generally this did not turn out to be the case. The main reason for this was a significant fall in the total number of mergers qualifying to pay a fee as a result of reduced merger activity and perhaps increased familiarity with the regime which meant more companies chose not to notify or businesses were seeking to avoid paying the fee.
9. Table 4 below shows cost recovery for merger control from 2008/09 to 2010/11. The total income from fees is approximately £2.4 million per year.

Table 4: Baseline cost recovery

	2008/09	2009/10	2010/11	Average
Total cost of Merger control	£10.6m	£9.0m	£4.1m	£7.9m
Income from fees	£1.9m	£1.7m	£3.5m	£2.4m
Deficit	£8.7m	£7.3m	£0.6m	£5.5m
Percentage of cost recovery	18%	19%	86%	41%

Source: OFT MTA and CC

10. Under the do nothing option, current merger fees would not change. The average cost recovery for the last 3 years is 41%. This average is skewed upwards by the 2010/11 financial year. 2010/11 was a very unusual year where cost recovery of 86% was achieved largely because there were only two phase 2 investigations by the Competition Commission (phase 2 investigations form a larger proportion of the regime's cost). Past experience would suggest that it would be more likely to have around 6 phase 2 investigations per year¹. Between April and August 2011 there have already been 3 references to Phase 2. Therefore if merger fees were kept at the same level we would expect cost recovery to be nearer the levels in 2008/9 and 2009/10 (around 20%) and the shortfall would need to continue to be met by the public purse. This option is therefore very unlikely to meet the policy objectives of increasing cost recovery in the coming years and therefore is not the Government's preferred option.

Option 2: Increase the level of fees payable within each of the three existing fee bands to achieve full or a greater level of cost recovery.

11. For the purposes of assessing cost recovery requirements, the OFT and CC estimate that the total annual cost of the merger control regime is likely to be in the region of £9m (£3m OFT and £6m CC) in coming years. We have used the average number of mergers qualifying to pay merger fees within each fee band in the past 3 years to estimate the amount of costs that would be recovered by the different options. Whilst the merger regime as operated under the Enterprise Act 2002 has been operating since 2003, its use by business and legal practitioners has changed to reflect decisions made and published and experience of its operation. In essence, fewer mergers are notified as the regime matures through experience of its operation and previous decisions on record. Therefore, the average number of fee paying mergers over the past 3 years has been used as the recent past is considered to be a more representative predictor of the future number of fee paying mergers, but given any one year may be an anomaly, an average of 3 years is used.

12. Increasing fees to £45k, £90k and £130k (£79k, £158k and £237k), within the existing fee bands, given the estimated number of mergers qualifying in each fee band would achieve a greater level of cost recovery. Based on the last three years data, this revised level of fee would achieve around 60% (100%) cost recovery, based on a £9 million cost of merger control. The proposed fee increase, which would set the UK's merger fee at the highest rate amongst the developed world jurisdictions, will also maintain a consistent and sensible gap between each of the turnover levels. The total cost to business from such fee increases is approximately £5 million to £9 million per year for the different fee levels presented. Therefore the additional cost to business is estimated at approximately

¹ The number of references to Phase 2 was 10 in 2007/08, 8 in 2008/09 and 7 in 2009/10.

£2.7 million to £6.6 million for the different fee levels respectively. This is a transfer from business to Government.

Table 5: Option 2 proposed merger fees

Value of the UK turnover of the enterprise being acquired	Number of cases	Proposed level (around 60% cost recovery)	Proposed level (approx. 100% cost recovery)
Below £20m	29	£45k	£79k
Between £20m - £70m	14	£90k	£158k
Above £70m	19	£130K	£237k

13. The benefit of this option is to increase the level of cost recovery, therefore meeting the policy objective. In addition, this option maintains the simplicity of the current fee bands.

Option 3: Increase the level of fees within the existing fee bands and introduce an additional fee band for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million to achieve full or a greater level of cost recovery.

14. Again, under this option it is estimated that the total cost of merger control will be around £9 million over the coming years and we have used the average number of mergers qualifying to pay merger fees within each fee band in the past 3 years, to estimate the amount of costs that would be recovered by the different options.

