Ombudsman Services

Emailed to: RCCPconsultation@beis.gov.uk

01 October 2021

Dear Sir/Madam,

The Department for Business, Energy and Industrial Strategy (BEIS) Command Paper Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers.

Thank you for the opportunity to respond to the BEIS Command Paper on Reforming Competition and Consumer Policy. We previously responded to the BEIS Modernising Consumer Markets: Green Paper in 2018 and welcome this follow up Command Paper. In our response we have provided:

- general comments on areas that we think would help improve competition and consumer policy; and
- answers to specific questions where we think we can contribute a helpful perspective.

General comments:

Overview

We welcome this Command Paper and its intention to help position the UK as a leader in modern competition and consumer policy. We support its aims of making the UK attractive to investors, enabling businesses to thrive and at the same time providing consumers with relevant protections that build consumer trust and confidence in markets.

We think this is an important balance to be struck and one that will need the wider regulatory framework and other key stakeholders to work together in new ways, for example by sharing more data and insights into what is happening in markets to act in a more agile, timely and preventative way.

On the specific proposals relating to ADR, we welcome ADR becoming mandatory in other sectors, such as the motor vehicle and home improvement sectors and possibly others, and the proposal to shorten the 8-week rule, which we know consumers feel is too long. However, we think that some of the proposals could result in ADR provision that misses the benefits of strategic redress and leads to circumstances where the interests of suppliers and consumers are not properly aligned.

More broadly, there have been significant developments since the initial BEIS Modernising Consumer Markets: Green Paper, namely the UK leaving the European Union (EU) and the global pandemic. Whilst these developments have given rise to challenges there are also opportunities in terms of making the UK

a leader in promoting competition and protecting consumers. We hope our contribution will support BEIS in seizing this opportunity, for the benefit of all consumers.

Updating the way market regulatory frameworks operate

Regulation and competition policy do not need to imply trade-offs between the competitiveness of markets and consumer protections. We firmly believe that the right frameworks can be beneficial where they help to build trust and sustainability across markets. To achieve this, we think regulatory frameworks serve markets best where they are proportionate and focussed on risk. This helps target intervention in the right areas. Having risk-based regulation in place is also more likely to be attractive to investors, by avoiding unnecessary red tape and uncertainty and helping new sectors to flourish in a sustainable way.

The paper outlines various recommendations on areas being considered in terms of providing the CMA with additional powers. We agree with the recommendations being proposed and think the CMA has a key role to play in helping to build and improve competition and consumer policy in markets in the UK.

It is important that other organisations, including redress providers, also modernise what they do and demonstrate that they can operate in an agile way to accommodate new or existing markets that change and develop. We think in many new and emerging markets – or markets where sufficient protections have not been in place – it is unlikely to be simply be a case of replicating what has happened before or 'dragging and dropping' regulatory frameworks (including ADR models).

Maximising the use of data, technology and artificial intelligence (AI)

Making more use of how organisations and sectors use data, technology and AI will be an important part of enabling a risk-based approach to regulation. Enhancing the collection of data and insight will help to identify the key risk areas within a sector, including the areas where consumers are facing most detriment. By targeting risk, regulators can act in a preventative way and become more agile in their approach.

We think that digital services represent a fantastic opportunity for consumer protection to be technology or AI led and supported by data and insight. Such an approach can help improve the options and experience for consumers and allows the regulatory framework to be more easily integrated from the start. For example, in terms of ADR, rather than just have ADR available for when things have gone wrong, using data and technology intelligently could feed into the thinking and approach of businesses, regulators and organisations such as the CMA. Joining up the data upstream in this way would support improvements for all consumers and not just those who make a complaint.

Helping businesses and organisations build the right culture of customer service

Again, this links into doing things in different ways within the wider regulatory framework. For example, in the redress area, we promote and operate what we call strategic redress. By working with all parties – including businesses and regulators – an ombudsman performs an important role to support the improvement of consumer outcomes at a macro level. Integrating redress with processes upstream (such as the way operators deal with complaints) helps to create the right cultures and practices in organisations and ultimately helps to foster trust and confidence in the broader market. The real benefit of strategic redress, therefore, is that the positive impact on consumers stretches far beyond those whose complaints remain unresolved and decide to bring them to an ADR provider Clearly, though, redress at an individual level remains crucial and providing a straightforward path to achieve justice for consumers when they have a complaint is a key part in building consumer trust and confidence.

