

| | | | | |
|--|---|--|--|--|
| Title: Government Response to consultation document "Increasing the use of mediation in the civil justice system" IA No: MoJ034/2022 RPC Reference No: RPC-MoJ-5212(2)c Lead department or agency: Ministry of Justice Other departments or agencies: HM Courts & Tribunal Service (HMCTS) | Impact Assessment (IA) | | | |
| | Date: 1 December 2023 | | | |
| | Stage: Final | | | |
| | Source of intervention: Domestic | | | |
| | Type of measure: Secondary Legislation | | | |
| Contact for enquiries: Disputeresolution.enquiries.evidence@justice.gov.uk | | | | |

| | |
|--|---------------------------|
| Summary: Intervention and Options | RPC Opinion: GREEN |
|--|---------------------------|

Cost of Preferred (or more likely) Option (in 2023 prices)

| Total Net Present Social Value | Business Net Present Value | Net cost to business per year | Business Impact Target Status Qualifying provision |
|--------------------------------|----------------------------|-------------------------------|--|
| £383m | £379m | £44m | QRP (- 173 m) |

What is the problem under consideration? Why is government action or intervention necessary?
 Claims to the County Court for a specified amount of money up to £10,000 are allocated to the small claims track. Currently, it is taking an average of 52.6 weeks for such claims to reach a hearing before a judge, which means individuals and businesses are waiting over one year to get justice. To speed up the dispute resolution process, HMCTS operates the Small Claims Mediation Service (SCMS) which provides a free mediation appointment on a voluntary basis for parties to certain small claims. Yet, while 52.5% of cases mediated via the SCMS result in a settlement, only 19% of parties currently utilise the service. To help parties achieve a swifter resolution and to free up judicial time for cases that really need to be decided by a judge, the government is proposing that defended specified money small claims disputes will be required to attempt mediation through the SCMS before their claim progresses to a hearing before a judge. This will ensure that the vast majority of small claims are offered the opportunity to reach a swifter, more consensual, resolution and to avoid the time and cost of litigation. We propose to do this via a pilot practice direction to change the Civil Procedure Rules to introduce a requirement for specified money claims to attend a free, one-hour mediation session with the SCMS with a view to expanding this to all small claims at a later date. The pilot practice direction will be replaced with a statutory Rule change via secondary legislation following evaluation and any adjustments. Government intervention is needed to make mediation a required step in civil litigation.

What are the policy objectives of the action or intervention and the intended effects?
 The policy objectives are to support the delivery of a sustainable and efficient civil justice system by: delivering swift access to justice for all civil court users for specified money small claims; ensuring that judicial resources are focussed on more complex cases; reducing the cost of resolving disputes for parties to specified money small claims; and by ensuring that the parties to specified money small claims are confident in and satisfied with the mediation process as a means to resolve their disputes.

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

- Option 0:** do nothing. Continue with current system of optional attendance at mediation.
- Option 1 (preferred):** Create a pilot practice direction to introduce a requirement into the Civil Procedure Rules to mediate for specified money small claims disputes, pending the introduction of a permanent rule change via secondary legislation at a later stage, following evaluation and any adjustments.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** May 2025

| | | | | |
|---|-----------------------|---------------------|---------------------------|---------------------|
| Is this measure likely to impact on international trade and investment? | No | | | |
| Are any of these organisations in scope? | Micro 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, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Create a pilot practice direction to introduce a requirement into the Civil Procedure Rules to mediate for specified money small claims disputes, pending the introduction of a permanent rule change via secondary legislation at a later stage following evaluation and any adjustments.

FULL ECONOMIC ASSESSMENT

| Price Base Year 2023 | PV Base Year 2023 | Time Period Years 10 | Net Benefit (Present Value (PV)) (£m) | | |
|----------------------|-------------------|----------------------|---------------------------------------|-----------|--------------------|
| | | | Low: 103 | High: 663 | Best Estimate: 383 |

| COSTS (£m) | Total Transition (Constant Price) Years | | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|---|---|--|----------------------------|
| Low | 2.95 | 2 | 10.58 | 111.20 |
| Best Estimate | 2.95 | 2 | 11.15 | 117.08 |
| High | 2.95 | 2 | 11.73 | 122.96 |

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

HMCTS: The SCMS will need to expand to manage the increased caseload. We estimate the associated costs are £4.1m annually, and £35.2m over the appraisal period (NPV). HMCTS will lose fee income where mediation diverts cases from court. Depending on the success rate of mediation, this cost is estimated to be between £0.5 - 1.9 m annually and £4.1-15.0m over the appraisal period (constant prices; 15-55% success rates).

Businesses: Businesses will face an additional cost from preparing for and attending the one-hour telephone mediation appointment. Our initial estimates of these costs are £6.6m annually and £56.1m over the appraisal period (NPV).

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

Individuals: individuals made up 42% of all parties. They would also incur the indirect costs of attending mediation (such as, time spent in preparation for and attending the appointment).

| BENEFITS (£m) | Total Transition (Constant Price) Years | | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|---|--|--|-------------------------------|
| Low | | | 25 | 214 |
| Best Estimate | | | 59 | 500 |
| High | | | 93 | 786 |

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

HMCTS: This option could free up 1,406 – 5,156 judicial sitting days (based on 15%-55% mediation settlement rates) leading to savings of £3.3m - £12m annually and £29.5-108m over the appraisal period (constant prices, 15-55% settlement rates). Pending new 2023-2024 pay awards for the judiciary, these benefits will be significantly higher. These savings will be used to support improved performance within the courts.

