

|  |   |  |  |                                       |
|--|---|--|--|---------------------------------------|
| <b>Title:</b> UK Implementation of the EU Damages Directive (2014/104/EU)<br><b>IA No:</b> BISCCP004<br><b>RPC Reference No:</b><br><b>Lead department or agency:</b><br>Department for Business, Innovation and Skills<br><b>Other departments or agencies:</b> | <b>Impact Assessment (IA)</b>                 |  |  |                                       |
|  | <b>Date:</b> 23/09/2016                       |  |  |                                       |
|  | <b>Stage:</b> Final                           |  |  |                                       |
|  | <b>Source of intervention:</b> Domestic       |  |  |                                       |
|  | <b>Type of measure:</b> Secondary legislation |  |  |                                       |
| <b>Contact for enquiries:</b><br>alex.shirvani@beis.gov.uk   |   |  |  |                                       |
| <b>Summary: Intervention and Options</b>   |   |  |  | <b>RPC Opinion:</b> Awaiting Scrutiny |

| Cost of Preferred (or more likely) Option |                            |   |                            |                               |
|---|----------------------------|---|----------------------------|-------------------------------|
| Total Net Present Value                   | Business Net Present Value | Net cost to business per year (EANDCB in 2014 prices) | One-In, Three-Out In scope | Business Impact Target Status |
| £83.9m                                    | £11.3m                     | -£1.3m  |                            | Qualifying provision          |

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

Anticompetitive behaviour from firms results in harm for other firms and consumers. Legislation to allow parties to pursue private actions for damages allows redress for harm suffered. The legal framework for taking private actions for damages resulting from infringements of EU competition law varies across Member States, leading to uncertainty concerning conditions under which injured parties can pursue private actions. The Damages Directive harmonises national rules on private actions in damages, levelling the playing field and making it easier to take private damages actions for antitrust infringements across Europe.

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

To allow consistent access to redress for breaches of competition law across all EU Member States.

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

- Do nothing: risk infraction from the European Commission.
- Implement the Directive in December 2016 and operate a “dual regime” where the changes do not apply to cases that are in scope of UK competition law but not EU competition law.
- Implement the Directive with a “dual regime” early, in October 2016.
- Implement the Directive in December 2016 and operate a “single regime” where the changes are extended to apply to existing UK competition law (gold-plating).
- Implement the Directive with a “single regime” early, in October 2016.

|  |  |  |                                       |                     |
|--|--|--|---------------------------------------|---------------------|
| <b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 10/2020                |  |  |                                       |                     |
| Does implementation go beyond minimum EU requirements?   |  |  | Yes                                   |                     |
| Are any of these organisations in scope?   |  |  | <b>Micro</b><br>Yes                   | <b>Small</b><br>Yes |
|  |  |  | <b>Medium</b><br>Yes                  | <b>Large</b><br>Yes |
| What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent) |  |  | <b>Traded: 0</b> <b>Non-traded: 0</b> |                     |

*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.*

**Signed by the responsible Minister:**  **Date:** 28.11.2016

# Summary: Analysis & Evidence

Policy Option 1

Description:

## FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2016 | PV Base<br>Year 2016 | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m) |           |                    |
|-------------------------|----------------------|-------------------------|---------------------------------------|-----------|--------------------|
|                         |                      |                         | Low: 0.0                              | High: 0.0 | Best Estimate: 0.0 |

| COSTS (£m)    | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Cost<br>(Present Value) |
|---------------|--|---|-------------------------------|
| Low           | 0.0  | 0.0   | 0.0                           |
| High          | 0.0  | 0.0   | 0.0                           |
| Best Estimate | 0.0  | 0.0   | 0.0                           |

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

No monetised costs as this represents the status quo.

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

The UK would be at risk of infraction from the European Commission.

| BENEFITS (£m) | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Benefit<br>(Present Value) |
|---------------|--|---|----------------------------------|
| Low           | 0.0  | 0.0   | 0.0                              |
| High          | 0.0  | 0.0   | 0.0                              |
| Best Estimate | 0.0  | 0.0   | 0.0                              |

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

No monetised benefits as this represents the status quo.

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

No monetised benefits as this represents the status quo.

|                                     |                   |     |
|-------------------------------------|-------------------|-----|
| Key assumptions/sensitivities/risks | Discount rate (%) | 3.5 |
|-------------------------------------|-------------------|-----|

## BUSINESS ASSESSMENT (Option 1)

|   |               |          |   |
|---|---------------|----------|---|
| Direct impact on business (Equivalent Annual) £m: |               |          | Score for Business Impact Target (qualifying provisions only) £m: |
| Costs: 0.0  | Benefits: 0.0 | Net: 0.0 |   |
|   |               |          | 0.0   |

# Summary: Analysis & Evidence

# Policy Option 2

Description: Dual Regime, December 2016 implementation (minimum implementation, no gold plating)

## FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2016 | PV Base<br>Year 2016 | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m) |             |                     |
|-------------------------|----------------------|-------------------------|---------------------------------------|-------------|---------------------|
|                         |                      |                         | Low: 0.0                              | High: 111.9 | Best Estimate: 55.9 |

| COSTS (£m)    | Total Transition<br>(Constant Price)<br>Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Cost<br>(Present Value) |
|---------------|---|---|-------------------------------|
| Low           | Optional                                      | Optional  | Optional                      |
| High          | Optional                                      | 4.2   | 36.6                          |
| Best Estimate | 0.0   | 2.1   | 18.3                          |

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

Small increased caseload to the courts, leading to an annual net cost of around £17,000. Annual legal costs to firms involved in private actions cases of around £2.1m. Under the "loser pays" principle of UK law, these costs fall on businesses that are either non-compliant with existing competition law or have unsuccessfully brought private actions cases.

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

Uncertainty associated with using a dual regime system, as prior to taking a case, parties would need to establish whether the case was in scope of EU or UK competition law. Potential satellite litigation to establish which regime applied in advance of hearing a cases. Familiarisation costs with two sets of (slightly) differing legal regimes.

| BENEFITS (£m) | Total Transition<br>(Constant Price)<br>Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Benefit<br>(Present Value) |
|---------------|---|---|----------------------------------|
| Low           | 0.0   | 0.0   | 0.0                              |
| High          | 0.0   | 17.2  | 148.4                            |
| Best Estimate | 0.0   | 8.6   | 74.2                             |

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

Access to redress of harm for firms (and consumers) suffering detriment from breaches of competition law, worth annual benefit of £0.98m. Potential benefits from deterrence, lower pricing and deadweight of £7.65m.

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

|                                     |                   |     |
|-------------------------------------|-------------------|-----|
| Key assumptions/sensitivities/risks | Discount rate (%) | 3.5 |
|-------------------------------------|-------------------|-----|

Key assumption is that there will be a 2.5 per cent increase in the increase in caseload as a result of implementing the Directive.

