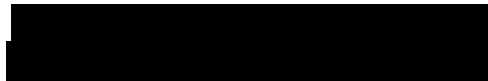




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## RESPONSE TO CONSULTATION Reforming Competition and Consumer Policy



TMO is pleased to have the opportunity to respond to this consultation. In reviewing the content of the Paper, we have focused on Chapter 3: Consumer Law Enforcement, in-particular the section on Alternative Dispute Resolution, and have provided a response to questions 65 to 72.

The Motor Ombudsman (TMO) has been operating as an ADR provider since 2016. Before that time, it was functioning under the name of Motor Codes and had been working to resolve disputes in the automotive sector since its inception in 2008, becoming approved under the ADR Regulations in 2015.

The Motor Ombudsman is *the* automotive dispute resolution body and is the first Ombudsman to be focused solely on the automotive sector. Its role is to investigate and resolve complaints, using this information to identify systemic issues at an individual business or sector level through case data collation and analysis and thereby help improve service levels and complaint-handling within the motor industry. In addition, TMO self-regulates the UK's motor industry through four Chartered Trading Standards Institute (CTSI)-approved Motor Industry Codes of Practice, providing whole market support.

With over 7,000 business accredited to TMO, ranging from vehicle manufacturers, warranty providers to franchise dealers and independent garages, TMO handles circa 80,000 enquiries and 6,000 cases per year, making it the leading ADR provider in the automotive sector.

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

In regard to access to ADR, there would appear to be 5 key issues that need to be addressed within the automotive sector:

### 1. Multiple ADR providers – Confusing landscape

- The existing ADR landscape for automotive consists of more than 16 CTSI Accredited ADR providers comprising of Ombudsman, Trade Bodies, Consumer Champion Organisations and smaller generalist organisations offering ADR in the automotive sector with different terminology and processes used to deliver ADR.
- **While this causes confusion in the minds of consumers, it must contribute further stress and confusion to vulnerable customers.**

### 2. Inconsistent coverage of ADR across the automotive sector

- The current voluntary nature of the legislation means that businesses can just ignore it. While the majority of Automotive Manufacturers, National Sales Companies and Franchise Dealers support ADR, there is a small percentage that remain unconvinced regarding the benefits of signing up to an ADR provider.
- In the Independent Garage sector, be it service and repair or used car sales, the take up of ADR is significantly lower, with circa only 10% of independent garages being subscribed to an ADR provider.
- TMO currently handles about 40% of its total case enquiries (77K) from consumers where the business is not accredited to an ADR provider
- **The outcome of this is that if a consumer raises a case with an ADR provider and the business is not accredited, then the consumer will need to seek an alternative resolution which in most cases would be the court system. For vulnerable consumers in particular, this can be a significant barrier and therefore prevent further action being taken, due to the complexity of the judicial process and any costs involved.**

### 3. Cost to access ADR

While access to ADR is free to all consumers via the Ombudsman model, this is not the case across all ADR providers within the automotive sector and while some offer free access for mediation or conciliation, they then charge should the case go to adjudication or arbitration. A factor to bear in mind for services offering arbitration is that the consumer is left without any recourse to a court, unlike other ADR schemes where the consumer still has that option. In the Civil Justice Council's recent report on making ADR compulsory, they excluded arbitration from their definition of ADR because rather than being a prelude to the court process, it fully bypasses it and, according to the report, raises its own issues of constitutionality. If there is a potential for this to cause consumer detriment, it is likely to hit vulnerable consumers the hardest.

- **Free access throughout the ADR process is a critical factor in the take up of ADR, for all consumers and even more so in the case of vulnerable consumers. The average caseload accepted by TMO for its free-of-charge service is 6,000, which is considerably higher than other ADR providers within the sector where there is a cost, no matter how nominal that may be.**

### 4. Awareness of ADR

Consumer awareness of ADR remains low, with the latest research from TMO highlighting that only around 44% of consumers are aware of ADR. While this rises to 57% where a consumer has had a complaint, there is clearly a large group of people who remain unaware of ADR and their rights. Research by many schemes shows that vulnerable consumers tend to be underrepresented, and although a great deal of effort goes into consumer awareness – particularly within the digital landscape – this will miss some key demographics. This lack of awareness is despite TMO reaching approximately 37m consumers through its PR programme and having 352,000 consumers accessing its website in 2020 alone.

- Awareness of ADR is a fundamental requirement and communication needs to be across the marketing mix, with more emphasis placed on non-digital forms of communication if more vulnerable consumers are to be reached.
- Vulnerable consumers also need to be aware of the support that can be provided by ADR providers throughout the case management process, unlike the court system where a consumer must essentially fend for themselves unless they pay for representation. The Ombudsman model, for example, is based on a combination of guidance and the provision of independent dispute resolution – recognising that consumers, especially vulnerable consumers, are often naturally at a disadvantage when in dispute with a business.
- ADR bodies should join up with consumer advice organisations and charities. Citizens Advice, for instance, has ADR pathways for referral – however, a more integrated journey between consumer advice and ADR would allow for the better provision of support to those in difficult circumstances.