15. Increasing fees to £40k, £80k and £120k within the current fee bands and introducing a fee of £160k for a new higher fee band, where the value of the UK turnover of the enterprise being acquired exceeds £120 million, would achieve a greater level of cost recovery, again estimated to be around 60% cost recovery based on data from the last 3 years and a £9 million cost of merger control. The total cost to business from such fee increases is approximately £5.0 million. To achieve full cost recovery of about £9 million, within the existing fee bands and introducing a new higher fee band would mean an increase in fees to £71k, £142k and 213k and the new higher fee band attracting a fee of £284k. Therefore the additional income from business from such fee increases is estimated at approximately £2.7 million fee bands £40K, £80K, £120K and £160K to £6.6M for the £71K, 3142K, £213K and £284K fee bands. This cost is a transfer from business to Government.

16. The consultation document published on 16th March 2011² proposed a fee increase designed to achieve full cost recovery. However, a number of responses to the consultation noted that the proposals to achieve full cost recovery would set the UK's merger fees higher than any other of the EU Member States and those charged by the US merger regime. The EU commission does not charge merger fees. Some respondents argued that as mergers involving larger companies were more likely to be notifiable to the European Commission it would mean the UK fees would fall disproportionately on smaller companies. Annex A shows the merger fees of other jurisdictions.

17. Business also disputed the principle that merger control should be funded fully through merger fees. They argued that the cost of merger control should be borne primarily by the Government as the regime does not provide a service to the parties of a merger but rather a service to society and it is the general public (through a more competitive

² <http://www.bis.gov.uk/Consultations/competition-regime-for-growth>

economy). Business also argued that a substantial increase in merger fees would lead to a chilling effect on merger activity and a substantial regulatory burden on business that would go against the growth agenda. There is some suggestion that when merger fees increased threefold in 2006/07, the number of notifications fell, although there are many other drivers that affect the number of notifications.

Table 6: Option 3 proposed merger fees

Value of the UK turnover of the enterprise being acquired	Number of cases	Proposed level (around 60% cost recovery)	Proposed level (approx. 100% cost recovery)
Below £20m	29	£40k	£71k
Between £20m - £70m	14	£80k	£142k
Between £70m - £120m	7	£120K	£213k
Above £120m	12	£160k	£284k

18. All enterprises would be required to contribute more. Introducing a new band however, would result in larger companies paying fees at levels which ensure that they do not benefit disproportionately from public subsidy.
19. The advantage of pursuing a greater level of cost recovery as opposed to full cost recovery is that it avoids the risk of over-charging. Further, under voluntary merger notification, pursuing full cost recovery would mean only businesses that 'use the system' would pay for the whole regime which also benefits the wider economy. Increasing merger fees to achieve a greater level of cost recovery increases the contribution of businesses that use the system, while acknowledging that merger control benefits the economy and society in general. The OFT's positive impact report estimated that UK merger control delivered direct benefits to consumers of £127 million per year on average over the period 2008 to 2011. Mergers that are notified to the OFT represent only around 10% of all mergers in the UK economy and there is an argument that these mergers should not have to bear the full cost of the system. However, businesses that voluntarily notify benefit from the certainty of not being called in by the OFT later when they have integrated. Therefore businesses are willing to pay, to some extent, for this certainty.
20. Full cost recovery would involve a substantial increase in the financial burden on mergers investigated by the competition authorities and may in the current economic climate go against the Government's growth agenda. It could have a chilling effect on merger activity – though the exact impact is difficult to predict. Crucially, though, any chilling activity will not discriminate against mergers that do add value and those that don't and therefore could deter pro-competitive, value adding mergers. Empirical evidence suggests that smaller mergers are more likely to create value and therefore introducing a new higher fee band would avoid deterring those mergers which are more likely to be potentially value creating³.
21. In addition, increasing merger fees to the level necessary to achieve full cost recovery may encourage companies not to notify mergers. This may weaken the current voluntary notification regime making mergers harder to identify. There is some suggestion that in 2006/07, when merger fees increased, the number of notifications fell in response, although there are many other drivers that affect the number of notifications including the level of merger activity in the economy. In addition, merging parties will face a range of costs such as legal, investment and banking services, restructuring of assets and transfer

³ Research commissioned by BIS from CASS Business School.

of personnel, marketing and rebranding. The merger fee will form a very small part of those costs. Some would argue that this suggests that an increase in merger fees would have a limited chilling affect on merger activity.

