Title: Protocol between DECC and the UK Downstream Oil Industry for the supply of fuel in an emergency	**Impact Assessment (IA)**
	IA No: DECC0062
Lead department or agency: DECC	**Date: 22/06/2011**
	Stage: Final
Other departments or agencies: BIS [OFT]	**Source of intervention:** Domestic
	Type of measure: Secondary legislation
	Contact for enquiries: paul.borthwick@decc.gsi.gov.uk

Summary: Intervention and Options

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

Disruptions to fuel supply can have significant impacts on the UK economy. Information sharing, joint planning and co-ordinated actions between the Industry Parties and DECC may minimise the cost by allocating the fuel available in the most efficient manner. The existing Memorandum of Understanding does not provide the necessary protection for Industry Parties to operate in this manner without the risk of challenges on the grounds that they are breaching competition law The MoU was granted by the OFT an exemption from the Chapter 1 prohibition of the Competition Act 1998. The exemption has expired and cannot be renewed by the OFT. In absence of Government intervention, there is an overwhelming risk that cooperation between Industry Parties is compromised.

What are the policy objectives and the intended effects?

The objective of the policy is to improve the distribution of fuels during an oil fuel disruption before and/or instead of the use of emergency powers.

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

Option 1 (Baseline): Do nothing, maintaining existing arrangements under the current MoU.
Option 2: An OFT 'comfort letter' that confirms the analysis that underpins its earlier exemption in 2001 (for the period of 2000-10) is still valid.
Option 3:, Making an Order to exclude from the prohibition in Chapter I of the Competition Act a voluntary protocol agreement to enable information sharing and joint working with Industry Parties and the Government. The Order itself should have no impact. The impact assessment assesses the impact were the protocol to be activated
Option 3 is the preferred option as it provides the highest estimated benefits with no additional costs.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:**
What is the basis for this review? Not applicable **If applicable, set sunset clause date:** N/A

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

Ministerial Sign-off For final stage Impact Assessments:

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) the benefits justify the costs.

Signed by the responsible Minister: Date: 6 March 2012

Summary: Analysis and Evidence

Policy Option 3

Exemption of a new voluntary Protocol from the 1998 Act (preferred option)

Price Base	PV Base	Time Period	Net Benefit (Present Value (PV)) (£m)		
Year2010	Year 2010	Years 10	Low: £0.6m	High: £6.4m	Best Estimate: £3.2m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0		0	0
High	0		0	0
Best Estimate	0		**0**	**0**

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

There are no estimated costs for Option 3 relative to the baseline (Option 1) as there would be no familiarisation costs from the voluntary Protocol, which will replace the existing Memorandum of Understanding without imposing extra requirements.

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

None identified.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0		£0.1m	£0.6m
High	0		£0.7m	£6.4m
Best Estimate	0		£0.3m	£3.2m

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

Introducing the Protocol will enable information sharing and joint planning to better allocate the fuel available. The impact of a fuel disruption is estimated by using ONS Gross Value Added data on industries' intermediate consumption. The analysis focuses on the direct impact of a fuel supply disruption on transport and refining sectors as these two sectors account for the majority of the downstream oil market.

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

It is expected that there would also be a benefit to other sectors of the economy from the use of the Protocol, but these have not been monetised in this IA. The OFT concluded that the potential costs to competition of the MoU were negligible. There is no reason to believe that the Protocol will have a different impact on competition. Option 3 will also have the benefit of reducing Government reputational risk, reduce the likelihood of using emergency powers and would help verify the need for the Government to escalate the response.

Key assumptions/sensitivities/risks	Discount rate (per cent)	3.5

A fuel disruption similar to that of September 2000 has been assumed. A full pass through of a fuel disruption to the transport and refining sectors has been assumed. The estimates of the impact of a disruption are therefore an upper bound. In the central scenario, it is assumed that the Protocol offset 5 per cent of the impact of the disruption. Sensitivity analysis around that is provided in the IA.

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO	Measure Qualifies as
Costs: 0	Benefits: 0	Net: 0	No	N/A

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			United Kingdom			
From what date will the policy be implemented?			2011			
Which organisation(s) will enforce the policy?			DECC (protocol is voluntary)			
What is the annual change in enforcement cost (£m)?			0			
Does enforcement comply with Hampton principles?			Yes			
Does implementation go beyond minimum EU requirements?			N/A			
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A		**Non-traded:** N/A	
Does the proposal have an impact on competition?			Yes			
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** N/A		**Benefits:** N/A	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro** N/A	**< 20** N/A	**Small** N/A	**Medium** N/A	**Large** N/A	
Are any of these organisations exempt?	No	No	No	No	No	

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	Impact	Page ref within IA
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	NA
Economic impacts		
Competition Competition Assessment Impact Test guidance	Yes	15
Small firms Small Firms Impact Test guidance	Yes	15
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	NA
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	NA
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	NA
Human rights Human Rights Impact Test guidance	No	NA
Justice system Justice Impact Test guidance	No	NA
Rural proofing Rural Proofing Impact Test guidance	No	NA
Sustainable development Sustainable Development Impact Test guidance	No	NA

[1] Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	Competition Act 1998 – for exemption of Protocol from the Chapter I Prohibition http://www.legislation.gov.uk/ukpga/1998/41/schedule/3
2	Energy Act 1976 – for energy emergency powers http://www.legislation.gov.uk/ukpga/1976/76/section/1
3	
4	