#### 5. Easy access to ADR

While the majority of consumers have access and knowledge of the internet, this is not always the case – particularly for those who are vulnerable and/or are digitally excluded.

- At TMO, roughly 50% of our case submissions are undertaken via our web portal with the remainder made up of written correspondence, telephone calls and in a small number of cases, fax. The major factors contributing to this are age, with older consumers preferring more traditional means of communication whilst younger consumers tend towards digital, and those requiring additional support to navigate the complaints process – for example, they may have a physical or learning disability, or English is not their first language.

#### In addressing the issues of:

1. Multiple ADR providers – confusing landscape
2. Inconsistent coverage of ADR across the automotive sector
3. Cost to access ADR
4. Awareness of ADR
5. Easy access to ADR

#### The key recommendations from TMO would be as follows:

- Make ADR mandatory across the automotive sector for New and Used Car Sales as well as Service & Repair:
  - This will provide consumer protection across the sector and address the issues raised in point 2
- Appoint a single body to administer ADR: This would address points 1,3,4 and 5.
  - To maximise the effectiveness of appointing a single ADR provider, TMO would recommend that the Ombudsman model be adopted as it would address points 1,3,4 and 5 as it:
    - Is free of charge for all consumers no matter where they are in the case process or whatever the outcome.
    - Provides consistent Ombudsman processes and terminology.
    - Looks to improve the quality of service and reduce complaints across the sector it operates in, which includes increasing awareness, providing multiple routes to access the service and raising standards for consumers with businesses.
    - Provides clear standards above and beyond any set out in regulation, such as the Ombudsman Association's Service Standards Framework, which includes provisions around accessibility, as well as the Caseworker Competency Framework.
    - Collates all complaints data in the sector, rather than this being spread across a variety of bodies, all of whom will capture and use the data differently thus preventing comparison and analysis.
    - Is a recognised brand within the consumer landscape, and while consumers may not fully understand the role of an Ombudsman, they appreciate that they are there to help.

- Improve the communication links between the ADR provider and consumer advice organisations to provide a joined-up service to ensure a smooth transition of consumers from one party to another.

#### 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?

Balancing the speed at which a consumer can bring a case to an ADR provider while providing the business with adequate time to investigate and rectify the issue/complaint is a critical area to get right in all sectors, as it often means more cases get resolved without the need for them to be passed to an ADR provider. However, for a smaller proportion of cases, it can also mean the business delays passing the case on.

In trying to balance these 2 factors, it is important to appreciate the key areas of consumer complaints. TMO constantly reviews its case management system to identify the root cause of consumer complaints and has identified that automotive complaints can, on the whole, be categorised into vehicle (V) and non-vehicle (i.e. customer service) (NV) as follows:

- **For Service & Repair**
  - Standard of the work undertaken 47% V
  - Booking in a vehicle 22% NV
  - Handling of complaint 22% NV
  - Staff 9% NV
  - Billing 9% NV
- **For New Car Warranties**
  - Manufacturer's New Car Warranty 70% V
  - Misleading Advertising 16% NV
  - Quality of new car at handover 7% V
- **For Vehicle Sales – New & Used Car**
  - Quality of vehicle at point of sale 58% V
  - Aftersales support 9% NV
  - Provision of warranty 8% V
  - Misleading advertising 8% NV
  - Complaint handling 7% NV

Within the automotive sector, businesses have up to 8 weeks to investigate before a consumer can pass their complaint to an ADR provider, unless the business has stated that they cannot assist the consumer any further, at which point the consumer is free to seek resolution from an ADR provider as long as the business is accredited.

It is recognised that vehicles are complex, both from a mechanical and an electronic perspective, and that the 8-week timeframe currently in place allows the vehicle to be brought back into the business, diagnosed, tested and any parts ordered. There are also instances where more complex cases need more than 8 weeks to resolve. Either the fault does not present itself in the first instance or the cause of the fault could be any number of issues that need to be rectified in a set order. TMO already categorises the cases it receives into levels of complexity, ranging from low to extreme, to ensure the right level of resource is allocated to each case.

From TMO's experience, the majority of consumers are happy to allow the business to have the time to rectify the issue as long as the communication process has been consistent and ongoing, and that the consumer is content that progress is being made. There may also be instances where mobility is an important factor, and if a courtesy car is provided, this can mitigate much of the inconvenience caused by a dispute.

However, the case data shows that circa 40% of the cases are not directly related to complaints about the vehicle itself and that, in these instances, a shorter period for the consumer to bring their complaint to an ADR provider would be appropriate

**TMO would not recommend a “one size fits all” approach across all sectors, but for the Competent Authority to have the power to agree timeframes with the ADR providers specific to each sector.**

**Specifically related to automotive, TMO would recommend that a tiered approach would be more appropriate with cases falling into a 4 or 8 week category, but still allowing for cases to progress pass the 8 weeks with the consent of the consumer.**

Outside of the timeframe, the other factor that may help balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints is the provision of a single communication portal for each sector that would allow the initial complaint to be communicated to both the ADR provider and the business at the same time. Whilst not the case for all businesses, having early input from an ADR provider can lead to a greater willingness to find a resolution, and providing an independent forum for communication can alleviate some of the communication breakdowns that occur during the complaint process.