## BUSINESS ASSESSMENT (Option 2)

|   |               |          |   |
|---|---------------|----------|---|
| Direct impact on business (Equivalent Annual) £m: |               |          | Score for Business Impact Target (qualifying provisions only) £m: |
| Costs: 0.0  | Benefits: 0.8 | Net: 0.8 |   |
|   |               |          | -4.0  |

# Summary: Analysis & Evidence

# Policy Option 3

Description: Dual Regime, October 2016 implementation

## FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2016 | PV Base<br>Year 2016 | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m) |             |                     |
|-------------------------|----------------------|-------------------------|---------------------------------------|-------------|---------------------|
|                         |                      |                         | Low: 0.0                              | High: 114.0 | Best Estimate: 57.0 |

| COSTS (£m)    | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Cost<br>(Present Value) |
|---------------|--|---|-------------------------------|
| Low           | 0.0  | 0.0   | 0.0                           |
| High          | 0.0  | 4.3   | 37.3                          |
| Best Estimate | 0.0  | 2.2   | 18.6                          |

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

Small increased caseload to the courts, leading to an annual net cost of around £17,000. Annual legal costs to firms involved in private actions cases of around £2.1m. Under the "loser pays" principle of UK law, these costs fall on businesses that are either non-compliant with existing competition law or have unsuccessfully brought private actions cases. Due to implementation 2 months earlier, there would be a small increase in costs in the first year of around £3,000 to the courts and £0.35m in legal costs to firms.

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

Uncertainty associated with using a dual regime system, as prior to taking a case, parties would need to establish whether the case was in scope of EU or UK competition law. Potential satellite litigation to establish which regime applied in advance of hearing a cases. Familiarisation costs with two sets of (slightly) differing legal regimes.

| BENEFITS (£m) | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Benefit<br>(Present Value) |
|---------------|--|---|----------------------------------|
| Low           | 0.0  | 0.0   | 0.0                              |
| High          | 0.0  | 17.5  | 151.3                            |
| Best Estimate | 0.0  | 8.8   | 75.7                             |

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

Access to redress of harm for firms (and consumers) suffering detriment from breaches of competition law, worth annual benefit of £0.98m. Potential benefits from deterrence, lower pricing and deadweight of £7.65m. Due to implementation 2 months earlier, there would be an increase in benefits in the first year of around £0.17m in redress and £1.27m in terms of deterrence, lower pricing and deadweight.

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

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Key assumption is that there will be a 2.5 per cent increase in the increase in caseload as a result of implementing the Directive.

## BUSINESS ASSESSMENT (Option 2)

|   |               |          |   |
|---|---------------|----------|---|
| Direct impact on business (Equivalent Annual) £m: |               |          | Score for Business Impact Target (qualifying provisions only) £m: |
| Costs: 0.0  | Benefits: 0.9 | Net: 0.9 |   |
|   |               |          | -4.5  |

# Summary: Analysis & Evidence

# Policy Option 4

Description: Single regime, December 2016 implementation [preferred option]

## FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2016 | PV Base<br>Year 2016 | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m) |             |                     |
|-------------------------|----------------------|-------------------------|---------------------------------------|-------------|---------------------|
|                         |                      |                         | Low: 0.0                              | High: 167.8 | Best Estimate: 83.9 |

| COSTS (£m)    | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Cost<br>(Present Value) |
|---------------|--|---|-------------------------------|
| Low           | 0.0  | 0.0   | 0.0                           |
| High          | 0.0  | 6.4   | 54.9                          |
| Best Estimate | 0.0  | 3.2   | 27.4                          |

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

Small increased caseload to the courts, leading to an annual net cost of around £26,000. Annual legal costs to firms involved in private actions cases of around £3.2m. Under the "loser pays" principle of UK law, these costs fall on businesses that are either non-compliant with existing competition law or have unsuccessfully brought private actions cases.

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

| BENEFITS (£m) | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Benefit<br>(Present Value) |
|---------------|--|---|----------------------------------|
| Low           | 0.0  | 0.0   | 0.0                              |
| High          | 0.0  | 25.9  | 222.7                            |
| Best Estimate | 0.0  | 12.9  | 111.3                            |

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

Access to redress of harm for firms (and consumers) suffering detriment from breaches of competition law, worth annual benefit of £1.46m. Potential benefits from deterrence, lower pricing and deadweight of £11.47m.

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

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Key assumption is that there will be a 3.75 per cent increase in the increase in caseload as a result of implementing the Directive. Maximum of 5 lines

## BUSINESS ASSESSMENT (Option 3)

|   |               |          |   |
|---|---------------|----------|---|
| Direct impact on business (Equivalent Annual) £m: |               |          | Score for Business Impact Target (qualifying provisions only) £m: |
| Costs: 0.0  | Benefits: 1.3 | Net: 1.3 |   |
|   |               |          | -6.5  |

# Summary: Analysis & Evidence

# Policy Option 5

Description: Single regime, October 2016 implementation

## FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2016 | PV Base<br>Year 2016 | Time Period<br>Years 10 | Net Benefit (Present Value (PV)) (£m) |             |                     |
|-------------------------|----------------------|-------------------------|---------------------------------------|-------------|---------------------|
|                         |                      |                         | Low: 0.0                              | High: 171.0 | Best Estimate: 85.5 |

| COSTS (£m)    | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Cost<br>(Present Value) |
|---------------|--|---|-------------------------------|
| Low           | 0.0  | 0.0   | 0.0                           |
| High          | 0.0  | 6.5   | 55.9                          |
| Best Estimate | 0.0  | 3.2   | 28.0                          |

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

Small increased caseload to the courts, leading to an annual net cost of around £26,000. Annual legal costs to firms involved in private actions cases of around £3.2m. Under the "loser pays" principle of UK law, these costs fall on businesses that are either non-compliant with existing competition law or have unsuccessfully brought private actions cases. Due to implementation 2 months earlier, there would be a small increase in costs in the first year of around £4,000 to the courts and £0.53m in legal costs to firms.

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

| BENEFITS (£m) | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition) (Constant Price) | Total Benefit<br>(Present Value) |
|---------------|--|---|----------------------------------|
| Low           | 0.0  | 0.0   | 0.0                              |
| High          | 0.0  | 26.3  | 227.0                            |
| Best Estimate | 0.0  | 13.1  | 113.5                            |

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

Access to redress of harm for firms (and consumers) suffering detriment from breaches of competition law, worth annual benefit of £1.46m. Potential benefits from deterrence, lower pricing and deadweight of £11.47m. Due to implementation 2 months earlier, there would be an increase in benefits in the first year of around £0.24m in redress and £1.91m in terms of deterrence, lower pricing and deadweight.

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

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Key assumption is that there will be a 3.75 per cent increase in the increase in caseload as a result of implementing the Directive. Maximum of 5 lines

## BUSINESS ASSESSMENT (Option 4)

|   |               |          |   |
|---|---------------|----------|---|
| Direct impact on business (Equivalent Annual) £m: |               |          | Score for Business Impact Target (qualifying provisions only) £m: |
| Costs: 0.0  | Benefits: 1.3 | Net: 1.3 |   |
|   |               |          | -6.5  |