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs										
Annual recurring cost										
Total annual costs	0	0	0	0	0	0	0	0	0	0
Transition benefits										
Annual recurring benefits	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3
Total annual benefits	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3

* For non-monetised benefits please see summary pages and main evidence base section

Annual profile costs and benefits - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4
Transition costs					
Annual recurring cost					
Total annual costs	0	0	0	0.002	0.011
Transition benefits					
Annual recurring benefits					
Total annual benefits	0	1.7	1.8	1.9	2.1

Version of GHG guidance used: e.g. March 2010

Sector		Emission Changes* (MtCO2e) - By Budget Period			Emission Changes (MtCO2e) - Annual Projections																		
		CB I; 2008-2012	CB II; 2013-2017	CB III; 2018-2022	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
Power sector	Traded	0	0	0																			
	Non-traded	0	0	0																			
Transport	Traded	0	0	0																			
	Non-traded	0	0	0																			
Workplaces & Industry	Traded	0	0	0																			
	Non-traded	0	0	0																			
Homes	Traded	0	0	0																			
	Non-traded	0	0	0																			
Waste	Traded	0	0	0																			
	Non-traded	0	0	0																			
Agriculture	Traded	0	0	0																			
	Non-traded	0	0	0																			
Public	Traded	0	0	0																			
	Non-traded	0	0	0																			
Total	Traded	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Non-traded	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cost effectiveness	% of lifetime emissions below traded cost comparator																						
	% of lifetime emissions below non-traded cost comparator																						

*** Important note: Please enter net emission savings as positive numbers and net emission increases as negative numbers.**

2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050
0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

PROTOCOL BETWEEN THE DEPARTMENT OF ENERGY AND CLIMATE CHANGE AND THE UK DOWNSTREAM OIL INDUSTRY FOR THE SUPPLY OF FUEL IN AN EMERGENCY

REFERENCE DECC0062: IMPACT ASSESSMENT – EVIDENCE BASE[2]

A. PURPOSE AND INTENDED EFFECT

1. Policy Objective

1.1 Disruptions to fuel supply can have significant impacts on the UK economy. Government needs to ensure that the Downstream Oil sector has the ability to minimise the cost by allocating the fuel available in the most efficient manner.

1.2 DECC is developing a voluntary Protocol agreement with the Trade Associations and companies in the UK Downstream Oil sector ("Industry Parties"). The purpose of the Protocol, if activated, on a temporary basis, is to improve the distribution of oil fuels during an oil fuel disruption. The Protocol helps to achieve this by:

- enabling the timely sharing of accurate information between the Parties concerned on: the disruption to operations, availability of oil fuel stocks, fuel tanker movements, and industry plans for relocation of tankers.
- enabling joint planning and, exceptionally, co-ordinated supply action between the Parties concerned by flexing, sharing and redeployment of assets, and the supply of fuel from alternative distribution terminals to end users.

1.3 However, this means that the Industry Parties will be asked to share commercially sensitive information in a way which may impact on competition and therefore engage the Competition Act 1998 (CA98). The Industry Parties are concerned by the risk of a third party[3] making a civil claim against them in the Courts. The Industry Parties would not become a party to the Protocol unless it is exempted from the domestic competition law regime, as the Industry Parties would otherwise risk be the subject of claims that they are breaching the CA98, which can be costly to defend, and potentially could incur heavy financial penalties, in order to fulfil a public policy goal without the legal certainty of immunity from investigation and prosecution.

1.4 The activation of the Protocol would be a more measured mechanism than the Government resorting to taking of emergency powers, which would lead to a substantially greater level of intervention into the downstream oil market. The Protocol is an emergency response measure in addition to the existing emergency powers and is not a substitute for emergency powers because the Industry Parties would be invited to carry out the above activities to mitigate the impacts of a fuel disruption on a voluntary basis, and without a statutory direction by the Government.

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[2] The Evidence Base for this Impact Assessment (IA) has been prepared in cooperation with Trade Associations and companies in the UK Downstream Oil sector beginning prior to the introduction of the new regulatory arrangements. The Evidence Base deviates from the suggested sequence of the evidence for the IA template to maintain consistency with versions shared with Industry Parties in consultation. It does, however, contain all information required for a standard IA.

[3] Affected third parties include: wholesalers or retailers of fuel in the downstream oil sector and commercial enterprises that hold their own bunker fuel stocks at risk of not being supplied fuel; or companies or organisations that hold bunkered fuel generally in the retail supply chain that are unable to acquire the fuel. Bunkered stocks are fuel supplies held in fixed tanks either owned by companies or organisations or held in the retail supply chain.

2. Background

2.1 The Protocol describes the circumstances under which the Protocol would be deployed, the nature and extent of the "joint planning and processes" envisaged and the Parties concerned.

a) The cause and extent of disruption to fuel supplies can be wide ranging. The downstream oil industry infrastructure is national in scope, is comprised of different physical elements (refineries, fuel distribution terminals, pipelines, road, rail and ship-driven logistics and service stations), is owned and operated by many different private companies (and parts of it by the State as well) and serves geographically dense as well as dispersed communities.

b) DECC would deploy the Protocol under such conditions where there was an imminent or actual risk to the supply of fuel that could lead to the disruption of the emergency services, the continuity of everyday activity, and in extremis, the rule of law and democracy, or caused risk to human life[4].

2.2 In the UK, road-based transport accounts for over 90 per cent of total passenger transport activity[5]. A fuel disruption could be caused by a number of factors including scarcity of supply, a technical problem with part of the fuel supply infrastructure or industrial action or public protest. In the event of such a disruption to supply, it is also possible that stocks could be further depleted through increased consumer demand ("panic buying"). Disruption could occur on a regional or, in a worst case scenario, on a national basis. This could have significant implications for the delivery of essential services across the UK.