Protect small and medium sized enterprises (SMEs)

As well as ensuring that regulatory burdens on businesses are proportionate and risk based, we think there is the potential for extending to SMEs the relevant protections that domestic consumers already enjoy. Ensuring that SMEs are properly protected is a key component of making sure that this important part of our economy flourishes post-Brexit and post-pandemic.

One example is access to redress. We support the government proposing to extend mandatory ADR into other markets but would point out that, even within some domestic markets where ADR is already well established, SMEs currently miss out. In the financial sector in 2018 the Financial Ombudsman Services FOS expanded its coverage to a wider population of SMEs. The remit is now SMEs with fewer than 50 employees (rather than 10 employees, as is the case in the energy and communications sectors). We think replicating this remit across other essential services could be an important step in supporting SMEs and we recover from the pandemic and allow SMEs to prosper post-Brexit.

We make some further comments on specific consultation questions below.

Chapter 1: Competition Policy

We think that the CMA has an important role to play in strengthening the UK's competition policy, updating the competition structure and reviewing and advising government and others on the state of competition with recommendations for improvement in the UK, and so we support the proposals put forward in the consultation.

Chapter 2: Consumer Rights:

Q36. *Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low-cost introductory offer period ends?*
Q37. *What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?*

We agree that there is more that can be done when it comes to subscription contracts and protecting consumers from being trapped in contracts, or from being uncertain as to what they need to do to end, renew or change a contract. We have seen end of contract notifications work effectively in energy and communications to inform consumers of their choices at the appropriate time. We think information provision such as this should be a useful and relatively light-touch tool that could increase engagement – and competition – across a number of markets.

Q40. *Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?*

Yes, we agree with this. It should be as simple and straightforward as possible for consumers to change services or suppliers.

Q42. *Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?*

We would support the banning of fake reviews and agree that to guard against this happening there should be inclusion of banning this in the CPRs. Consumer reviews should be genuine because otherwise consumers will lose trust and the competitive benefits of public reviews will be dampened.

Q46. *Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?*

We think it is likely that many consumers will be unaware of some business practices that seek to influence consumer behaviour in ways that do not necessarily align with consumer interests. Clearly, where these are identified as harmful to consumers then intervention may be necessary by regulator(s) or the CMA.

Q47. *Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?*

We think it is only fair that consumers understand the information they are provided and how that information has been sourced and prioritised, i.e. whether the product or service is high up on the list because its provider has paid for it to be there.

Chapter 3 Consumer Law Enforcement

Q65. *What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?*

We think that there is more that can be done to help vulnerable consumers access ADR and indeed that ADR providers should be looking to improve their service and access for vulnerable consumers. From our own experience we set out some points below.

- Suppliers, ADR providers and others need to look at the whole consumer journey for vulnerable consumers in the round and not just the complaint journey. As mentioned above, an important role of strategic redress is sharing data and insights to work with businesses to help improve their service for all their customers. Using data, technology and AI to help businesses in terms of how they operate and handle complaints will help them to become more consumer-centric and therefore build consumer trust and confidence. If this can be done in the right way then all consumers, including vulnerable consumers, should receive a better service and quicker resolution if something goes wrong.

- As our understanding of vulnerable consumers and their needs grow, and new technology opens up new ways to connect with consumers, ADR providers should continually look to improve the accessibility and service that they provide to consumers in vulnerable circumstances. For example, it may be that additional support, faster resolution, catering for consumers who are digitally excluded, or a more customised approach is required in some settings.

- We think it is important that, where appropriate, regulators, suppliers and ADR providers come together to discuss how best to adapt services for vulnerable consumers. Other organisations such as the Ombudsman Association are also well placed to be able to share best practice across the ADR landscape.

At Ombudsman Services we have completed (or are in the process of completing) a number of initiatives aimed at improving the service we offer to vulnerable consumers, including:

- understanding why certain groups of consumers (including those in vulnerable circumstances) may be less likely to access our service;
- creating specific commitments for vulnerable consumers;
- training of colleagues and specialist support for customers in particularly vulnerable circumstances;
- improving the way we identify vulnerable consumers;
- ensuring our case management system is intuitive and easy to use for all types of consumers;
- using consumer feedback to continually improve our systems and processes;

- working with third parties in terms of signposting, providing appropriate support during 'warm' transfers; and
- sharing our data and insight with businesses, regulators, consumer organisations and other stakeholders to help improve the outcomes for vulnerable consumers. For example, during the pandemic we regularly met with our regulators and shared information on the complaints we were seeing from vulnerable consumers.