Businesses: Businesses make up 58% of all parties involved in a small claim. Where mediation results in a settlement, businesses will save the time and cost of a court hearing. We estimate this benefit could be £25m-£92m per annum and £226m-829m over the appraisal period (constant prices, 15-55% settlement rates).

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

Individuals: where mediation is successful, individuals will be saved the unquantified cost of legal representation at and preparation for a hearing before a judge and the court hearing fee.

All court users: both individuals and businesses will be spared the time and stress of litigation; and businesses can benefit from resolution of the dispute in a less adversarial manner which is likely to preserve business relationships.

Judiciary: judicial resources will be freed up to focus on more complex cases.

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

The above impacts depend on certain key assumptions. These relate to the settlement rate of SCMS mediations; the number of parties that are businesses and individuals; and the cost to businesses of a legal dispute. These are set out in more detail in section F. We also assume any affected legal service providers will find work of similar economic value.

BUSINESS ASSESSMENT (Option 1)

| Direct impact on business (Equivalent Annual) £m: | | | Score for Business Impact Target (qualifying provisions only) £m: (-173m). |
|---|-------------------|-----------------|--|
| Costs: £6.6m | Benefits: £23-83m | Net: £16m- £76m | |

Evidence Base

A. Background

1. The civil justice system deals with non-criminal matters of law that are not family disputes or issues handled by the tribunals. Unlike criminal cases – in which the state prosecutes an individual – civil court cases arise where an individual or a business believes their rights have been infringed. Typical civil cases include businesses trying to recover money they are owed; individuals seeking compensation for injuries; or individuals or businesses claiming for poorly provided goods or services.
2. The vast majority of civil cases take place in the County Courts, where judgments usually call for the payment or return of money or property. Civil cases within the County Courts are split into three separate tracks that are managed differently according to the value of the claim in dispute. The small claims track deals with cases usually valued under £10,000; the fast-track deals with cases usually valued at £10,000-25,000; and the multi-track deals with cases valued over £25,000.

Problem Under Consideration

3. The waiting time to resolve a civil legal dispute for a specified money claim up to £10,000 takes over a year, which is a long time for individuals and businesses to wait for justice. Within the County Court, incoming claim volumes are on average 78% of pre-Covid levels. However, timeliness remains below pre-Covid levels. Small claims are taking an average of 52.6 weeks between receipt of claim and final hearing (compared to 37.6 weeks in 2019); fast-track claims are taking 73.1 weeks (compared to 56.7 weeks in 2019); and multi-track claims are taking 115 weeks (compared to 94.3 in 2019).¹
4. Small claims make up 68% of all defended claims allocated to a track in the County Court. Of these, 78% are claims for a specified amount of money. Hence, allocated specified money small claims make up 53% of all defended claims allocated to a track in the County Court. As a means to facilitate the proportionate and consensual resolution of these modest value claims and free up judicial resource for more complex, high value cases, HM Courts and Tribunals Service (HMCTS) operates the Small Claims Mediation Service (SCMS), which provides a free one-hour telephone mediation for parties involved in defended small claims disputes, currently on a voluntary basis. However, while 52.5% of the cases that go to the SCMS are resolved, current uptake levels are low, with only 19% of small claims cases utilising the service.² There is also a persistent issue with non-attendance at appointments, with only 48% of those volunteering to mediate actually attending a mediation session.³
5. HMCTS conducted a pilot within the Online Civil Money Claims (OCMC) service from May 2021 whereby all claims under £500 were automatically referred to SCMS mediation, requiring parties to actively opt out if they did not wish to participate (previously, parties wishing to attend mediation had to actively opt in to the service, so the pilot reversed the burden on parties). Following an evaluation of the pilot, the opt-out approach has been extended to cover all claims issued through the OCMC (i.e., those worth up to £10,000). The evaluation identified a range of barriers that discouraged users from choosing to participate in mediation. These included: uncertainty about the mediation process; not understanding how mediation offered something above and beyond their previous negotiations; distrust of

¹ Internal 2022 HMCTS data

² Internal 2022 HMCTS data

³ Internal 2022 HMCTS data

the other party; and an entrenched desire to have their day in court.⁴ These findings emphasise that, despite efforts to increase awareness of mediation and incentivise participation, the current system is still failing to persuade users to engage.