# Impact Assessment

## Background and problem under consideration

### Problem being addressed

1. When businesses engage in anti-competitive practices it often leads to harm for other businesses or consumers. Competition law exists to take action against businesses carrying out anti-competitive practices, and the option to pursue private actions for damages allows the prospect of redress for injured parties.
2. In the Consumer Rights Act 2015 (CRA), the Government made a number of amendments to make it easier for parties, particularly smaller businesses and individuals, to bring private actions in the UK. This included measures to widen the jurisdiction of the Competition Appeals Tribunal (CAT) to hear stand-alone claims in addition to follow-on claims<sup>1</sup>; making it easier to bring collective proceedings on behalf of multiple parties (for instance a party acting on behalf of consumers); and a voluntary redress scheme as a form of alternative dispute mechanism.
3. When there is a dispute between parties trading between Member States of the European Union (EU), the case is in scope of EU competition law. However, the differences between the rules in Member States governing actions for damages for infringements of EU or national competition law lead to uncertainty concerning the conditions under which injured parties can pursue private actions. Injured parties often pursue private actions in their own Member State, meaning the discrepancies between national rules lead to an uneven playing field regarding private actions for damages and may affect competition on the markets in which the injured parties and those carrying out anti-competitive practices operate.
4. The intention of the Damages Directive<sup>2</sup> is to make it easier for injured parties to obtain compensation for harm suffered by infringing businesses across the EU, by introducing minimum standards for antitrust damages actions which all Member States are required to meet. In many respects the provisions of the Directive mirror existing provisions of the UK law, but the UK will extend a small number of provisions in order to implement the Directive.
5. The Government ran a consultation on implementing the Directive from January to March 2016<sup>3</sup>. The consultation received 26 responses from a range of stakeholders, including practicing competition lawyers, regulators, the Competition and Markets Authority, consumer representative bodies and individuals. The consultation responses revealed support for the UK implementing the Damages Directive on the Common Commencement Date of December 2016.
6. The consultation responses, in addition to internal legal advice, suggested that existing UK law satisfied many of the Directive requirements, with only minor changes required to demonstrate to the European Commission that the UK has fully implemented the

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<sup>1</sup> Follow-on claims happen where an infringement of competition law has already been established, stand-alone claims require the party bringing the action to prove infringement

<sup>2</sup> [http://ec.europa.eu/competition/antitrust/actionsdamages/damages\\_directive\\_final\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf)

<sup>3</sup> <https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive>

Directive<sup>4</sup>. We will, therefore, not be following the full copy out approach as set out in the consultation. We have decided, instead, only to legislate in those areas where we believe there are not already sufficient provisions in UK legislation or common law. In particular, this means that we will no longer legislate for all of the provisions relating to:

- Disclosure of evidence;
- The passing-on defence;
- The quantification of harm; and
- The suspensive effect of consensual resolution.

7. The consultation also revealed support for implementing the Directive through a 'single regime' which would involve extending the requirements of the Directive into domestic UK law to avoid the complications of running a dual system. The implications of this are explained further in paragraphs 14 to 18 and paragraph 44.
8. This Impact Assessment considers the implications of implementing the Damages Directive in to UK law. The consultation invited views<sup>5</sup> from respondents on a development stage Impact Assessment published alongside the consultation<sup>6</sup>. No consultation responses challenged the assumptions covered in the development stage Impact Assessment, which had been largely drawn from an earlier Green-rated Impact assessment for changes to private actions as part of the CRA<sup>7</sup>. The Competition Appeal Tribunal is the primary court for hearing competition cases in the UK. We tested our assumptions with the CAT (as experts in this field) and BEIS internal legal advisors.

## **2016 EU referendum**

9. On 23 June 2016, a referendum took place on the UK's membership of the European Union and the people of the United Kingdom voted to leave. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU. The assumptions used in this Impact Assessment have been chosen accordingly.

## **Regulatory changes required in implementing the Directive**

10. Implementing the Directive involves some changes to the way in which damages claims for competition infringements are treated. These changes are small because most of the requirements of the Directive already exist in UK law.

## **Legal presumption of harm**

11. There will now be a legal presumption of harm in a cartel. This could encourage a higher number of cases to be taken as the evidentiary burden of proof on claimants is reduced.

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<sup>4</sup> These include provisions relating to disclosure of information, passing-on defence, quantification of damages, joint and several liability and consensual dispute resolution.

<sup>5</sup> Paragraph 7.22 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf)

<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/493269/BIS-16-82-impact-assessment-damages-directive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493269/BIS-16-82-impact-assessment-damages-directive.pdf)

<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69124/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69124/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf)



However, this is a minor change as under current UK law the available evidence must be used to establish the level of harm and hence set the level of damages, and the same evidence will be used to set the level of damages under the proposed changes (and the defendant can still rebut the evidence); it therefore seems unlikely in practice that this is a significant legal change. It is possible that this will marginally increase the likelihood of damages being awarded compared to under the current UK law, meaning that it is possible that a higher number of cases will be heard.

### **Passing on defence**

12. The principle of the “passing on” defence means that if a cartel member overcharges a purchaser, and that purchaser then passes on the entire overcharge to another purchaser, the cartel member will have a defence. Whilst the principle of a “passing on” defence has never been established in a court case in the UK, it is likely that if an appropriate case were to be heard under the current law that it would be established following the normal principles of the law of tort.

### **Disclosure**

13. Whistle-blowers will be completely protected from disclosure of their leniency statement. Under current law, the leniency statement can only be released if the interest in release outweighs the public interest in non-release. This will not lead to additional costs.

### **Limitation periods**

14. The new directive stipulates when the start of the limitation periods is calculated. The directive requires it to run from when the claimant knows, or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law, the fact the infringement caused harm and the identity of the infringer. At present, the limitation period for cases in the High Court of England and Wales and the CAT runs from when the infringement took place, or for cases which section 32 of the Limitation Act 1980 applies, which may include cartel cases, when the claimant has sufficient information to bring the case. This means that in some cases, the limitation period may run for longer than before, making it slightly easier for some parties to bring a case.

### **Policy options**

15. The policy options available to Government involve either implementing or not implementing the Directive; implementing the requirements of Directive in terms of application to cases in scope of EU law only or applying the requirements across all UK competition law; implementing on the deadline set by the EU Commission or implementing earlier in line with a UK Common Commencement Date.

#### **Option 1: Do nothing**

16. This is being used as the baseline for appraisal. This would leave the UK at risk of infraction proceedings from the European Commission. Following the decision taken in the UK Referendum on EU membership, the UK Government has reaffirmed its commitment to uphold the obligations of EU membership until such a date that it was no longer a Member State.

#### **Option 2: Dual regime, implementation December 2016**

17. This option would fully implement the Directive with no gold plating, on the deadline set by the EU Commission of 27 December 2016. This would result in a number of small changes to the way cases covered by EU competition law (defined as cases that may affect trade between member states) are treated, but these changes would not apply for

cases that were in scope of UK competition law only. This would lead to a “dual regime” where there are small differences in the law depending on whether cases come in scope of EU competition law or UK competition law.

**Option 3: Dual regime, implementation October 2016**

18. This option is the same as Option 2, but would implement the Directive early – on the UK common commencement date of 1 October 2016.

**Option 4: Single regime, implementation December 2016**

19. This option would fully implement the Directive but also apply the changes required by the Directive to UK competition law so that they would apply even to cases that were not in scope of EU competition law, but were in scope of UK competition law only. This would lead to a “single regime” where only one set of rules applies, whether cases come in scope of EU or UK competition law. This option would implement the changes on 27 December 2016.

**Option 5: Single regime, implementation October 2016**

20. This option is the same as Option 4, but would implement the Directive early – on the UK common commencement date of 1 October 2016.