2.3 The costs associated with a disruption to fuel supplies are, by definition, subject to almost infinite levels of variability depending upon the nature, extent and duration of a disruption and the underlying economic conditions prevailing at the time. These costs could be subject to some degree of measurement (i.e. those that are economic) but could also be broader, encompassing the CONOP indicators above.

2.4 For the downstream oil industry, the Protocol would replace the Memorandum of Understanding (MoU) dated 29th September 2000. The MoU was agreed to provide an overarching framework for co-operation between relevant public and private sector parties in the event of a significant fuel supply disruption. The MoU is one of the response tools in the National Emergency Plan for Fuel (NEP-F)[6] which may be activated quickly by DECC ministers without the need to take emergency powers. The Protocol seeks to update those elements of the MoU which relate explicitly to co-operation between companies within the downstream oil industry, and between the industry and Government, and will form another response tool in the NEP-F. The MoU will remain in place.

2.5 The activities defined by the MoU raised potential concerns under competition law, and an Office of Fair Trading (OFT) review led to a conditional exemption from the Chapter 1 prohibition in the CA98 by the OFT in 2001 for a period of 10 years starting 29th September 2000[7]. However, a further individual exemption Decision concerning the Protocol is no longer possible; changes to competition law under the Modernisation Programme[8] mean that industry parties would have to

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[4] The Central Government's Concept of Operations (CONOPS) sets out the UK arrangements for responding to and recovering from emergencies. It focuses primarily on the response to no-notice or short notice emergencies requiring UK central government engagement. http://www.cabinetoffice.gov.uk/resource-library/central-government%E2%80%99s-concept-operations

[5] DfT Transport Statistics Great Britain 2009, chart 1.1, p. 14

[6] http://www.decc.gov.uk/en/content/cms/meeting_energy/en_security/downstream_oil/downstream_oil.aspx

[7] Decision of the Director General of Fair Trading No. CA98/8/2001, 25 October 2001

[8] EC Regulation 1/2003, known as the Modernisation Regulation, came into force on 1 May 2004. It empowers national competition authorities and courts of the member states to apply and enforce Articles 81 and 82 of the EC Treaty. One of the key changes was the abolition of the notification system and the introduction of a system under which businesses must self-assess compliance with both European and national competition law.

undertake and rely on their own self assessment of whether the activities envisaged would comply with competition law.

2.6 UK oil companies who are members of the United Kingdom Petroleum Industry Association Limited (UKPIA)[9] have indicated to DECC that effective and timely implementation of the Protocol will be adversely impacted unless a clear mechanism can be provided to ensure that exposure to potential competition law-related action is minimised. Their reasons are as follows:

a) The 2001 OFT Decision has expired (end September 2010).
b) Self assessments by the companies (were they to be undertaken in the event of a supply disruption and in response to a request for participation by DECC) do not address the oil companies' concerns that:
   (i) carrying out the assessments will inevitably delay the companies' implementation of their response to DECC's requests;
   (ii) a self assessment will not prevent third parties from bringing proceedings against the oil companies seeking to recover their losses. Even if, as they would hope, the oil companies are ultimately successful in defending such actions, the costs and disruption caused by such actions would be significant. Concern about such actions is likely to make the oil companies more cautious in the extent and scope of their response to DECC requests.
c) Whilst self assessments are, in principle, available to companies as a means of satisfying themselves that information sharing and joint action are acceptable, DECC is satisfied that, in practice, this route will not result in the necessary speed and flexibility of co-ordinated response from industry envisaged by the Protocol. DECC is, therefore, seeking an exclusion for the Protocol from the Secretary of State for Business Innovation and Skills under Schedule 3, Paragraph 7(1) (a) and (b) of the CA98 on the basis that he is satisfied that there are exceptional and compelling reasons of public policy why the Chapter I prohibition ought not to apply to the "Protocol between the Department of Energy and Climate Change and the UK Downstream Oil Sector for the supply of fuel in an emergency".

3. Operation of the Protocol

3.1 The Protocol is intended to enable information sharing and joint planning by DECC and the Trade Associations and companies operating in the UK Downstream Oil Sector, with the aim of preserving supply and, in the event of unavoidable supply disruption, of protecting supplies to defined essential users. This could cover the emergency "blue light" services or critical supply chains, for example food, water, power generation or health and social care, as well as financial and key government services.

3.2 The Protocol would enable the collection, analysis and reporting of data on fuel supply and demand and the sharing of some or all of this information with impacted or relevant parties or the facilitation of discussion between impacted or relevant parties.

3.3 The significant disruption that occurred in 2000 during the fuel protests and, albeit to a lesser extent, in 2008 during the two separate periods of strike action in the downstream oil sector showed quite clearly the potential and actual social and economic impacts of a significant disruption to fuel supplies.

3.4 The MoU was first activated in 2005, following the explosion at the Buncefield Oil Storage Depot, to enable industry to work together to maintain supply of jet fuel to Heathrow, and to enable

[9] The UK Petroleum Industry Association Limited whose members comprise BP Oil UK Ltd, Chevron Ltd, ConocoPhillips Limited, Esso UK Ltd, INEOS Refining, Murco Petroleum Ltd, Petroplus Refining Teesside Limited, Shell UK Ltd and Total UK Ltd and their affiliates

other fuels and additional road tankers to be available to supply into SE England and the Midlands from alternative terminals.