Q66. *How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?*

Generally, the timescale for ADR referral is around eight weeks, or sooner if the consumer and the supplier reach deadlock. There is now good evidence that consumers see the 8-week time period as too long to wait. At a time when advances in technology and customer service have allowed services to be delivered much more efficiently, we think the eight-week rule increasingly stands out as having been set in an analogue age.

We know consumers' thoughts from our own independently commissioned research "Consumer Action Monitor", which looks at consumer behaviour when making complaints. It shows that consumers generally think eight weeks is too long and that a period of two to four weeks is more appropriate. A shorter timescale would, in our view, benefit both the individual consumers who can turn to ADR sooner and, importantly, apply a broader incentive for suppliers to manage all complaints and communication more effectively.

Possible counter arguments to the reduction could be:

1. it moves responsibility for resolving the complaint from supplier to ADR provider; and
2. it would lead to an unmanageable increase in complaints to the ADR provider.

With regard to the first, suppliers will still have four weeks to resolve complaints before consumers have the option to bring their unresolved complaint to ADR. We think this should be sufficient time for suppliers to resolve the majority of complaints. But importantly, where complex complaints arise which take longer to resolve, it is not the case that consumers will automatically refer their case to ADR as soon as they can. We see many examples within our sectors where good communication from suppliers encourages patience and understanding from consumers who are then happy to wait a little longer for a complaint to be resolved. Indeed, the majority of consumers who are eligible to bring their complaint to an ADR provider never do. There are various reasons for this, but it is clear that the behaviour and communication of the supplier contributes to the likelihood that a consumer will feel the need to come to us.

On the second point, it is obviously preferrable for everyone if suppliers are able to resolve complaints at the first tier before ADR needs to get involved. Indeed, as an ombudsman we work with suppliers to improve business practices with the aim of reducing the number of complaints that come to us. However, it is likely that moving from eight weeks to four weeks will increase the number of complaints that come to ADR, though we would expect any significant increase to be short-lived, for the reasons set out above, as suppliers adjust and improve their processes. Though we cannot speak for suppliers or other ADR providers, at Ombudsman Services we have an operational model that will allow us to cope with either a short-term or longer lasting increase. Specifically:

- A new operating model (to go live in Q1 2022) which will upgrade and streamline our systems and processes for consumers.
- Flexible outsourcing arrangements with third parties.
- Our own, scalable and flexible resource with a national footprint.

In summary, though there are other broader improvements that can also be made to ADR, we support the proposed reduction in referral time. We think that suppliers should be able to mitigate the effects of any increase in ADR complaints by striving to become better at resolving complaints sooner and by communicating effectively with consumers where it is not possible to resolve a complaint within four weeks.

At Ombudsman Services we have an operational model that would allow us to cope with an increase in referrals, whether this was a short-term increase or persisted for some time after the change.

Q67. *What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?*

In our experience, this currently works well in our regulated markets of energy and communications. This is in part because the relationship we have is more strategic in nature, and the regulator can tailor its requirements to the specific sector it operates in.

There are other markets where ADR standards could be improved and we think the approaches to ADR standards in regulated markets are good benchmarks to consider, rather than necessarily defaulting to the requirements of the ADR Regulations.

Certainly, both Ofgem and Ofcom undertake regular reviews of the ADR services we provide via the primary, secondary and guidance that supports the Consumer, Estate Agents and Redress Act 2007 and the Communications Act 2003. More informally, this also includes regular updates on operational matters, sharing of data and insights, and also, in the energy sector, tripartite working between Ofgem, Citizens Advice and the Energy Ombudsman.

Q68. *What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?*

Updates to the ADR regulations could consider, among other things:

- What requirements ADR providers have to support vulnerable consumers in terms of accessibility, how they will identify vulnerability, how they plan to continually improve the service they provide to vulnerable consumers, and how they will signpost and work with other consumer organisations and charities. It may be that specific requirements are best agreed at a sector level if there are unique industry characteristics that make specific provision necessary for vulnerable customers.

- A stronger focus on the quality of consumer outcomes and experience. ADR providers operate in different ways and consumer journeys can be very different across sector and depending on which ADR provider the business has signed up to use. Some provide support and help to consumers; however, providers do have different complaint journeys (and therefore timeframes) and structures in place for keeping in touch with consumers. These differences result in different outcomes for consumers along their journey, and it is worth thinking about how ADR success may be measured more completely than simply, say, the time it takes for a complaint to work its way through the ADR process.