21. This table shows how the policy options fall across two dimensions.

**Table 1: Summary table of policy options**

|                                 | October 2016<br>(early) implementation | December 2016<br>implementation |
|---------------------------------|--|---------------------------------|
| Single regime<br>(gold plating) | Option 5                               | Option 4                        |
| Dual regime                     | Option 3                               | Option 2                        |

# Impact of implementing the Directive

## Number of cases

22. It is challenging to predict the impact of these changes on the number of cases brought as there is little legal precedent to use, and no precedent of these exact changes being made in other countries. The 2013 impact assessment for Private Actions in Competition Law, which involved more significant changes being implemented as part of the Consumer Rights Act 2015 (CRA) predicted a 25 per cent increase in cases being brought. This was based on consultation with a legal expert.
23. Table 2 illustrates the predicted annual number of changes according to the 2013 impact assessment. In the first year following the introduction of the policy, the Competition and Markets Authority (CMA) recorded 7 stand-alone cases and 5 follow-on cases, compared to a prediction of 7 and 3 respectively. In the absence of strong evidence to the contrary, we have used the annual predicted case load from the 2013 impact assessment as the basis for this analysis.
24. The changes made as part of the CRA included developing court rules and alternative dispute resolution (ADR), and allowing opt-out collective actions to be taken by consumers and/or by businesses. Those changes fundamentally strengthened the ability of consumers and businesses to take private actions.
25. The changes as a result of implementing the Damages Directive are much less significant, and may not even increase the number of cases being brought at all. The Department's internal legal advice suggested that the small changes involved in implementing the Directive make it slightly easier to bring a case and so there is a theoretical reason to model a small increase in the number of cases, whilst acknowledging that the absence of evidence means the assumption used will be speculative. Our starting assumption is that under the "dual regime" (options 2 and 3) there will be an increase in cases of between 0 and 5 per cent, with a central estimate of 2.5%.
26. Under a dual regime the changes in the directive would only cover cases under the scope of EU competition law, i.e. cases where trade between member states could be affected as a result of the competition law infringement and where EU competition law is applied in parallel with UK law. A case that may affect trade between member states can include a firm who provides goods or services to a number of member states. However, agreements between companies with small market shares (across the EU) may benefit from a presumption that such agreements do not have an appreciable effect on trade<sup>8</sup>.
27. Under a dual regime, the directive will not make any differences to cases that are covered by or investigated solely under national competition law. This will result in the rules being different for cases that are covered by EU law (including where it is applied in parallel with UK law) and those that are not.
28. There will be a slightly higher increase in additional cases brought under a single regime (policy options 4 and 5), where all cases are affected by the Directive. Under these options, we are extending the changes required under the Damages Directive to cases that are in the scope of UK law as well as those in scope of EU law. This involves a form of gold-plating: whilst we are not extending the regulatory requirements over and above the requirements of the Directive for cases that come in scope of EU law, we are

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<sup>8</sup> <http://www.fieldfisher.com/pdf/EU-competition-law-articles-101-102.pdf>

applying the full requirements of the Directive for cases that come in scope of UK law despite not being required to do so by the EU.

29. In order to assess how many additional cases would be covered by the directive if we gold-plated it to include cases which related to UK competition law only (in addition to that covered by EU competition law, i.e. to maintain a single regime), we looked at 20 CMA civil cartel investigations opened between 2004 and 2015, selected at random, and we found that in 65 per cent of the investigations was taking place under both UK and EU competition law, whereas in 35 per cent the investigation was only taking place under UK law. Note that there are other types of infringements which can be investigated, such as abuse of dominance and there will be some private actions which relate to EU commission decisions or stand-alone actions rather than CMA investigations.
30. The percentages above suggests we might expect a 50 per cent greater increase in cases if we extend the changes to also cover UK law only cases. This makes our assumption for the single regime an increase of between 0 and 7.5 per cent (central estimate 3.75 per cent).
31. The overall estimates in this Impact Assessment are highly sensitive to the estimates used for the increase in number of cases as a result of these changes. The respective central estimates used are 2.5 per cent (dual regime) or 3.75 per cent (single regime). These estimates are necessarily speculative due to the unknown nature of the impact of a new legal change. After agreeing the estimates with an internal legal advisor, the estimates were checked with the CAT. The CAT regarded these as reasonable estimates to use whilst acknowledging their speculative nature. They should be seen therefore in the context of informed parties regarding these legal changes as leading to a small theoretical increase in the number of cases heard.
32. The tables below illustrate the estimated impacts in terms of number of cases under using the central estimates. Cases can be either “follow-on” cases where there has already been an infringement decision from a competition authority before the private action is taken, or “stand-alone” cases where there was no prior infringement decision. Cases can go through ordinary courts (eg the High Court) or through the Competition Appeal Tribunal (CAT). The CRA sought to establish the CAT as the main body through which competition cases would be heard as it is a specialised competition court which can progress cases more quickly and with less expense.
33. All the tables in this Impact Assessment that give costings do so based on the central estimates of an increase of 2.5 per cent (dual regime) or 3.75 per cent (single regime) in number of cases heard. The summary paragraphs that summarise the overall costs or benefits of the single or dual regimes include estimates of the lower bound or upper bound estimates of increase in number of cases heard.

Table 2: Estimated annual cases after 2015 Consumer Rights Act Reforms<sup>9</sup>

|                 | Stand-alone cases | Follow-on cases | Total |
|-----------------|-------------------|-----------------|-------|
| Ordinary courts | 2                 | 1               | 3     |
| CAT             | 7                 | 3               | 10    |
| Total           | 9                 | 4               | 13    |

<sup>9</sup> 2013 Impact Assessment: Private Actions in Competition Law

**Table 3: Estimated increase in annual cases for dual regime (policy options 2 and 3) (central estimate: a 2.5% increase)**

|                 | Stand-alone cases | Follow-on cases | Total |
|-----------------|-------------------|-----------------|-------|
| Ordinary courts | 0.05              | 0.025           | 0.075 |
| CAT             | 0.175             | 0.075           | 0.25  |
| Total           | 0.225             | 0.1             | 0.325 |

**Table 4: Estimated increase in annual cases for single regime (policy options 4 and 5) (central estimate: a 3.75% increase)**

|                 | Stand-alone cases | Follow-on cases | Total  |
|-----------------|-------------------|-----------------|--------|
| Ordinary courts | 0.075             | 0.0375          | 0.1125 |
| CAT             | 0.2625            | 0.1125          | 0.375  |
| Total           | 0.3375            | 0.15            | 0.4875 |

## Costs

### Court costs

34. High court cases take longer to be heard and are more expensive than cases heard in the CAT. Whilst there will be differences from case to case, the Department's estimate prior to appraisal of the CRA changes was for a follow-on case in the High Court to cost £28,000 and a stand-alone case to cost £105,000. These estimates came from discussion with a legal expert during preparation of the 2013 impact assessment for Private Actions in Competition Law and were tested at consultation where they were not contradicted by stakeholders.
35. Prior to appraisal of the CRA changes, the CAT's best estimate of the cost of handling a follow-on case was £15,400 and based on the estimate that a stand-alone case would cost between three and four times the amount of a follow-on case. Based on a multiple of 3.75, the estimate for a stand-alone case is £57,750. These are rough estimates, because the costs of each case will vary, but the figures are broadly compatible with the CAT's average case cost across all types of cases (not just private actions) of £45,000. Again these estimates were made during preparation of the 2013 impact assessment for Private Actions in Competition Law.
36. As part of this impact assessment the estimates above were tested with the CAT to see whether they were still valid or should be updated in line with inflation or changes in court costs. The CAT noted that private actions vary greatly in their size, complexity and duration and consequently in their demands upon the Court, however as general estimates of average costs across a range of differing cases of all types they regarded the existing estimates as appropriate to use for this impact assessment.
37. The tables below reflect the increase in costs to the courts calculated by multiplying these figures above by the expected increase in number of cases (tables 3 and 4). These reflect costs to the courts of an increase in cases.