3.5 During the two separate periods of industrial action in 2008 formal reporting arrangements were set up by DECC under the MOU. The industry was able to meet most market demand by flexing deliveries to regions where fuel shortages were more pronounced and, with good use of mutual aid and business continuity by local responders, it was decided not to implement emergency powers.

3.6 The information sharing process would enable the preparation of a situation report for use internally within DECC and as part of DECC's role as Lead Government Department for energy emergencies within the cross-Whitehall Cabinet Office Briefing Room (COBR) machinery. The process also includes formal reporting arrangements to analyse the nature and extent of an incident, to monitor the distribution and supply of fuel supplies following an incident, and allows recommendations to be made on actions to be taken to manage the consequences of an incident including whether there are grounds for taking emergency powers.

3.7 On the basis of previous incidents, DECC is likely to need to invite the Industry Parties to work closely with DECC under the Protocol and, possibly, to attend meetings with DECC to discuss coordinated response measures. Response measures, in extremis, may include the rationing of fuel to customers or breaking contracts to enable available fuel to be diverted elsewhere, e.g. to supply the emergency services and other defined essential users. Industry parties' inability to work closely with Government would seriously impede (i) collective action to respond to the supply disruption and (ii) the Government's ability to monitor the market and determine whether action to escalate policy responses (e.g. deploy emergency powers under the EA76) is warranted.

3.8 It is the intention of both DECC and the Industry Parties that implementation of the Protocol will comply with competition law so that:

a) Any exchange of information and/or co-operation will be restricted to that necessary for dealing with an oil fuel emergency and any information would be used only in order to deal with an oil fuel emergency.
b) In the event of an oil fuel emergency, where reasonably practicable, oil fuels will be supplied to each defined essential user by its normal supplier and any restrictions on the supply of oil fuels by all or any of these suppliers must be indispensable for protecting security of supply.

3.9 It is not necessary for the OFT or other competition authority to have found that an infringement has occurred before damages can be awarded. A civil claim based on a breach of the competition law can be brought independently of any enforcement action by the competition authorities. The potential for such actions to be brought is underlined by the nature of the concerns caused by various commercial entities about the MoU at the time of the OFT's review in 2001 – which are set out in the 2001 Decision.

3.10 Whilst it is the intention of all the parties to operate the Protocol fully in compliance with competition law, the potential impact of the implementation of the Protocol on third parties means that there is a risk that third parties will seek to recover their losses by bringing an action alleging breach of the competition rules by the oil companies. The burden of proof on a claimant alleging breach of the UK competition rules would be relatively low because they would be able to cite the OFT's finding on its 2001 Decision that the MoU had the "object" of restricting competition (and so potentially avoiding the need to prove effect). As a result, the principal burden of proof (entailing very substantial economic evidence) will rest on the oil companies who will have to defend their position and prove that the actions taken in implementation of the Protocol meet the conditions for exemption under section 9 of the CA98.

3.11 The OFT will have access to all planning meetings concerning (i) arrangements relating to an oil fuel emergency, (ii) test runs of the arrangements and (iii) any meetings held during an oil fuel emergency:

a) All relevant documents in connection with the Protocol will be available to the OFT.
b) The decision would be taken by DECC to activate the Protocol in response to an incident that could cause significant disruption to the supply of oil fuels. DECC would advise the OFT of the activation and the deactivation of the Protocol, as well as any material changes to it.

B. CONSULTATION

4.1 DECC has consulted though meetings and exchange of correspondence on the following options:

Option 1 - Do nothing – Maintaining existing arrangements under the MoU

4.2 Under this option, there is an overwhelming risk that cooperation between Industry Parties is compromised. The Industry Parties concerns mean that their responses are likely to be slower, less flexible and less extensive. For example:

a) Companies may only be willing to provide DECC with supply and demand data on a bilateral basis, i.e. direct to DECC without the involvement of their relevant industry associations. This would remove the beneficial aggregating function and strategic overview/advisory role that associations can play.
b) There could be a considerable time delay as every report would be subject to competition law-related self assessments before submission. Timeliness is crucial for DECC – it needs Industry Parties' support to respond to targets set by Government under Cabinet Office CONOPs for the preparation of assessments, briefings and situation reports for COBR meetings.
c) Each company would have to consider individually rather than collectively any requests to enter into any form of joint planning or co-ordinated action. Companies may refuse to enter into any form of joint planning or co-ordinated action or may limit the extent of their involvement. This will limit the Government and industry's ability to sustain market activity in the event of the supply disruption in question and is likely to hasten the adoption of emergency powers under the Energy Act 1976 ("EA76"). The powers under the EA76 are only intended to be used in a serious supply disruption situation and their use (which would require a high degree of public communication) is viewed as having potential downside risks (i.e. creating further public anxiety).

Option 2 - Updated opinion from the Office of Fair Trading

4.3 Informally, the OFT has recognised the broad public interest that would be served by the deployment of the Protocol, and has indicated that it might be willing to consider offering some form of 'comfort letter' confirming that the analysis that underpins the 2001 Decision is still valid[10].

4.4 In practice, this option will not provide the necessary level of competition law security required by the companies concerned and will, in effect, be the same as Option 1.

Option 3 - Exclusion Order

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[10] The OFT had decided in 2001 that sections 2 and 6 of the MoU has the object and effect of preventing, restricting or distorting competition in the UK; but it merited an individual exemption from the Chapter 1 Prohibition as it met the test for the Section 9 criteria that the restrictions were not indispensible for the operation of the MoU.