22. A smaller increase in merger fees, to increase the level of cost recovery is likely to have fewer unintended consequences and is therefore the Government's preferred option. Introducing a new fee band means larger companies bearing a greater burden of the fee increases and is therefore also the Government's preferred option.

Other options considered

23. The options available for merger fees were last examined in 2005, and following public consultation the previous administration concluded that the existing three fee bands remained appropriate, providing an appropriate level of differentiation between smaller and larger mergers.
24. A single flat fee for all qualifying mergers considered by the competition authorities was considered during public consultation in 2005. A single flat fee would provide clarity to the acquirer of the costs involved, and a simple charging structure for the OFT to administer. However, the previous administration concluded that removing all differentiation between the fee payable when acquiring a smaller and when acquiring a larger enterprise could place disproportionate costs on smaller mergers and may discourage some smaller transactions. Therefore this option is not being considered again.
25. A separate fee that is applicable to those mergers that are referred to the CC for a phase 2 investigation was also considered during consultation in 2005. However, the previous administration concluded that this would introduce greater complexity and uncertainty about the costs to be incurred. Further, it might jeopardise the economic rationale of some mergers that are referred – with the possibility of more cases being abandoned at reference stage. Further, it might also be deemed unfair – particularly in cases where a merger is subsequently cleared, as it penalises mergers simply because they appear capable of giving rise to competition concerns as they involve enterprises that operate in similar markets. Therefore this option is also not considered further.

Stakeholder Views

26. As already noted business respondents to the consultation were against the proposed increase in merger fees and argued that UK merger fees were already high compared to other countries.
27. Business also questioned the robustness of Government's estimates of the cost of merger control as the costs varied year on year. They expressed concern that our estimate of £9 million was too low and therefore the actual mergers fees needed to give full costs recovery would be higher than that proposed in the consultation document.
28. Only a few respondents questioned whether there was a better method of calculating fees for example on the basis of the complexity of the case or levying an additional fee for phase 2 cases.

One In One Out

29. The preferred option will involve a transfer from business to Government. However, this is out of scope of OIOO. According to the OIOO methodology fees and charges are out of scope except where they result from an expansion or reduction in the level of

regulatory activity. Given that the additional cost to business is the result of the rise in merger fees and not the level of regulatory activity, it is out of scope of OIOO.

Microbusiness exemption

30. SME's, as defined by the Companies Act 2006, and microenterprises are exempt from merger fees.

Summary

31. The Government's preferred option is to pursue option 3 which will result in an increased level of cost recovery by increasing fees from the current level and introducing a new fee band. This would achieve the policy objective of increasing the level of cost recovery, while larger companies would take on more of the burden of the increased fees.

Annexe A

Table A.1: Merger fees in jurisdictions which have a greater GDP and lower merger filing fees than the UK

Country	GDP (adjusted for PPP) ⁴ \$million	Filing fees
EU	15,170,419	None
United States	14,657,800	Fees are as follows: <ul style="list-style-type: none"> • transaction value of US\$66 million or greater but below US\$131.9 million = US\$45,000 fee; (approx £27,000) • transaction value of US\$131.9 million or greater but below \$659.5 million = US\$125,000 fee; (approx £76,000) • value of \$659.5 million or greater= US\$280,000 fee (approx £170,000)
China	10,085,708	None
Japan	4,309,432	None
Germany	2,940,434	A filing fee of up to €50,000 (approx £45,000)
Russia	2,222,957	A filing fee of 20 000 roubles (approx £400) applicable only to transactions that require Pre-Transaction Filing. No filing fees for a Post-Transaction Filing.

⁴ International Monetary Fund, 2010. PPP is Purchasing Power Parity which takes into account the cost of living / inflation differences to produce a more accurate figure.

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