**Table 5: Estimated court costs (£)**

|                 | Stand-alone cases | Follow-on cases |
|-----------------|-------------------|-----------------|
| Ordinary courts | 105,000           | 28,000          |
| CAT             | 57,750            | 15,400          |

**Table 6: Annual increase in court costs for dual regime (policy options 2 and 3) (£)**

|                 | Stand-alone cases | Follow-on cases | Total  |
|-----------------|-------------------|-----------------|--------|
| Ordinary courts | 5,250             | 700             | 5,950  |
| CAT             | 10,106            | 1,155           | 11,261 |
| Total           | 15,356            | 1,855           | 17,211 |

**Table 7: Annual increase in court costs for single regime (policy options 4 and 5) (£)**

|                 | Stand-alone cases | Follow-on cases | Total  |
|-----------------|-------------------|-----------------|--------|
| Ordinary courts | 7,875             | 1,050           | 8,925  |
| CAT             | 15,159            | 1,733           | 12,892 |
| Total           | 23,034            | 2,783           | 25,817 |

38. Our estimates of the annual increase in court costs as a result of implementing the Damages Directive are therefore £0.017m (low: £0, high: £0.034m) in the case of the dual regime options or £0.026m (low: £0, high: £0.052m) in the case of single regime options.

### **Costs to business**

39. The changes involved in implementing the Directive make it slightly easier to bring a claim for damages, however the underlying law that defines what constitutes an infringement remains the same. In the case of a change to the underlying law we may expect businesses to commission legal advice to ensure they are compliant with new legislation. However, a Departmental legal advisor felt that this was unlikely to happen as a result of the changes introduced in order to implement the Damages Directive. Firms may become aware of the changes through general legal seminars, newsletters or information bulletins but would be unlikely to commission legal advice unless they were facing an action. We have therefore assumed there will be no additional compliance or familiarisation costs as a result of these changes.
40. The costs to businesses will occur when firms want to either bring or defend themselves against a claim. As with the court costs, the costs of legal advice to businesses involved in competition cases will vary with the complexity and duration of the case. Generally private actions involving competition law are substantial and complex pieces of litigation, with even small cases generally involving costs of £100,000 to £200,000.
41. Estimates of the costs to business associated with private actions cases were included in the 2013 Private Actions in Competition Law impact assessment. Opinions from legal experts suggested these costs would be at least £1m and potentially significantly more if other expert advice was required, or if the case challenged jurisdictional points or involved extensive disclosure. One expert estimated that the costs of legal advice faced by businesses for follow-on actions were likely to be between £1m and £1.8m, and the costs for stand-alone actions would be £2m to £3m. Further costs to businesses of pursuing and defending claims include management of the case and dealing with disclosure requirements. One stakeholder advised us these might increase the legal costs by around 50 per cent, which would take the total costs per business to between £1.5m and £2.7m for follow-on cases, and between £3m and £4.5m for stand-alone cases. As there are two parties in a case, these figures should be doubled to give the total cost to businesses per case. Our estimates of total legal costs to business (excluding costs paid to cover court costs that would be counted in the estimates above) are therefore between £3m and £5.4m for follow-on cases (central estimate £4.2m) and between £6m and £9m for stand-alone cases (central estimate £7.5m).
42. In preparation for this impact assessment the estimates above were tested with the CAT. The CAT advised that the estimates were still valid, although noted that the fast track procedure now available could reduce the cost of smaller cases. As we do not have a disaggregated estimate of the potential number of cases that would be suitable for the fast track procedure we have not reduced the cost estimate as part of this impact assessment. We have therefore retained these estimates for this impact assessment.
43. Note that in the 2013 impact assessment, the costs to business were treated as being the same regardless of whether the case went through the High Court or the CAT. This approach was also tested with the CAT as part of preparation for this impact assessment, as the CAT is generally regarded as a preferable Court through which to hear competition cases. The CAT noted that there may be some difference due to the absence of court fees in the CAT, whereas a claim with a value of over £200,000 would face an issuing fee of £10,000 in the High Court. However, the court fee is still relatively

small in relation to the overall costs of legal advice as illustrated above, which would be likely to be similar as the underlying legal framework is the same regardless of the Court in which the case is heard.

44. The advantage to business of using the CAT rather than the High Court was not felt to be in lower financial cost but in access to a judicial body with specialist expertise in competition law, economics, accountancy, business and related fields. Another advantage would come in the likelihood of having the case resolved more quickly. The CAT's list has more scope for a quicker hearing than the crowded lists of the High Court. Substantial private actions in the CAT take an average of 9 to 18 months from registration to final hearing, with some relatively small cases able to be heard on a fast track route which would be heard within 6 months. In contrast, 12 to 36 months would not be unusual in the High Court<sup>10</sup>.
45. We have therefore retained the same estimates for cost to business that were used in the 2013 Private Actions in Competition Law Impact Assessment, and used the same approach of regarding the costs as the same whether the case was heard in the High Court or CAT.

**Table 8: Estimated legal costs to businesses (£)**

|                 | Stand-alone cases | Follow-on cases |
|-----------------|-------------------|-----------------|
| Ordinary courts | 7,500,000         | 7,500,000       |
| CAT             | 4,200,000         | 4,200,000       |

**Table 9: Annual increase in costs to businesses for dual regime (policy options 2 and 3) (£)**

|                 | Stand-alone cases | Follow-on cases | Total     |
|-----------------|-------------------|-----------------|-----------|
| Ordinary courts | 375,000           | 105,000         | 480,000   |
| CAT             | 1,312,500         | 315,000         | 1,627,500 |
| Total           | 1,687,500         | 420,000         | 2,107,500 |

**Table 10: Annual increase in costs to businesses for single regime (policy options 4 and 5) (£)**

|                 | Stand-alone cases | Follow-on cases | Total     |
|-----------------|-------------------|-----------------|-----------|
| Ordinary courts | 562,500           | 157,500         | 720,000   |
| CAT             | 1,968,750         | 472,500         | 2,441,250 |
| Total           | 2,531,250         | 630,000         | 3,161,250 |

46. Our estimates of the annual increase in legal costs to businesses as a result of implementing the Damages Directive are therefore £2.108m (low: £0, high: £4.215m) in the case of the dual regime options or £3.161m (low: £0, high: £6.323m) in the case of single regime options. In practice, under the 'loser pays' principle of UK competition law, these costs will either fall on businesses that are non-compliant with existing competition law, or pursue an unsuccessful claim for damages.

#### **Uncertainty and potential for satellite litigation**

47. The key distinction between operating a dual or single regime is that in operating a dual regime there will be two distinct systems of rules in operation, with one system applying

<sup>10</sup> Estimates given by the CAT



for cases solely in scope of UK law (ie where only domestic markets are affected) and the other applying where EU competition law would apply (where the relevant market included another Member State), including where it is applied in parallel with UK law. This creates the potential for dispute over which set of rules would be appropriate for a particular case, which may have to be settled by satellite litigation in order to determine which rules applied for a particular case. This would lead to additional legal costs and time taken. The potential frequency, cost or additional time delays of satellite litigation are subject to a high degree of uncertainty and it was felt too speculative to try and quantify this for the impact assessment. However, in consultation 25 out of 26 respondents (1 abstention) recommended implementing this as a single regime. Given the relatively small differences between the two sets of rules in any case, it would not be cost effective to create the risk of satellite litigation.