4.5 Schedule 3, paragraph 7 of the CA98 allows the Secretary of State to exclude an agreement from the Chapter 1 prohibitions, which would remove the legal uncertainty and issues of concern. The requirement for an exclusion is that there are "exceptional and compelling reasons of public policy", which we believe is the case here:

a) The information sharing and joint industry activity envisaged are essential mechanisms to manage a collective response to a fuel supply disruption in the public interest
b) It provides the legal certainty under the CA98 necessary for companies to participate in the activities envisaged in The Protocol; an Order under Schedule 3, paragraph 7 is the only way in which the fuel companies can be fully protected from the risk of third party action for breach of the Chapter I prohibition under the CA98.
c) It does not preclude the use of emergency powers, if deemed necessary.
d) In terms of public policy responsibility, DECC is the lead Government Department for coordinating the response to major energy incidents. The aims of the emergency arrangements in place within DECC are consistent with the CONOPs to:
   (i) Protect human life and, as far as possible, property.
   (ii) Alleviate suffering.
   (iii) Support the continuity of everyday activity and restoration of disrupted services at the earliest possible opportunity.
   (iv) Uphold the rule of law and democratic process.

Consultation within Government

4.6 DECC has consulted with the Department for Business, Innovation and Skills (BIS) and the Office of Fair Trading (OFT).

Consultation with Industry Parties

4.7 DECC has sought advice from the trade associations within the UK Downstream Oil Sector who represent their members outlined below ("Industry Parties") of the proposed Protocol:

a) The UK Petroleum Industry Association ("UKPIA"), which represents the interests of companies engaged in the UK downstream oil industry (including crude oil refining), and its member companies; BP Oil UK Ltd, ConocoPhillips Limited, Essar Oil (UK) Limited, Esso UK Ltd, INEOS Refining, Murco Petroleum Ltd, Petroplus refining & Marketing Ltd, Shell UK Ltd Total UK Ltd and Valero Energy Limited.
b) The Downstream Fuel Association ("DFA"), which represents independent fuel suppliers (i.e. companies that are not International Oil Companies and have no refining integration) and their member companies; GB Oils Ltd, Greenergy Fuels Ltd, Harvest Energy, Mabanaft Ltd, Maxol Group, Prax Petroleum, Tesco, J. Sainsbury's, Somerfield/Co-Op, Morrisons, and World Fuel Services Europe Ltd.
c) The Federation of Petroleum Suppliers ("FPS") which represents smaller companies involved in the distribution of petroleum products; heating oil to end users in the UK and petroleum products for heating, power and transport uses in a variety of agricultural, marine, industrial and commercial sectors.
d) RMI Petrol Retailers Association ("RMIP"), the industry association which represents the interests of the independent petroleum retailing sector.
e) UK LPG, the industry sector which representing companies who are producers, distributors, equipment and service providers, and vehicle converters of Liquid Petroleum Gas.
f) Asda Group Limited.

Issues identified during consultation

4.8 Trade Associations, representing their members, have advised DECC that whilst it would be their intention to operate the Protocol in compliance with the requirements of competition law they are concerned, (particularly in view of the finding in the OFT's 2001 Decision, that the MoU has the object of restricting competition) that there is:

a) a risk that in responding to a request from DECC under the Protocol they may take actions which are subsequently found to have infringed the competition rules; and
b) a greater risk that even if their action is ultimately established to have been compliant with the competition rules, third parties who are adversely affected by the action of the oil companies pursuant to the Protocol may bring proceedings against the oil companies alleging breach of the competition rules.

4.9 The risk of third party action, with its consequent costs is not fanciful. In a fuel emergency, supplies to essential users will be given priority. This carries the inevitable risk that supplies to other users and intermediaries supplying not essential users may be restricted and as a result they may suffer financial loss. Understandably these parties may seek to recover their losses (which could be very significant both individually and cumulatively) and the oil suppliers are the obvious target for such damages claims. It is well established that a party that has suffered loss as a result of an infringement of the UK competition rules can recover damages from the parties to the anti-competitive agreement[11] .

4.10 Even though it is expected that the oil companies should be successful in defending actions, the prospect of having to defend themselves against such actions, with the inevitable costs and diversion of management time is an unattractive prospect for the oil majors and one which they wish to avoid.

4.11 The UKPIA consider that even if the OFT was willing to issue an opinion that the protocol was compliant with competition law this would not provide the oil companies with the same legal certainty that they enjoyed under the 2001 Decision nor consequently with adequate comfort that third party actions under competition law were unlikely.

4.12 Thus, without the certainty of a public policy exemption for the Protocol under Schedule 3, paragraph 7 of the CA98, there is a material risk that the effectiveness of the Protocol would be impaired because of the potential delay whilst the Industry Parties self-assess the proposed actions on each occasion and because the Industry Parties are likely to be more cautious and therefore less flexible in the scope of action they are prepared to take; in particular, the scope of joint information sharing and joint action may be restricted, as well as inconsistent / fragmented as between the different Industry Parties. At best, some companies may be willing to share supply related information on a bilateral basis with DECC but joint information sharing (via associations) or joint action are likely to be impossible.

C. COSTS AND BENEFITS ANALYSIS

5.1 This section estimates the impact of a fuel disruption under Option 3 relative to Option 1. This provides an estimate of the possible benefits of the new Protocol to deal with fuel supply disruptions.