6. As the Federation of Small Businesses has reported, this challenge is particularly relevant for small businesses, which make up 99.2% of all UK businesses.⁵ Whilst on the whole, the use of mediation and other forms of “alternative dispute resolution” (ADR) have increased; “this trend does not seem to have permeated down to the small business community to the degree that many would like”, with their survey finding that only 8% of small businesses in England and Wales used ADR to resolve their most recent dispute.⁶ As the report notes, “Despite the potential advantages, ADR is not widely used by small businesses in England and Wales, compared to the numbers using the courts”.
7. The FSB suggests small businesses are not realising such benefits due to a ‘knowledge-gap’ and the fragmented supply of dispute resolution services. They note that small businesses (which make up almost all UK businesses) have limited resources to learn about dispute resolution; that insufficient planning for disputes makes people choose familiar options (i.e., court) when a new dispute arises; and that trusted sources are unlikely to have much awareness of dispute resolution. In addition, the dispute resolution sector is fragmented, encompassing various resolution methods, a large number of providers, and different standards bodies, making it difficult for businesses to navigate.
8. In 2021, the Civil Justice Council (CJC) published a report on “The Resolution of Small Claims”, which recommended compulsory attendance at mediation for all claims valued under £500.⁷ The CJC stated that this policy would have “clear advantages to the potential litigants/litigants (who would be spared incurring further costs and devoting more time to the claim) and a beneficial effect upon the availability of judicial and administrative resources for other claims”.
9. The Government consulted on introducing mediation as a step in the litigation process from 26 July to 4 October 2022.⁸ A total of 134 responses were received from mediation or dispute resolution professionals, legal professionals, representative bodies, academics, the advice sector, local government, the judiciary and the public. In the Government Response, published on 25 July 2023, the Government announced its intention to take the CJC’s recommendation further and integrate mediation for all defended small track claims. Under this proposal all parties to a defended specified small claim will be required to attend a free, one-hour, telephone appointment with the SCMS before their case proceeds to a hearing.
10. We propose to start by integrating mediation for all specified money small claims, which represent almost 80% of all claims in 2022; therefore, the costs and benefits in this Impact Assessment (IA) are calculated based on specified money small claims, rather than all small claims.

⁴ HMCTS opt out mediation evaluation report - GOV.UK (www.gov.uk)

⁵ <https://www.gov.uk/government/statistics/business-population-estimates-2022/business-population-estimates-for-the-uk-and-regions-2022-statistical-release-html>

⁶ <https://www.fsb.org.uk/resources-page/tied-up--unravelling-the-dispute-resolution-process-for-small-firms.html>

⁷ <https://www.judiciary.uk/announcements/civil-justice-council-calls-for-improved-procedure-for-claims-under-500/>

⁸ [Increasing the use of mediation in the civil justice system - GOV.UK \(\[www.gov.uk\]\(http://www.gov.uk\)\)](https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system)

B. Policy rationale and objectives

Rationale

11. The conventional economic approach to government intervention is based on efficiency or equity arguments. Government may consider intervening if there are strong enough failures in the way markets operate, for example monopolies overcharging debtors, or if there are strong enough failures in existing government interventions, such as outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. Government may also intervene for reasons of equity (fairness) and for re-distributional reasons (e.g., reallocating resources from one group in society to another).
12. In this instance, there are two efficiency rationales for intervention. Firstly, integrated mediation provides a mechanism for claimants to resolve claims against businesses in cases where they believe the law has been breached. The average wait for a court hearing is around a year. The time, resource, and stress involved may be prohibitive for some parties. Mediation enables parties to resolve their dispute swiftly and consensually. Currently consumers may not be aware of the benefits of mediation over court action for specified money small claims (imperfect information). We expect that the proposed changes to the SCMS may motivate more businesses to offer redress where appropriate (deterrent effect). Businesses may reconsider the likelihood of claimants escalating a complaint and may be more incentivised to improve customer satisfaction, in order to avoid complaints, or to provide compensation for existing complaints.
13. Secondly, integrating mediation into the small claims track will generate efficiencies for both civil court users and the civil justice system. Where mediation is successful, parties to small claims disputes will be saved the additional time and cost of taking their case through to hearing, and the burden on the courts will be reduced. Mediation can also have the effect of narrowing the issues in dispute. As the appointment is free to the parties, one-hour in length, and conducted via the telephone, we do not believe this proposal presents a disproportionate burden to users.

Policy Objectives

14. The associated policy objectives are to:
 - deliver swift access to justice for all civil court users.
 - ensure that sufficient judicial resources are available for complex cases.
 - reduce the cost of resolving disputes for parties to specified money small claims.
 - ensure that parties to specified money small claims are confident in and satisfied with the mediation process as a means to resolve their disputes; and,
 - support the delivery of a sustainable and efficient civil justice system.

C. Affected Stakeholder Groups, Organisations and Sectors

15. A list of the main groups that would be affected by the options in this Impact Assessment (IA) is shown below:
 - Users of the County Court specified money small claims track, including businesses and individuals

- HMCTS, who bear the cost of the SCMS for small claims track users but who would also benefit from the reduction in court sitting days.
- Legal professionals
- The Judiciary

D. Description of options considered

16. The following options are considered in this IA:

- **Option 0** – do nothing. Continue with the current system of optional attendance at mediation for specified money small claims disputes.
- **Option 1** – create a pilot practice direction to change the Civil Procedure Rules to introduce a requirement for specified small money claims to be required to attend a free, on-hour mediation session with the SCMS. The pilot practice direction will be replaced with a statutory Rule change via secondary legislation evaluation and any adjustments.

17. Option 1 is preferred as it best meets the policy objectives.

Option 0

18. Under this option, attendance at an SCMS appointment would continue to remain optional for parties to specified money small claims disputes. Where mediation does take place, parties would not be obliged to settle at mediation. If they fail to reach a settlement, the claim will continue as normal to a court hearing. However, this Option would not address the current issues with the use of mediation and so would not meet the policy objectives.

Option 1

19. Under this option, mediation will be integrated for all defended, specified small money claims in the County Court (generally those valued under £10,000). All parties to a such a claim will be required to attend a free, one-hour, telephone appointment with the SCMS. Parties will not be obliged to settle their case and access to a court hearing will remain open to all. Where a settlement is reached, this agreement can be registered with the court as an enforceable settlement order.