### **Risk of precautionary over-compliance**

48. With the introduction of new regulation there can be an associated risk that businesses will incur costs by being driven to go further than legally required in order to reduce the threat of being non-compliant. After consideration, Department lawyers did not expect over-compliance. as the Directive does not make fundamental changes to competition law (as most of the significant changes affecting private actions were made under the CRA). As such, it is also unlikely that businesses would incur costs of extra legal advice to avoid the risk of non-compliance as they are more likely to use business-as-usual activities such as reading briefings and web blogs produced by law firms or attending legal workshops.

## Benefits

49. There are two main types of benefit associated with making it easier to bring private actions cases in competition law. The first is the potential for redress where a party who has suffered some harm as a result of anticompetitive behaviour from another party can now access compensation for the harm suffered. The second is the impact the presence the regulations have on future economic behaviour, for instance through acting as a deterrent against cartel behaviour or through lower pricing and the “deadweight gain” which is realised as a result of a more competitive market outcome being achieved<sup>11</sup>.

### Redress

50. Following a judgement that harm has been suffered to one party due to anticompetitive practices of another, a court can award damages to the party that suffered harm. Rodger (2008) provides some evidence of competition litigation settlements, showing 5 cases where settlement was below £1m, three where settlement was between £1m and £5m and one where it was between £5m and £20m<sup>12</sup>. Opinion from legal experts suggests that realistically it would not be worth bringing a case if the potential redress was below £500,000, so we have chosen a central estimate of £3m per case in the light of the limited data available above.

**Table 11: Value of damages awarded**

|               | Annual increase in cases | Damages per case (£) | Total (£) |
|---------------|--------------------------|----------------------|-----------|
| Dual regime   | 0.325                    | 3,000,000            | 975,000   |
| Single regime | 0.488                    | 3,000,000            | 1,462,500 |
| Total         |                          |                      | 2,437,500 |

51. Private actions cases can be taken both by businesses and consumers, so some of the above benefit could go to consumers as well as businesses. In practice, due to the costs involved, it is difficult for consumers to use competition law to bring private actions cases. The reforms in the CRA sought to increase consumers’ access to redress from harm by anticompetitive practices, by making it easier to bring collective actions, for example a consumer organisation bringing the action on their behalf. However there have not been any collective claims since the CRA reforms and there was only one collective claim before the reforms. We have therefore assumed that 90 per cent of the benefit of damages awarded will go to businesses and 10 per cent to consumers.
52. Our estimates of the total benefits occurring as a result of redress are therefore £0.975m (low: £0, high: £1.950m) in the case of a dual regime, of which £0.878m (low: £0, high: £1.755m) accrue to businesses and £0.098m (low: £0, high: £0.195m) accrue to consumers, or £1.463m (low: £0, high: £2.925m) in the case of a single regime, of which £1.316m (low: £0, high: £2.925m) accrue to businesses and £0.146m (low: £0, high: £0.293m) accrue to consumers. For the purposes of cost-benefit analysis, redress is treated as a net zero, because it is just a transfer from non-compliant businesses (a cost) to parties they have harmed (a benefit). However the disaggregation here is relevant in the context of One-In-Three-Out calculations (see paragraphs 53 to 57).

<sup>11</sup> “Deadweight loss” refers to the cost to society resulting from a reduction in economic efficiency when a market outcome moves away from a competitive equilibrium. Typical anti-competitive behaviour would result in a redistribution of benefits or “surplus” from consumers to producers, but some of the loss to consumers would not be transferred to producers and would just be lost – the “deadweight loss”. Where anti-competitive practices are addressed and market outcomes move towards a competitive equilibrium there is a reversal of this loss or “deadweight gain”.

<sup>12</sup> Rodger (2008) ‘Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005’

## Deterrence, lower pricing and deadweight gain

53. Private actions in stand-alone cases provide a more obvious form of deterrent as they create a new case of infringement with associated publicity and direct financial costs. There is a lower deterrence impact from a follow-on case as there is no new infringement although it raises the financial costs relative to the case where there is no recourse to private actions. The 2013 impact assessment discussed an approach to modelling the deterrence impacts of private actions<sup>13</sup>, citing Office for Fair Trading (OFT) survey evidence that estimated an effect of 4:1 for abuse cases, 5:1 for cartel cases and 7:1 for commercial agreements, subsequently recommending 5:1 as an estimate for the deterrence effect of damages in stand-alone cases, and a more modest 1:1 estimate for the deterrence effect of damages in follow-on cases. Given an estimate of £3m damages per case, this would lead to deterrence of £15m for stand-alone cases and £3m for follow-in cases. Note that estimates around deterrence are subject to high degrees of uncertainty and the CMA does not include the effect of deterrence on its estimates of the benefit of its own interventions in its annual impact assessments<sup>14</sup>.
54. The OFT estimated a saving of around £21.4m due to lower prices and £10.7m due to deadweight gain when a cartel is discovered, leading to a total benefit of £32.1m<sup>15</sup>. As around 55 per cent of stand-alone cases involve cartels<sup>16</sup>, this leads to an average benefit per case of lower pricing and deadweight gain of £17.665m for every stand-alone case. For a follow-on case, these benefits would result from the original ruling rather than due to the ability to pursue private actions for damages. As a result the total effect from deterrence, lower pricing and deadweight gain per case would be £32.655m for stand-alone cases and £3m for follow-on cases.
55. The total annual increase in deterrence, low pricing and deadweight gain benefits would therefore be £7.647m (low: £0, high: £15.295m) under the dual regime options and £11.471m (low: £0, high: £22.942m) under single regime options.

**Table 12: Deterrence, lower pricing and deadweight gain benefits (£)**

|                 | Stand-alone cases        | Follow-on cases |
|-----------------|--------------------------|-----------------|
| Deterrence      | 15,000,000               | 3,000,000       |
| Lower pricing   | 11,770,000 <sup>17</sup> | -               |
| Deadweight gain | 5,885,000 <sup>18</sup>  | -               |
| Total gain      | 32,655,000               | 3,000,000       |

**Table 13: Annual increase in deterrence, low pricing and deadweight gain benefits for dual regime (policy options 2 and 3)**

|                   | Increase in cases | Benefit per case (£) | Total (£) |
|-------------------|-------------------|----------------------|-----------|
| Stand-alone cases | 0.225             | 32,655,000           | 7,347,375 |
| Follow-on cases   | 0.1               | 3,000,000            | 300,000   |
| Total             | 0.325             |                      | 7,647,375 |

<sup>13</sup> 2013 Impact Assessment: Private Actions in Competition Law

<sup>14</sup> CMA (2016) CMA impact assessment 2015/16

<sup>15</sup> 2013 Impact Assessment: Private Actions in Competition Law

<sup>16</sup> Rodger (2009) 'Competition Law Litigation in the UK Courts: a Study of all UK Cases 2005-08 – Part 1', *Global Competition Review*, p 93-114

<sup>17</sup> 21.4m x 0.55

<sup>18</sup> 10.7m x 0.55

**Table 14: Annual increase in deterrence, low pricing and deadweight gain benefits for single regime (policy options 4 and 5)**

|                   | Increase in cases | Benefit per case (£) | Total (£)  |
|-------------------|-------------------|----------------------|------------|
| Stand-alone cases | 0.338             | 32,655,000           | 11,021,063 |
| Follow-on cases   | 0.15              | 3,000,000            | 450,000    |
| Total             | 0.488             |                      | 11,471,063 |

## Cost-benefit analysis of options

56. The following table summarises of the above annual costs and benefits under a dual regime or single regime according to the central estimates.