5.2 As mentioned in paragraph 4.11, Option 2 would not provide sufficient cover for industry parties and would therefore lead to no improvement in co-operation between parties during a fuel disruption. Option 2 would lead to the same results as Option 1 and therefore it is not considered any further.

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[11] Case C453/99 Courage v Crehan [2001] ECR I-6297

Monetized costs and benefits

5.3 The economic impact of fuel disruption is open to great uncertainty as it depends on how people respond to the crisis. Evidence from *'Transport lessons from the fuel tax protests of 2000'* [12] shows that the impact on lifestyle and business was mixed, with a number of winners and losers. For example, out of town shopping developments suffered during the period but local shops saw increased business.

5.4 Furthermore the impact of a fuel disruption depends on its timing relatively to daily, weekly and seasonal cycles. As reported in the report *'Life without Lorries'*[13], if a disruption occurs before one of the critical cut-off times in delivery schedules, the consequence will be much greater. For instance if the stoppage begins on a Sunday afternoon its impact on shelf-availability would be less immediate than if it started on Thursday or Friday night. On a seasonal basis, the worst case scenario would be for the stoppage to occur a week or two before Christmas, when the flow of 'fast moving consumer goods' reaches its peak.

Methodology

5.5 The impact of a fuel disruption is estimated by using ONS Gross Value Added (GVA) data on Industries' intermediate consumption[14] in 2008 (latest available year). The gross value added of one sector is the contribution of this sector to GDP. GVA data for 2008 is adjusted in line with GVA growth rate since 2008[15].

5.6 For this analysis, we focused on the direct impact of a fuel supply disruption on transport and refining sectors. These two sectors have been selected as they account for the majority of the downstream oil market. In fact, fuel use as a percentage of GVA for these sectors is around 27 per cent.

5.7 It is likely that several other sectors of the economy are affected by a disruption, both directly or indirectly. The report 'Life without Lorries' shows that after the 2000 fuel protest, many companies with commercially held stocks were able to run their lorries on fuel that they had bunkered and thereby maintain a nearly-normal service. However in the last ten years, because of the increased cost of maintaining own commercially held stocks (operational costs, safety and environmental regulations) and the spread of the use of fuel cards, supply chains and emergency services now rely on filling stations as a source of fuel. Overall, the impact on these sectors on GVA is assessed to be small as fuel use account for less than 2 per cent of their aggregate GVA.

5.8 Based on ONS data, GVA of the non-rail transport sector (includes: water transport, air transport and other non-rail land transport) and the refining sector[16] is estimated at £100 million per day in 2010[17].

5.9 We assume a full pass through of a fuel disruption to the transport and refining sectors. The estimates of the impact of a disruption are therefore an upper bound. In fact, it is likely that a fuel disruption will not have a immediate one-to-one impact on transport as fuel is stocked both in retail and commercial sites and in vehicle tanks. Current stocks are capable of providing a good level of resilience for shorter disruptions. Refineries operating in the UK also keep a certain level of working stocks as part of their day-to-day business activities.

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[12] Lyons and Chatterjee (2002), Transport lessons from the fuel tax protests of 2000.
[13] McKinnon A (2004), Life without Lorries.
[14] http://www.statistics.gov.uk/about/methodology_by_theme/inputoutput/latestdata.asp
[15] GVA at basic prices declined by 3% in 2009 and rose by 3% in 2010.
[16] This sector also includes solid and nuclear fuels.
[17] Total annual GVA is divided by 365 days

5.10 DECC monthly data on deliveries of petroleum products for inland consumption18 shows that, in September 2000, deliveries of motor spirit to final consumers decreased by 7 per cent compared with August 2000, and that demand was not restricted for the whole of September. In addition compared with September 1999 demand was 5% lower. Also, demand in August 1999 and August 2000 was almost identical. According to *'Transport lessons from the fuel tax protests of 2000'* [19], the 2000 fuel protest only seriously affected supply chain over a period of three days (12-14 September), however data on the amount of fuel disrupted over these three days are not available. Based on DECC data we estimate that over the 2000 fuel protest, 70 per cent of fuel was disrupted[20] .

5.11 For this analysis, we consider a similar disruption as that of September 2000, which lasted three days leading to an estimated 70 per cent reduction in fuel. This is a sensible comparison as if the disruption were to have significant bigger impacts than it is more likely that emergency powers would be deployed. If this was the case, then Option 1 and 3 would be the same.

5.12 Assuming a full pass through, a 70 per cent fuel disruption will lead to a 70 per cent reduction in transport and refining output. Based on GVA data, around £70 million will be lost over a three days disruption[21].

Analysis

5.13 The Protocol would be temporarily deployed during the duration of a disruption that the market itself cannot resolve. Without the Protocol the Industry Parties would not share information at the request of DECC due to the risk of companies' infringing the CA98 Prohibitions.

5.14 The benefits of the Protocol would be to improve the distribution of oil fuels during an oil fuel emergency. This would be achieved by both sharing information on the disruption to operations, availability of oil fuel stocks, fuel tanker movements, and industry plans for relocation of tankers and by coordinating the response through sharing and redeployment of assets, and the supply of fuel from alternative terminals to end users.

5.15 The Protocol does not increase the supply of fuel, however, we believe, that through sharing information and coordinated responses, there would be a more timely and efficient allocation of fuel available. This is turn would reduce the cost of the disruption.