20. Where mediation is undertaken but fails to result in a settlement, litigation will resume as usual. If a party does not attend their scheduled mediation appointment without reasonable excuse, a judge will be able to apply a suitable sanction at their discretion. This may be a cost sanction, which means the judge can order the non-compliant party to pay for part or all of the other party's legal or court costs, or the costs of a wasted mediation appointment. The sanction of strike-out of the claim or defence is not excluded, which means the judge can automatically rule in the other party's favour.

21. As part of this option, the SCMS will be expanded during 2023/24 (with supporting messaging to drive voluntary uptake) and upgrades to the technology will be implemented in advance of the pilot practice direction coming into effect in 2024/25.

22. The Government plans to support the success of this option by improving the information provided to users about the mediation process and its benefits.

Other options considered

Non-regulatory options

23. In the course of refining Option 1, we considered whether a non-regulatory option could fulfil our policy objectives but concluded that initiatives to nudge parties towards engagement in mediation had been exhausted. HMCTS has consistently improved the information available to parties about the SCMS. For example, in response to user feedback on the ‘opt-out’ mediation model, HMCTS introduced new screens to increase awareness of mediation for parties to a claim.⁹ However, as noted below this did not produce the desired effect.
24. Furthermore, and as was mentioned above, HMCTS have already attempted to strengthen existing non-regulatory measures to encourage the uptake of mediation in small claims issued within the OCMC by moving from an “opt in” model of mediation to an “opt out” model. This effected only a 4% increase in the number of parties being referred to the SCMS (moving from 17% under the “opt-in” model to 21% under the “opt-out” model), while the settlement rate remained constant. There also remained a high level of non-attendance at mediation sessions.¹⁰ In conjunction, these initiatives have exhausted the non-regulatory options to nudge people into mediation.

Regulatory options

25. We also considered a range of other regulatory options. One lighter touch regulatory option considered was to introduce integrated mediation for small claims valued under £500 only (as per the CJC’s recommendation). However, we saw no reason to limit the benefits to only the very small claims as a small claims track-wide approach would be more consistent and user-friendly.
26. More widespread reforms were also reviewed, including the possibility of extending a requirement to mediation to fast-track and multi-track cases in the County Court, using external mediators rather than in-house HMCTS mediators. As this would require the establishment of a subsidy arrangement for those on low-incomes, and potentially an intervention in the external mediation market, this option was ruled out until further scoping work is completed.

E. Cost and benefit analysis

27. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
28. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised. These might be impacts on certain groups of society or data privacy impacts, both positive and negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are not monetised.

⁹ p. 21 [SMALL CLAIMS \(judiciary.uk\)](https://www.judiciary.uk)

¹⁰ <https://www.gov.uk/government/publications/hmcts-opt-out-mediation-evaluation/hmcts-opt-out-mediation-evaluation-report>

29. The costs and benefits of each option are compared to option 0, the counterfactual or “do nothing” scenario. As the counterfactual is compared to itself, the costs and benefits are necessarily zero, as is its net present value (NPV).
30. For the counterfactual we have assumed that uptake levels and settlement rates would remain relatively constant under option 0. The total number of claims received in 2022 was approximately 1.54 million. Of these 244,000 were defended and 105,000 were allocated to the small claims track. 42,000 were referred for mediation and 31,000 agreed to participate in voluntary mediation. Of these, 11,000 mediations were abandoned or cancelled. 20,000 mediations were conducted and, of these, 11,000 were settled, giving a 52.5% settlement rate for cases that undertook mediation. However, this would still mean that only 19% of small money claims cases would be utilising the SCMS and so would not meet the policy objectives to increase the number of cases resolved more swiftly and free up judicial time for those cases that need to be resolved via a judicial determination.
31. The impacts of each option are presented in 2023 prices using an appraisal period of 10 years from 2023-2033. Optimism bias of 20% has been applied to all the costs.

Data & Methods

32. Our modelling of the impacts of Option 1 only considers the impact of all specified money small claims referred to mediation under this option. It does not include the costs of mediations which already occur as these form part of the costs of the baseline option.
33. The impact of the preferred option will be determined by the settlement rate of claims at mediation. In this analysis, we have modelled for a 15-55% settlement rate. The upper figure largely reflects the success rate for the small claims currently being mediated by the SCMS on a voluntary basis. The lower rate was selected to create a plausible range. We anticipate a likely dip in the settlement rate when parties are required to attend mediation, but we expect settlement rates to remain above 35%, which we have used as our best estimate.
34. This 35% rate approximates the 40% settlement rate in the only evaluation of the Ontario Mandatory Mediation Programme in Canada¹¹. In 1999, 3 districts of Ontario introduced an automatic referral to mediation for civil cases over the value of around £15,000 with an independent mediator included on a list maintained by the court. The evaluation carried out 23 months after the scheme was introduced reported that 40% of cases going to mediation in 2 of the 3 locations settled at or within 7 days of the mediation. Whilst the Ontario model is not a direct comparator for Option 1, and the evaluation is somewhat dated, it does concern mandatory mediation and suggests that the 35% success rate may be in the right ballpark.
35. In addition, cases in the County Court involving lower amounts of money (less than £500) already have a higher settlement rate on average. And whilst this settlement rate tapers off as the value of the claim increases, over half (52%) of specified claims in 2022 were for less than £500 with a settlement rate with the SCMS of 61%¹² as compared to the average settlement rate of 52% for all specified money claims. We propose to mitigate this reduction further by providing improved information about mediation and its benefits, including new video information.¹³