**Table 15: Annual costs and benefits (rounded to nearest £ thousand)**

|                                       | Dual regime | Single regime |
|---------------------------------------|-------------|---------------|
| <b>Costs</b>                          |             |               |
| Court costs                           | 17,000      | 26,000        |
| Legal costs                           | 2,108,000   | 3,161,000     |
| Total costs                           | 2,125,000   | 3,187,000     |
| <b>Benefits</b>                       |             |               |
| Redress                               | 975,000     | 1,463,000     |
| Deterrence, lower pricing, deadweight | 7,647,000   | 11,471,000    |
| Total benefits                        | 8,622,000   | 12,934,000    |
| <b>Net costs</b>                      | -6,498,000  | -9,746,000    |

## One-in, Three-out (OI3O) assessment – summary

57. The court costs described above fall on the public sector and so are not included in the Equivalent Annual Net Direct Cost to Business (EANDCB). These have been included in a Justice Impact Test that has been submitted separately to the Ministry of Justice.
58. Under the “loser pays” principle of UK law, the costs to business fall on the losing party. In the case of a claimant making a successful claim for damages, both the claimant’s reasonable costs and the costs of the defendant will be borne by the defendant<sup>19</sup>. A successful claim would imply that a defendant was non-compliant and thus out of scope of the EANDCB. In the case of a claimant making an unsuccessful claim for damages, both the claimant’s costs and the reasonable costs of the defendant will be borne by the claimant, and so this will also be out of scope of the EANDCB as the decision to make a claim for damages will be down to the business and not required by Government.
59. The costs of redress are borne by non-compliant businesses and so are not included in the EANDCB. However, redress involves a transfer to businesses and consumers that have suffered harm, giving a benefit to businesses that would be in scope of the EANDCB as the changes made as a result of implementing the Directive mean that businesses that suffer harm from anti-competitive practices will now have means of redress available. As a result, the estimated value of redress to businesses (excluding the value of redress that goes to consumers) would be £0.878m in the case of a dual regime and £1.316m in the case of a single regime.

<sup>19</sup> “Reasonable” costs will be covered by the losing party.

60. Deterrence, lower pricing and deadweight gain are all indirect benefits and so out of scope of the EANDCB.
61. The following table summarises of the above costs and benefits under a dual regime or single regime according to the central estimates.

**Table 16: EANDCB (rounded to nearest £ thousand)**

|                                       | Dual regime     | Single regime     |
|---------------------------------------|-----------------|-------------------|
| <b>Costs</b>                          |                 |                   |
| Court costs                           | -               | -                 |
| Legal costs                           | -               | -                 |
| Total costs                           | -               | -                 |
| <b>Benefits</b>                       |                 |                   |
| Redress                               | 878,000         | 1,316,000         |
| Deterrence, lower pricing, deadweight | -               | -                 |
| Total benefits                        | 878,000         | 1,316,000         |
| <b>Total EANDCB</b>                   | <b>-878,000</b> | <b>-1,316,000</b> |

### Effect of implementation date

62. Policy options 2 and 3, and policy options 4 and 5, are differentiated by the choice of implementation date, with options 2 and 4 involving December 2016 implementation and options 3 and 5 involving October 2016 implementation.
63. The impact in terms of implementing in October rather than December 2016 would be an extra 2 months (16.67% of 1 year) to accrue costs and benefits.
64. The recommended option in the development stage Impact Assessment was Option 5 (single regime, implementation in October 2016). However, a majority of consultation respondents suggested that a later implementation date would be favourable, allowing more time to be spent ensuring that the implementing legislation was effective. As a result the preferred policy option is to implement a single regime in December 2016 (Option 4).

### Cost-benefit analysis: comparison of options

65. The table below summarises the Cost-benefit analysis (CBA) for each of the four options. In line with HM Treasury Green Book<sup>20</sup> and HM Government's Better Regulation Framework Manual<sup>21</sup>, a constant discount rate of 3.5% was used over an appraisal period of 10 years. Figures for EANDCB and BIT score are converted in to 2014 prices, using GDP deflator data<sup>22</sup>, and then discounted back to the Present Value Base Year of 2016<sup>23</sup>.

<sup>20</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220541/green\\_book\\_complete.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220541/green_book_complete.pdf)

<sup>21</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf)

<sup>22</sup> <https://www.gov.uk/government/statistics/gdp-deflators-at-market-prices-and-money-gdp-june-2014-quarterly-national-accounts>

<sup>23</sup> More information in the HM Government Impact Assessment Calculator <https://www.gov.uk/government/publications/impact-assessment-calculator--3>

**Table 17: CBA comparison of options (rounded to nearest £ thousand)**

|  | Option 2      | Option 3     | Option 4      | Option 5     |
|--|---------------|--------------|---------------|--------------|
| Dual or single                             | Dual          | Dual         | Single        | Single       |
| Implementation                             | December 2016 | October 2016 | December 2016 | October 2016 |
| Annual net costs                           | -6,498,000    | -6,498,000   | -9,746,000    | -9,746,000   |
| Cost of early implementation <sup>24</sup> | n/a           | -1,083,000   | n/a           | -1,624,000   |
| Total NPV                                  | 55,924,000    | 57,007,000   | 83,899,000    | 85,524,000   |
| Business NPV                               | 7,558,000     | 7,704,000    | 11,328,000    | 11,547,000   |
| EANDCB <sup>25</sup>                       | -836,000      | -852,000     | -1,253,000    | -1,278,000   |
| BIT score <sup>26</sup>                    | -4,181,000    | -4,262,000   | -6,287,000    | -6,389,000   |

### Impact of gold-plating

66. Option 2 represents the minimum implementation option and has a total economy NPV of £55.9m and an EANDCB of -£0.8m. The preferred option (Option 4) has a total economy NPV of £83.9m and an EANDCB of -£1.3m, so the impact of gold plating is to raise the total NPV by £28m and reduce the EANDCB by £0.4m.
67. In this policy, gold plating increases the benefits to the economy because it increases the likelihood of both consumers and businesses being able to gain redress for detriment suffered due to anti-competitive activity, and has a corresponding deterrence effect on other potential anti-competitive activity.

### Competition Impact test

68. Implementation of the Damages Directive is aimed as a pro-competitive intervention as it increases the ability of parties suffering harm from anti-competitive behaviours to seek redress. By acting as a deterrent against anti-competitive behaviours this will increase suppliers' incentives to compete vigorously, strengthen their ability to compete and may indirectly increase the number or range of sustainable suppliers. The net impact of the measure is expected to be an increase in effective competition.

### Justice Impact Test

69. A separate Justice Impact Test was submitted to the Ministry of Justice (MOJ). This JIT was cleared by the MOJ in July 2016<sup>27</sup>.

### Small and Micro Business Assessment

70. The policy increases access to redress for firms that are harmed by anti-competitive behaviour, which should lead to benefits for smaller firms who are more vulnerable to this kind of detriment than larger firms. These proposals do not result in regulatory burdens on businesses that would necessitate an exemption for small and micro businesses.

<sup>24</sup> Cost included in Year 1

<sup>25</sup> EANDCB calculated by annualising Business NPV using annuity rate consistent with 10 years at constant 3.5% discount rate (8.60769), then deflated in to 2014 prices using deflation factor (1.01438), and discounted back to present year using discount factor (1.035). See HM Government Impact Assessment Calculator.