- Requirements of ADR providers to contribute to broader sector or societal objectives. As we have set out, the unique benefit of strategic redress is the broader insight it can generate that can then be used to improve outcomes for all consumers – be that through supplier improvements or broader sectoral changes. The extent to which ADR is strategic in this regard varies from sector to sector and we think it is worth considering how these benefits could be more widely realised across other sectors.

Q69. *Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?*

We welcome that the government is thinking about extending the mandatory requirement on businesses to belong to an ADR scheme in other sectors, such as motor vehicles and home improvements. It is clear to us from our experience of trying to provide ADR coverage in sectors where there isn't a mandatory

requirement on businesses to sign up to an ADR provider, that this has resulted in the vast majority of businesses not engaging with ADR.

As we have outlined in our response, the type of ADR is very important. Basic ADR seeks to achieve administrative justice for individuals; strategic redress (the ombudsman model) shares that aim but also uses the insight gained from investigating unresolved complaints to support improvements for all consumers. This approach is therefore more impactful across any sector, and particularly new or emerging sectors where there is significant scope to influence the shape of the market as it evolves.

We do not think it is possible to achieve a truly joined-up, strategic approach where a large number of ADR providers need to compete for business. In this situation, the incentives of suppliers to select ADR provider (for example on cost) can become misaligned with the interests of consumers. Moreover, complicating sectors with multiple ADR providers inevitably means sacrificing the full-sector insight that can be provided when there is a single ADR provider that can see complaints across the whole market.

On financing, there are several ways of funding ADR, and we think the best solutions may need to be looked at on a sector-by-sector basis. For example, it may make sense and offer value for money to have a subscription fee that can be based on size of business or the number of complaints a business has per year (so a fair and proportionate approach) alongside a smaller case fee. It may be that this kind of model is more appropriate and can result in ADR being more sustainable in a given market.

Q70. *How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?*

We believe ADR works best when free of charge to consumers and therefore have concerns about putting in place a nominal fee for consumers to access ADR in unregulated sectors. Any fee, however small, will make it less likely for consumers to complain – especially those who are financially vulnerable. If the issue it is trying to prevent is vexatious complaints, then it is worth considering the likely magnitude of the problem. From the ombudsman schemes that we operate in energy and communications, for example, vexatious complaints account for approximately 0.45% of complaints. Our Consumer Action Monitor research and our experience shows that the problem is the opposite: far more consumers do not bring a complaint to ADR even when they meet the requirements to do so.

Moreover, there are other ways of trying to deter vexatious complaints being made by managing consumer expectations. For example, setting our clear terms of reference for schemes and building complaint case studies with appropriate resolutions as well as indicating complaints that have been vexatious. We think the drawbacks of charging for ADR will significantly outweigh any benefits of avoiding vexatious complaints.

Similarly, we think having a lower limit on the value of claims is also unwise. In some complaints that we see in our sectors, the remedies provided that are fair and reasonable given the facts of the case can involve different things, such as an apology or the business taking some non-financial action. There isn't always a financial remedy involved. Indeed, not accepting complaints worth a lower monetary value risks losing valuable insight into potential systemic issues for a sector or company. And consumers will sometimes complain on matters of principle where there is no monetary value (or none is desired) – we think these are important complaints that should be treated with equal respect.

Q71. *How can government best encourage businesses to comply with these changes?*

In promoting ADR to businesses, it will be important to look at the wider benefits in a positive way. ADR that provides data and insights and works with businesses to improve their competitiveness and the service they provide to all their customers is likely to be a positive sell to businesses. We think this is a more sustainable approach than one that might try to placate business fear, for example by making it more difficult for individual consumers to bring their complaint to an ADR provider.

Where changes are proposed it will be important to allow businesses sufficient time to be able to meet them, and again the time required may vary by sector depending on the final proposals.

Q72. *To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?*

Collective redress could, in some circumstances, make it easier for consumers who have experienced similar detriment to get justice. However, it is important to recognise that consumers may be affected in different ways even if the problem that has led to that detriment is the same event. For example, the impact of the detriment could be multiplied if a consumer is in vulnerable circumstances.

Looking at the sectors that we operate in, we could see examples where collective redress could become more prevalent in regard to, say, decarbonising of heat in the energy sector and the growth of heat networks or community heating systems where an outage of heat would affect potentially the whole community on that system.

So, in principle we would be supportive of opening up routes to collective redress where this does not preclude consumers pursuing individual redress where appropriate.

Please do not hesitate to contact us if you would like further information regarding our response. Our response is not confidential.

Your sincerely,

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