¹¹ [Evaluation of the Ontario Mediation Program \(Rule 24.1\) Final Report: The First 23 Months \(com.s3.amazonaws.com\)](https://www.amazonaws.com)

¹² Based on internal HMCTS data (unpublished)

¹³ <https://www.youtube.com/watch?v=rR-Oe9R5Nsk>

36. We are confident in the data sources used for the analysis of the costs and benefits to HMCTS. The data sources for the costs and benefits for businesses are, however, less robust. For the benefits to businesses, we are primarily using figures provided within the Legal Services Board's report on the legal need of small businesses (2017)¹⁴, which reports various measures relating to the average cost of the last legal dispute faced by respondents. For the purposes of this IA, this is assumed to be the baseline cost to business of not going through the SCMS which would be avoided if they were to do so.
37. In this IA, we have used, as our best estimate for the cost of proceeding to hearing, the median figure in the report. This is appropriate as it captures the average cost while not placing undue importance on higher values. This is particularly important given the fact the costs are self-reported and may be overestimated. The report uses the interquartile range to remove outliers and reports a median cost of £1000. Inflating to 2023 prices yields a value of £1214. This represents the latest available estimate of these costs. These figures are based on research participants' own estimates and has not been triangulated with other sources. It is not possible to break this estimate down into direct and indirect costs.
38. We use this figure to calculate the benefit to businesses from our policy. £1214 is assumed to be the cost incurred when a business goes to court. We calculate the number of businesses this applies to by considering the average number of parties to a dispute, the proportion of parties that are businesses, the proportion of parties that currently take up mediation and it's assumed success rate. Multiplying the two figures yields the estimated total benefit to businesses.
39. The only other evidence available on the costs to business is from a 2016 survey conducted by the Federation of Small Businesses (FSB). Respondents were asked to estimate the cost of their most recent legal dispute and found that the mean cost was £17,000.¹⁵ This included direct costs and indirect costs, although again a breakdown was unavailable. We have decided to use the more conservative estimate of £1214.
40. We assume this figure reflects the average cost of a legal dispute in the small claims track. Small businesses, which make up the vast majority of UK businesses,¹⁶ are also most likely to be involved in smaller, less complex disputes. We have used internal HMCTS data to make an assumption about the number of times a business is a claimant or defendant to a specified money small claim.
41. Note that, of the small businesses surveyed for the Legal Services Board report, only a small number actually commenced legal proceedings. In practice, this means that the average cost of legal disputes involving legal proceedings is likely to be significantly higher than £1214 – going to court requires significant time and resource. On the other hand, a portion of these costs will still be incurred before court proceedings are issued and requiring mediation would not save these costs. However, it is very difficult to quantify the extent to which there are costs which are likely to be common between the two approaches.
42. Therefore, for the purposes of this IA, we assume that the legal dispute costs incurred prior to mediation and the additional costs incurred by going to court balance each other out. Given these considerations and given the significantly higher costs estimated by the FSB (£17,000), we take £1214 to be a reasonable estimation of the business cost of a small claim dispute.

¹⁴ [Small business legal needs \(legalservicesboard.org.uk\)](https://legalservicesboard.org.uk). Average legal problem cost in 2017 in Table 21.

¹⁵ [Tied Up | FSB, The Federation of Small Businesses](#) (2016)

¹⁶ <https://www.gov.uk/government/statistics/business-population-estimates-2022/business-population-estimates-for-the-uk-and-regions-2022-statistical-release-html>

43. Nevertheless, given the sensitivity of this cost estimate, we have undertaken a sensitivity analysis at section F, which shows that even if the business savings are only 44% of £1214, the NPV of the planned policy option would still be positive at a settlement rate of 15%.
44. We explain we calculate the costs to business of Option 1 in paragraphs 47- 48 below.

Option 1 – Create a pilot practice direction to introduce a requirement into the Civil Procedure Rules to mediate for specified money small claims disputes, pending the introduction of a permanent rule change via secondary legislation at a later stage following evaluation and any adjustments.

Costs of Option 1

Monetised Costs

HMCTS

45. There will be monetised costs to HMCTS associated with the expansion of the SCMS, including: the recruitment and training of additional mediators; IT improvements; resources for a public information campaign on the policy change; internal resources; and evaluation costs. Excluding the transition costs required to expand and improve the SCMS, we estimate these costs to HMCTS to be an additional £4.1m annually. This primarily covers the ongoing salary cost of an expanded SCMS staff as well as ongoing IT costs.
46. HMCTS will also incur costs in terms of the lost hearing fee income from cases that settle through mediation. This is estimated to amount to £0.5 -1.9m annually (based on 15-55% settlement rates). Other fees such as the HMCTS issue fee for making the claim to the court would be unaffected. Likewise, cases which do not settle through mediation would still incur the hearing fee as the case proceeds. Court fees initially fall to claimants although they ultimately be met by the losing party to the case assuming they have the means to pay.