<sup>26</sup> BIT score calculated as 5 x EANDCB. Note that HM Government Impact Assessment Calculator round EANDCB to the nearest 100,000 before calculating BIT score, giving scores as follows: Option 2: -£4m, Option 3: -£4m, Option 4: -£6.5m, Option 5: -£6.5m. The BIT score taken forward to the Department's annual return will be this rounded score of -£6.5m for the preferred option, Option 4.

<sup>27</sup> JIT 157 BIS EU Damages Directive

## Equalities Impact Assessment

71. The costs and benefits of these policies would not be expected to fall disproportionately on any of the protected groups.

### Family test

72. The costs and benefits of these policies would not be expected to affect families or their formation.

## Annexe 1: Modelling Assumptions

73. The following table summarises the assumptions used in this Impact Assessment and the source from which the assumptions were taken.

**Table 18: Modelling Assumptions**

|   |                        | Assumption  | Source   |
|---|------------------------|-------------|--|
| <b>Increase in caseload</b>                       |                        |             |  |
| Increase in cases due to implementation           | Dual regime:           | 2.50%       | Departmental legal advisors, CAT   |
|   | Single regime:         | 3.75%       |  |
| <b>Costs</b>                                      |                        |             |  |
| High Court costs                                  | Stand-alone cases:     | £105,000    | Departmental legal advisors  |
|   | Follow-on cases:       | £28,000     |  |
| CAT costs   | Stand-alone cases:     | £57,750     | CAT  |
|   | Follow-on cases:       | £15,400     |  |
| Legal costs to business                           | Stand-alone cases:     | £7,500,000  | Legal experts consulted by Department, CAT   |
|   | Follow-on cases:       | £4,200,000  |  |
| <b>Benefits</b>                                   |                        |             |  |
| Value of redress                                  |                        | £3,000,000  | Midpoint from cases in Rodger (2008)   |
| Proportion of damages awards awarded to:          | Businesses:            | 90%         | Departmental legal advisors  |
|   | Consumers:             | 10%         |  |
| Deterrence ratio                                  | Stand-alone cases:     | 5:1         | 2013 Impact Assessment on Private Actions in Competition Law, OFT survey evidence  |
|   | Follow-on cases:       | 1:1         |  |
| Proportion of stand-alone cases involving cartels |                        | 55%         | Rodger (2009)  |
| Benefits from cartel discovery                    | Due to lower prices    | £21,400,000 | OFT estimate cited in 2013 Impact Assessment on Private Actions in Competition Law |
|   | Due to deadweight gain | £10,700,000 |  |

74. Tables 19 and 20 below are analogous to tables 15 and 17 but with the high end assumptions on increase in caseload: 5.0% rather than the central estimate of 2.5% for the dual regime options and 7.5% rather than 3.75% for the single regime options. For ease of comparison, tables 15 and 17 are repeated in this annexe.

**Table 19: Sensitivity analysis: High assumption on increase in caseload  
Annual costs and benefits (rounded to nearest £ thousand)**

|                                       | Dual regime | Single regime |
|---------------------------------------|-------------|---------------|
| <b>Costs</b>                          |             |               |
| Court costs                           | 34,000      | 52,000        |
| Legal costs                           | 4,215,000   | 6,323,000     |
| Total costs                           | 4,249,000   | 6,374,000     |
| <b>Benefits</b>                       |             |               |
| Redress                               | 1,950,000   | 2,925,000     |
| Deterrence, lower pricing, deadweight | 15,295,000  | 22,942,000    |
| Total benefits                        | 17,245,000  | 25,867,000    |
| <b>Net costs</b>                      | -12,995,000 | -19,493,000   |

**Table 15 (repeated): Central assumption on increase in caseload  
Annual costs and benefits (rounded to nearest £ thousand)**

|                                       | Dual regime | Single regime |
|---------------------------------------|-------------|---------------|
| <b>Costs</b>                          |             |               |
| Court costs                           | 17,000      | 26,000        |
| Legal costs                           | 2,108,000   | 3,161,000     |
| Total costs                           | 2,125,000   | 3,187,000     |
| <b>Benefits</b>                       |             |               |
| Redress                               | 975,000     | 1,463,000     |
| Deterrence, lower pricing, deadweight | 7,647,000   | 11,471,000    |
| Total benefits                        | 8,622,000   | 12,934,000    |
| <b>Net costs</b>                      | -6,498,000  | -9,746,000    |

**Table 20: Sensitivity analysis: High assumption on increase in caseload  
CBA comparison of options (rounded to nearest £ thousand)**

|  | Option 2      | Option 3     | Option 4      | Option 5     |
|--|---------------|--------------|---------------|--------------|
| Dual or single                             | Dual          | Dual         | Single        | Single       |
| Implementation                             | December 2016 | October 2016 | December 2016 | October 2016 |
| Annual net costs                           | -12,995,000   | -12,995,000  | -19,493,000   | -19,493,000  |
| Cost of early implementation <sup>28</sup> | n/a           | -2,166,000   | n/a           | -3,249,000   |
| Total NPV                                  | 111,865,000   | 114,031,000  | 167,790,000   | 171,038,000  |
| Business NPV                               | 15,106,000    | 15,399,000   | 22,664,000    | 23,103,000   |
| EANDCB <sup>29</sup>                       | -1,672,000    | -1,704,000   | -2,508,000    | -2,556,000   |
| BIT score <sup>30</sup>                    | -8,358,000    | -8,520,000   | -12,540,000   | -12,782,000  |

<sup>28</sup> Cost included in Year 1

<sup>29</sup> EANDCB calculated by annualising Business NPV using annuity rate consistent with 10 years at constant 3.5% discount rate (8.60769), then deflated in to 2014 prices using deflation factor (1.01438), and discounted back to present year using discount factor (1.035). See HM Government Impact Assessment Calculator.

<sup>30</sup> BIT score calculated as 5 x EANDCB. Note that HM Government Impact Assessment Calculator round EANDCB to the nearest 100,000 before calculating BIT score, giving scores as follows: Option 2: -£4m, Option 3: -£4m, Option 4: -£6.5m, Option 5: -£6.5m. The BIT score taken forward to the Department's annual return will be this rounded score of -£6.5m for the preferred option, Option 4.



**Table 17 (repeated): Central assumption on increase in caseload  
CBA comparison of options (rounded to nearest £ thousand)**

|                              | Option 2      | Option 3     | Option 4      | Option 5     |
|------------------------------|---------------|--------------|---------------|--------------|
| Dual or single               | Dual          | Dual         | Single        | Single       |
| Implementation               | December 2016 | October 2016 | December 2016 | October 2016 |
| Annual net costs             | -6,498,000    | -6,498,000   | -9,746,000    | -9,746,000   |
| Cost of early implementation | n/a           | -1,083,000   | n/a           | -1,624,000   |
| Total NPV                    | 55,924,000    | 57,007,000   | 83,899,000    | 85,524,000   |
| Business NPV                 | 7,558,000     | 7,704,000    | 11,328,000    | 11,547,000   |
| EANDCB                       | -836,000      | -852,000     | -1,253,000    | -1,278,000   |
| BIT score                    | -4,181,000    | -4,262,000   | -6,287,000    | -6,389,000   |

75. In the case of the lower bound assumption on increase in caseload (ie implementation of the Directive leads to no change in the number of cases), the costs and benefits of implementation would be zero.