5.16 Evidence on the potential benefits of the new Protocol is not available. To reflect the uncertainty the analysis provides three scenarios to demonstrate the impact of alternative assumptions:

- High case scenario: information sharing and joint planning lead to a quick and effective response which will offset 10 per cent of the impact of the disruption. Based on GVA data for the transport and refining sectors, total loss amount to £63 million (£70m-10 per cent*70m) over three days. The net benefit of Option 3 compared to the baseline is **£7 million** (£70m-£63m) over three days.

- Low case scenario: under this scenario we assume that the introduction of the Protocol help to mitigate 1 per cent of the disruption. Total GVA loss in refining and transport is estimated at around £69.3m and the net benefit of Option 3 compared to the baseline at **£0.7 million** over three days of disruption.

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[18] http://www.decc.gov.uk/en/content/cms/statistics/source/oil/oil.aspx

[19] Lyons and Chatterjee (2002), Transport lessons from the fuel tax protests of 2000.

[20] Over the 30 days of September, deliveries declined by 7%. Assuming that deliveries declined just in the 3 days of the disruption and remained constant over the remaining 27 days, we estimate that fuel was reduced by 70% over the three days.]

[21] 70%*£100m

- Central case scenario: the Protocol will have a positive but moderate effect on dealing with a disruption. We assume that the Protocol reduce the impact of a disruption by 5 per cent. Total GVA loss in refining and transport is estimated at around £66.5m and the net benefit of Option 3 compared to the baseline at **£3.5 million** over the three days of the disruption.

Probability of a disruption occurring

5.17 A disruption in fuel supply is a low probability event. The twentieth century has seen seven occasions of fuel supply disruptions in the UK[22]: 1940 during World War II, Winter 1973 during the Arab-Israeli Conflict, Summer 1979 during the Iran-Iraq Conflict, the September 2000 Protest, in 2008 during the two separate periods of strike action and in 2005, following the explosion at the Buncefield Oil Storage Depot. The probability of a disruption is therefore estimated to be 7 in 71 years, an annual probability of around 10 per cent. Except for the September 2000 crisis, there is no evidence to assess how long the previous disruptions lasted for.

5.18 Table 1 shows the annual expected net benefit of Option 3 compared with the baseline. In the central case scenario the annual expected net benefit of Option 3 compared to the baseline is therefore estimated to be £0.3m[23].

Table 1: Net benefit of Option 3 compared to the baseline

	Net Benefit per 3 days of disruption (£m)	**Annual Expected Net Benefit (£m)**	**Net Present Value (£m)**
High case scenario	£7m	£0.7m	£6.4m
Low case scenario	£0.7m	£0.1m	£0.6m
Central case scenario	**£3.5m**	**£0.3m**	**£3.2m**

Discounting

5.19 In line with Green Book guidance, the net present benefit of option 3 compared with the baseline has been estimated assuming a social time preference rate of 3.5% over 10 years. In the central case scenario the net present value of Option 3 compared to the baseline is estimated to be £3.2m.

Monetize costs

5.20 Option 3 would have no monetize costs as the familiarization costs of the new Protocol for the companies involved is negligible as the Protocol would replace the MoU and is voluntary. The Protocol does not go beyond the requirements of the MoU.

Conclusion

5.21 To sum, the central estimated benefits of option 3 compared to the do-nothing option will be of £3.2m, while the estimated costs are negligible.

Non Monetize costs and benefits

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[22] Lyons and Chatterjee (2002), Transport lessons from the fuel tax protests of 2000.

[23] £3.5m*(7/71)

5.22 Option 3 will have the benefit of reducing reputational risk as the Government will be seen to take actions to mitigate the adverse impact of a fuel disruption and act in the country's best interests.

5.23 Whilst the main sectors affected by a disruption are included in the analysis, it is likely that other sectors of the economy may be affected. We have not attempted to quantify these because these are subject to lot of uncertainties around how consumers and businesses adjust to a fuel disruption. However, we believe that all sectors of the economy would gain by the Protocol and the fuel available would be distributed in a more efficient manner.

5.24 In addition, the use of the Protocol would also reduce the likelihood of using emergency powers and would help verify the need for the Government to escalate the response and whether other measures, including the use of statutory emergency powers of direction by Government, are necessary.

5.25 On non monetize costs, there is a potential impact on competition if the Protocol is used. However the OFT decision in relation the MoU in 2001 concluded that the MoU did not affect competition in respect to a substantial amount of fuel. There is no reason to believe that the Protocol will have a different impact on competition. In addition, we have no reason to believe that market conditions changed since the OFT decision.

D. SMALL FIRM IMPACT TEST

6.1 Small firms are likely to be significantly affected by a fuel supply disruption. All organisations rely to some extent on fuel be it getting their staff to work, distributing products or providing a service. Small firms would benefit from a better allocation of the fuel available through the use of the Protocol.

E. COMPETITION ASSESSMENT

7.1 The 2001 OFT Decision in relation to the MoU provides a clear precedent that the Protocol would fall within the scope of the Chapter I prohibition. As with the MoU, the object of the Protocol includes ensuring priority users have access to fuel and to ensure effective cooperation between Government and industry to mitigate the effects of any crisis. This could include the sharing of commercially sensitive information. It therefore seems possible that the Protocol has an anticompetitive object and effect. Whilst the Chapter I prohibition would therefore apply it is the Secretary of State's view that there are exceptional and compelling reasons that the Chapter I prohibition should not apply to the Protocol.