Businesses using the Small Claims Track

47. There will be a monetised cost to businesses of using integrated mediation. Internal HMCTS data suggests 58% of all parties to a specified small money claims track are organisations (rather than individuals).¹⁷ We have also found that a claim involves 2.1 parties on average. Hence, we estimate that businesses were party to a defended specified small money claim 138,000 times in 2022. The costs to businesses are based on an hourly rate of staff time of a managers, directors, and senior officials, assumed to be £27 per hour.¹⁸ We assume that a senior manager would need to spend two hours on the mediation, implying a total cost of £54 per business for each mediation session.
48. This estimate has been constructed using two separate statistics. Firstly, we get the average hourly wage of £23.25 for managers, directors and senior officials from the 2023 Annual Survey of Hours and Earnings (ASHE) released by the ONS. We also get the average non-wage labour costs from the Index of Labour Costs by Hour (ILCH). We find that on average non-wage costs are 15% of total labour costs for a firm. We took the average of this proportion over all quarters from 2011 to 2020Q3.

¹⁷ This is in line with the [2015 Civil Court User Survey](#) (Table 3.3)

¹⁸ [Employee earnings in the UK - Office for National Statistics \(ons.gov.uk\)](#)

49. The total cost to businesses is found by multiplying the number of parties by the cost of attending mediation. This cost to businesses is estimated at £6.6m approximately annually.

Non-Monetised Costs

Individual (non-business) Court Users

50. The above paragraphs have assessed the costs to business users of Option 1. However, non-business court users (e.g., private individuals) will also be impacted by Option 1.
51. As the mediation service is included in the issue fee to file a claim with the County Court, there will be no direct costs to individual court users. However, they will be required to make time to prepare for and attend the one-hour telephone mediation appointment. They may also wish to secure legal representation to attend the mediation session on their behalf, although this is not necessary and the SCMS is designed for use by litigants in person. The costs associated with the mediation would be the same for individuals that are claimants and defendants.

Legal Professionals

52. Under Option 1, lawyers may lose income from representing specified money small claims parties (both businesses and individuals) in a court hearing. However, as is the case with proposals to simplify the legal process, we make the assumption that those affected will be able to find work of equal or next best economic value and so will incur no loss.

Benefits of Option 1

Monetised Benefits

HMCTS

53. There will be monetised benefits to HMCTS from the sitting days saved through the reduction in specified money small claims hearings. The cost of a sitting day in 2023-24 is estimated at £2,326. This includes judicial costs, estates, and costs such as interpreters. Pending new 23-24 pay awards for the judiciary, the judicial costs will be significantly higher.
54. Option 1 is estimated to achieve a 15-55% reduction in specified money small claims hearings, and free up 1,406 – 5,156 sitting days (9-32%) of all County Small Claims Court sitting days). The benefits of sitting days saved by this option are therefore estimated to amount to £3.3m - £12m annually.
55. The government does not intend to cash out these sitting days; instead, they will be used to help improve performance across the County Court. The savings for HMCTS are expected to outweigh their costs unless the settlement rate at mediation is lower than 25.4%.

Businesses using the Specified Money Small Claims Track

56. The monetised benefits for businesses derive from the swift resolution of legal disputes. There is little evidence on costs to businesses of legal disputes. As discussed, we are averaging the figures provided within the Legal Services Board's report on the *Legal Needs*

of *Small Businesses Report* and correcting for inflation, which gives a cost saving of £1214 per legal dispute to a business using the small claims track.¹⁹

57. Based on our approach, our estimate of the cumulative savings for all businesses affected are £16m-76m per year with the best estimate being £46m.
58. The requirement to attend a mediation session with the SMCS benefits business by averting the additional costs of litigation (preparation for, and representation at, a hearing) in the event of a settlement. We assume that the benefits of avoided litigation costs constitute a direct benefit. Under Option 1, businesses that would not have opted in, or may have opted out of, mediation, will now be required to attend a mediation session. A percentage of these businesses will settle their claims via mediation and hence will not have to incur the cost of going to a judicial hearing. This includes incurring a hearing cost for the claimant, time for preparation and attendance at a hearing, and if represented, legal costs of representation by a lawyer at the hearing.
59. These costs are direct and hence this benefit must be included in the calculation of the equivalent annual net direct cost to business (EANDCB). The impact is 'first round'. Business, particularly (but not exclusively) those that routinely file claims, would treat legal costs as a cost of doing business. Integrated mediation, by reducing the probability of having to wait for and prepare for a hearing, will reduce these businesses' expected costs, meaning that it will be cheaper for all levels of goods production or service provision. This will increase the businesses expected profit and have a direct impact on operating decisions.

Non-Monetised Benefits

Individual (non-business) Court Users

60. Where mediation is successful, individual non-business court users will be saved the cost of a legal dispute, including preparation costs and fees for legal representation at a court hearing, and (for the claimant) the court hearing fee. We haven't quantified these costs as they are nearly impossible to pin down owing to high variability in both wage rates and the costs of legal advice and representation.

All Court Users

61. The non-monetised benefits of this option include the unquantified cost savings for all specified money small claims track users, including the reduced burden for all parties in terms of the time and stress associated with protracted litigation; and the costs saved by businesses who can preserve their relationships with customers and suppliers through achieving a consensual resolution.
62. In addition, mediation enables outcomes which are not available as a court remedy, which is generally limited to a monetary win/lose scenario. Mediation allows individuals and businesses to agree flexible payment plans, exchange of goods, or commitments to improve business processes. In addition, data suggests that, because the parties are involved in, and agree to, the settlement terms they are more prepared to pay than when an independent, judicial decision has been made. One study suggests enforcement issues are eight times more likely following court judgments than following mediation.²⁰ This suggests that mediation outcomes present significant benefits compared to court judgment outcomes.

¹⁹ [Small business legal needs \(legalservicesboard.org.uk\)](https://legalservicesboard.org.uk). Average legal problem cost in 2013, 2015, and 2017 in Table 21.

²⁰ At 1.1% vs. 8%. [Institutionalising mediation? An evaluation of the Exeter Court small claims mediation \(exeter.ac.uk\)](https://exeter.ac.uk)

63. Given the judicial sitting days saved will be used to reduce the time for other cases to progress to a hearing, Option 1 should reduce waiting times for all County Court cases, so reducing the time and stress associated with protracted litigation for all County Court users.

Judiciary

64. We expect to see judicial resources freed up for use on more complex cases. The assumption is that more of the simpler, clear-cut cases will be resolved through mediation and a higher proportion of cases proceeding to hearing will be complex or where a judicial decision is necessary to resolve the conflict. While it is not possible to monetise these costs, we will be able to verify if this is happening by looking at what proportion of cases proceeding to hearing are complex.

F. Assumptions, risks and sensitivity analysis

Assumptions

65. The key assumptions used in calculating the impact of the preferred option include the following: that most specified money small claims are suitable for mediation; the proportion of defended specified money small claims that require a hearing; the rate of successful mediations; the number of parties to specified money small claims disputes that are businesses and individuals; the cost to businesses of a legal dispute; and the cost of a judicial sitting day for HMCTS.

HMCTS

66. To calculate the costs of mediation for the government, we have estimated the additional number of mediations that will be undertaken based on the amount of specified money small claims allocated in 2022. Using this figure, we have modelled the additional annual costs of extra mediator and administrative staff, as well as technology maintenance costs. This includes an assumption about the number of mediations a mediator can do in a day. We have also made assumptions about transition costs, including upgraded IT, recruitment and training, evaluation, and communications. To calculate the cost of hearing fees lost, we have assumed the income of hearing fees would have remained stable without integrated mediation.

67. To calculate the benefits of mediation for the government, we have made assumptions about the number of cases heard in court each day and the cost of a judicial sitting day.

Businesses

68. To calculate the costs of mediation to businesses, we have assumed that preparing for and attending a one-hour mediation will take two hours on average. This covers any preparation that would not be covered by preparing for a court hearing, which would require the exchange of witness statements, gathering and ordering all evidence and pre-trial checklists. This is not required for the mediation session. The additional effort required for the mediation is for the manager to reflect and decide what settlement they would be prepared to accept to resolve the dispute at mediation, including what offer they might make, or accept, as a compromise to bring the legal case to an end swiftly and consensually. It is not possible to precisely break down and monetise all these costs, so we can't achieve a clean delineation between preparation costs that would occur with or without mediation. We do feel however that the estimates we have are representative of reality.

69. In absolute terms, attorneys in the United States on very high value (median \$111,000) medical malpractice lawsuits spend, on average, 3.49 hours preparing for mediation.²¹ They estimated spending 36.29 hours, on average, to prepare the same case for trial.²² It is likely much of work done in the 3.49 hours would have also been done as part of the 36.29 hours. 3.49 hours is spent preparing for high value, highly complicated medical malpractice suits. Given the fact that the average small claim is valued at under £3000 and likely is much less complex, we consider 1 hour of *additional* preparation time to be reasonable. We include a further 1 hour to attend the mediation. The costs to businesses per hour are based on an hourly rate of staff time of a managers, directors, and senior officials, assumed to be £27 per hour.²³
70. To calculate the benefits to businesses, we have assumed that the savings to business of a legal dispute is £1214 per successful mediation (see paragraphs 32-35 for how this figure has been arrived at). We view this as the additional cost avoided if mediation succeeds.

Risks

71. The main risks associated with the preferred option is that the current rate of successful mediations within the SCMS (52.5%) is not maintained, perhaps due to cases with those parties most amenable to mediation already being mediated on a voluntary basis. Extension to all specified money small claims may mean the settlement rate drops. We are working to mitigate these risks by improving public information to ensure that users understand mediation and how to prepare to engage with this process, as well as promoting the benefits of resolving their case through mediation, for instance via new video information.²⁴ We are also bolstering the mediator training provision to support success.
72. We have presented the range of costs and benefits that factor in a 15-55% settlement rate where mediation takes place. We hope success rates would increase over time as mediation becomes an integral part of the small claims track and users are familiarised with the process. However, as the breakeven analysis below shows, the NPV would positive even where settlement rates are significantly lower than our low 15% estimate.
73. Break even analysis highlights that the success rate of mediation has to be approximately 7.64% in order for the NPV to remain positive.

| Success rate | NPV 2023 prices £m |
|--------------|--------------------|
| 7.64% | 0.11 |
| 7.63% | (-0.03) |

Sensitivity Analysis

74. The estimated savings are highly sensitive to the estimated savings for a business per successful mediation. We therefore undertook a sensitivity analysis to factor in a potential lower rate of savings. We found that as long as the cost of a dispute was at least 46.5% of the estimate used (46.5% of £1214 is £565), the NPV is positive in each scenario. The NPV in the best case remains positive for savings as low as £172 (14.2% of 1214).