7.2 There exist exceptional and compelling reasons for excluding the protocol from the application of the Chapter I prohibition because:

a) the Protocol is intended to prevent serious harm to the economy and the welfare of persons in the United Kingdom in certain relatively narrowly defined circumstances;
b) the alternative measures (including the use of emergency powers) are substantially less advantageous as a matter of public policy;
c) the conditions set by the OFT Decision would be complied with under the Protocol and therefore the Protocol is limited to imposing only the restriction(s) on competition necessary to its purposes; and
d) the Protocol would, it is likely, be exempt in any event as meeting the criteria set out in section 9 CA 98 and Article 101(3) TFEU.

7.3 Therefore, the OFT concluded that the MoU does not affect competition in respect to a substantial amount of fuel. There is no reason to believe that the Protocol will have a different impact on competition. In addition, we have no reasons to believe that market conditions changed since the OFT decision.

Is the Protocol exempt under section 9 CA98?

7.4 The analysis provided by the OFT in the 2001 OFT Decision set out in detail the reasons why the MoU was exempted under section 9 CA98. This was on the basis that the MoU improved the distribution of oil fuels during an oil fuel emergency, that consumers in the form of essential users would benefit directly and consumers in general would benefit from the priority given to these users, who for example, provide emergency services, maintain public safety or supply food, that the restrictions upon competition arising from the MoU were no more than necessary and that the MoU would not affect competition for oil fuel surplus to the Government's allocation requirements and would therefore not eliminate competition in respect of a substantial part of the products in question. The differences between the MoU and the Protocol are primarily clarifications and do not affect the competition analysis. It is, therefore, considered highly likely that the Protocol would also be exempt under section 9 of the CA98.

Application of EU law

7.5 Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition. The Chapter I prohibition in the CA98 mirrors this provision domestically. It therefore follows that article 101(1) TFEU may therefore also apply to protocol. DECC is of the view that article 101(3) (which provides exemptions for agreements which contribute to improving the production or distribution of goods, and is mirrored by section 9 CA98) would apply for the same reason that section 9 CA98 would apply to the Protocol.

F. ONE-IN, ONE-OUT

8.1 This voluntary agreement (i.e. the Protocol) is not a new regulatory proposal; however using the existing powers in the Competition Act 1998 to exempt a new Protocol (which will be voluntary and not backed by regulation) will have a (beneficial) impact on the UK and UK business.

Net cost to business

8.2 This measure can therefore be considered a zero cost measure as the familiarization costs of the new Protocol for the companies involved is negligible as the Protocol would replace the MoU and is voluntary. The Protocol does not go beyond the requirements of the MoU.

8.3 We believe this measure is out of scope of One-in, One-out because it is classified under civil emergencies regulation - those measures which would be classified as an emergency under the Civil Contingencies Act 2004. For example, once signed by the parties the Protocol would become a response tool in the NEP-F that, if the Protocol is activated in the event of an emergency, it would be deployed for information reporting, joint planning or co-ordinated action by the Industry Parties and DECC as described in paragraphs 3.6 to 3.8 above.

G. IMPLEMENTATION AND DELIVERY PLAN

9.1 The decision to activate the Protocol shall be taken by DECC following receipt of information from industry that an incident has or is about to occur that might cause significant disruption to the supply of oil fuels. At the earliest possible moment, DECC will advise the OFT of the activation and the deactivation of the Protocol, as well as any material changes to the Protocol.

9.2 DECC will review the use of the Protocol following if it has been activated as part of a resilience review exercise. The Post Implementation Review (PIR) Plan for the Protocol is described in Annex 1.

H. SUMMARY

10.1 To summarise, DECC believes that the context in which action is envisaged and the nature and implications of the actions envisaged under the draft Protocol serve a clear and significant public interest and would, by definition, only be deployed in exceptional circumstances.

10.2 The active participation of the downstream oil industry is essential to the meaningful deployment of the Protocol. At present, their concern to avoid undertaking activities that may be deemed to be in breach of the competition rules and about the threat of competition law based claims against them by third parties as a result of the implementation of the Protocol means that there is a material risk that the response of the member companies of the UKPIA would be slower potentially diverse / fragmented and more limited than is needed to ensure the effectiveness of the Protocol in a fuel supply emergency.

10.3 DECC therefore recommends that the "Protocol between the Department of Energy and Climate Change and the UK Downstream Oil Sector for the supply of fuel in an emergency" is excluded from the Chapter I Prohibition of the CA98 by Secretary of State for Business under Schedule 3, Paragraph 7(1) (a) and (b) of the CA98 on the grounds that there are exceptional and compelling reasons of public policy.

POST IMPLEMENTATION REVIEW (PIR) PLAN

Basis of the review:

DECC is not planning a Regulatory PIR for the Protocol under the Impact Assessment arrangements. The basis of a review of the Protocol would be post any event that caused a disruption to fuel supplies that required the Protocol to be activated.

Review objective:

To establish that PPEO granted to the Protocol adequately allowed the Industry Parties to operate effectively in fulfilling its objectives without any inhibiting factors relating to possible breaches of competition law that would lead to investigation and sanction.

Review approach and rationale:

DECC is not planning a Regulatory PIR for the Protocol under the Impact Assessment arrangements.

Baseline:

DECC is not planning a Regulatory PIR for the Protocol under the Impact Assessment arrangements.

Success criteria:

DECC is not planning a Regulatory PIR for the Protocol under the Impact Assessment arrangements.

Monitoring information arrangements:

DECC is not planning a Regulatory PIR for the Protocol under the Impact Assessment arrangements.

Reasons for not planning a PIR:

The Protocol is a voluntary agreement. The effect of the Protocol would be evaluated however by DECC following an activation as part of a resilience review exercise.