²¹ [Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project | Health Affairs](#)

²² [Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project | Health Affairs](#)

²³ [Employee earnings in the UK - Office for National Statistics \(ons.gov.uk\)](#)

²⁴ As part of the improvement to public information provision, HMCTS have published a SCMS educational video: <https://www.youtube.com/watch?v=rR-Oe9R5Nsk>. This will be evaluated to inform further interventions.

| Net Present Value under lowered savings rates | 15% success rate | 35% success rate | 55% success rates |
|---|------------------|------------------|-------------------|
| 46.5% - £565 | £0.83m | £144m | £288m |
| 14.2% - £172 | -£61m | £0.27m | £61m |
| 5.5% - £67 | -£77m | -£39m | £0.48m |

NVP Base Year

75. The analysis presented here has used 2023 prices as the base year. Presenting these figures in 2019 prices - for regulatory purposes - gives the corresponding estimates below. These are calculated using GDP deflators from the Quarterly National Accounts from ONS, March 2023.²⁵

| NPV base year | Net Benefit (Present Value) £m | | |
|---------------|--------------------------------|------|---------------|
| | Low | High | Best estimate |
| 2019 | 103 | 550 | 317 |

G. Wider impacts

Better Regulation

76. This measure is a qualifying provision under Section 22(3) of the Small Business Enterprise and Employment Act 2015.

Equalities

77. The equalities assessment has been undertaken and the resulting statement is included within the *Increasing the Use of Mediation in the Civil Justice System* government response document.²⁶

Small and Micro Business Assessment

78. Internal HMCTS data suggests that that 58% of all parties to specified money claims are businesses, most of which we assume are micro or small businesses (given they comprise 99% of all businesses and are more likely than larger businesses to be involved in claims less than £10,000). Policy option 1 presents substantial cost savings to businesses by avoiding the significant time and resources required for preparing for and attending a court hearing. Exempting small and micro businesses from the policy would therefore significantly reduce the benefits to HMCTS as well as to the businesses themselves.

79. There are no disproportionate burdens on small and micro businesses. The Small Claims Mediation Service is designed for litigants in person. No specialised knowledge is required. It is therefore very suitable for small and micro businesses, which may be more likely to represent themselves in court. Moreover, the FSB report suggests that small business simply do not ordinarily have the bandwidth to consider mediation as an alternative to court. Policy option 1 brings the benefits to small businesses without them having to go out and navigate the complicated dispute resolution market. It does not delay their case, it is free, and it by telephone.

²⁵ GDP deflators at market prices, and money GDP March 2022 (Quarterly National Accounts) - GOV.UK (www.gov.uk)

²⁶ www.gov.uk Increasing the use of mediation in the civil justice system - GOV.UK (www.gov.uk)

80. There will be some costs involved as small and micro businesses will need to attend and prepare for the free mediation appointment. However, the *additional* preparation required will be minor, compared to the preparation required for a court hearing. Mediation-specific preparation is generally limited to reflecting on key issues, what (flexible) solutions they might want, what they are prepared to offer, and what they are prepared to settle for. We assume that this additional mediation-specific preparation time will take about 1 hour, plus the one hour required to attend the mediation. (Mediation for \$US100,000 medical cases take less than 4 hours to prepare in total – a significant portion of that preparation would have to be done for court also).
81. In order to help small and micro businesses prepare for mediation effectively, we have begun producing accessible information in a variety of formats. For example, we have produced a video on small claims mediation,²⁷ which tackles areas of confusion identified in the opt-out mediation evaluation.²⁸ We are reviewing and updating information provision across the board to ensure it is accessible and understandable for litigants in person, which may include owners of small and micro businesses.

A summary of the potential trade implications of measure

82. The preferred option is unlikely to have an impact, as businesses involved in international trade are unlikely to be involved in litigation in the small claims track of the County Court – the Commercial Courts (part of the Business and Property Courts of the High Courts of Justice) deal with international trade disputes.

H. Monitoring and Evaluation

83. We will build in evaluation from the start, using management information along with economic indicators and qualitative attitudinal indicators to provide benchmarks from which we will be able to observe changes in behaviour and outcomes in dispute resolution related to this change in policy.
84. Key indicators that we will use to measure the above include timeliness statistics for the County Court; small claims hearing data within the County Court; settlement rates for the SCMS; and user satisfaction rates for the SCMS. A full logic model and list of the data requirements needed to evaluate the policy is being developed in line with evaluation guidelines set in the HMT Magenta Book.
85. Process, impact and economic evaluations will all be necessary to fully demonstrate the outcomes of the policy in terms of how the policy is applied, the impact of the policy and its value for money.
86. Process evaluations will examine the activities involved in the planned option's implementation and delivery pathways. They cover questions such as: What worked well and less well, and why? How was the intervention implemented? What could be improved? How has the context influenced delivery?
87. Impact evaluations will measure whether the planned option has achieved its intended outcomes, and whether it was the cause of any changes in outcomes. Such evaluations can also identify any unintended consequences of the policy.

²⁷ [What is small claims mediation? - YouTube](#)

²⁸ [HMCTS opt out mediation evaluation - GOV.UK \(www.gov.uk\)](#)

88. Economic evaluation will consider the value-for-money of the planned option, including whether the benefits are outweighed by the costs, and whether the intervention remains the most effective use of resources. Benefits can include both direct financial savings for MoJ and potentially other government departments, along with wider social benefits.