Consumers are often not aware of their rights or find it difficult to articulate the specific reason for their complaint. A single complaints portal containing the appropriate legal information for both consumers and businesses specific to the automotive sector, with guidance as to what to include in the complaint and an area to upload supporting evidence, would streamline the whole process.

**The success of a single case portal in the automotive sector would depend on the willingness to appoint a single ADR provider for the sector and to make ADR mandatory, however a single portal would make the process more efficient and would also allow the clock for the case to be passed to an ADR provider to begin as soon as the case is submitted. In TMO’s experience, it would also support reducing the time taken for a business to conclude the case or in passing it to an ADR provider.**

#### **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?**

The key issue to this requirement is the proliferation of ADR Bodies leading up to and since the introduction of the ADR directive in 2015. This is predicated on ADR being seen as a market, in which competition should thrive, as opposed to a fundamental public service that is vital in providing access to justice.

Vague legislation and definition around the standards required to be an ADR provider has contributed to this proliferation, but there also appears to have been no clear strategy to the appointment of ADR providers, with little ability to monitor or enforce standards after appointment leading to the following results:

- 16 ADR providers being approved to cover the Automotive Sector, while other sectors have no approved ADR provider or are covered by generalists. Generalists can lack the sector-specific expertise required to reach an outcome and may have little ability to enforce the case outcome and have no incentive or capability to improve the quality of customer service within the sectors in which they operate.
- A landscape of ADR approved providers comprising of Ombudsman, Trade Bodies, Consumer Champion Organisations and smaller Generalist organisations working to different service levels with different terminology and processes used to deliver ADR.
- An additional list of ADR providers who operate outside of any sort of approval or accreditation scheme.
- A wide range of standards and requirements for each ADR body, leading to significant variances in quality: the Legal Ombudsman, for example, has multiple Competent Authorities, and ADR bodies who are part of the Ombudsman Association not only must meet the standards of their Competent Authorities but also the OA’s requirements. In addition, there appears to be little communication or cohesion between each Competent Authority.

It is clearly recognised by BEIS and CTSI that the Ombudsman model is best practice for the following reasons:

- It is free of charge for all consumers, no matter where they are in the case process or whatever the outcome.
- It provides consistent Ombudsman processes.
- Looks to improve the quality of service and reduce complaints across the sector it operates in, which includes increasing awareness, providing multiple routes to access the service and raising business standards for all consumers.
- Provides clear standards above and beyond any set out in regulation, such as the Ombudsman Association's Service Standards Framework, which includes provisions around accessibility, and Caseworker Competency Framework;
- Collates all complaints data in the sector, rather than this being spread across a variety of bodies, all of whom will capture and use the data differently thus preventing comparison and analysis;
- "Ombudsman" is a recognised brand within the consumer landscape, and while consumers may not fully understand the role of an Ombudsman, they appreciate that they are there to help;
- The Ombudsman Association, as a body, facilitates best practice through collaborative working – for example, its working groups on topics such as first contact and casework, as well as within its conferences and its online forums.

**Adopting the Ombudsman model, would at a stroke:**

- **Reduce the proliferation of ADR providers in individual sectors,**
- **Reduce consumer confusion**
- **Improve sector customer service levels.**

The 'Competent Authority' would then be able to focus on those sectors with no ADR provision and, supported by the correctly worded legislation, would be able to improve standards across the ADR landscape and enforce key service levels such as end-to-end case delivery timings.

**The combination of an effective 'Competent Authority' utilising the Ombudsman model with a single Ombudsman per sector would provide a clear and cohesive ADR landscape, allowing for investment in service levels, increased data collection and identification of key issues, more effective compliance across the sector, resulting in reduced customer detriment and increased customer satisfaction.**

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

In reviewing the additional changes that government could make to the ADR regulations, it becomes clear that following the Ombudsman model, supported by the OA's Service Standards Framework and Caseworker Competency Framework, would provide much of what is required, which combined with the use of the term 'Ombudsman' would significantly improve consumer and business confidence in the process.

#### **Consumer**

Key requirements:

- Confidence in who is leading the ADR provider with a "Fit and Proper" persons test for those leading the business, so long as this test is suitably defined.
- Confidence that the ADR provider understands and are experienced in the sector they are operating within, for automotive this would relate to how vehicles operate, the recognised terminology of key mechanical, electrical and electronic parts and consumer behaviour during the sales and repair processes.
- A clear set of Codes of Practice that go beyond that required by legislation, covering every stage of the consumer journey and clearly laying out what is expected from businesses in the automotive sector – turning the generic obligations of consumer law into requirements specific to the industry.



- A clear compliance mechanism for ensuring that businesses who are not compliant have sanctions placed against them and allow consumers to access redress without necessarily having to apply to the courts.
- A clear internal mechanism for ensuring the ADR provider is accountable, an example of this is TMO's Independent Compliance Assessment Panel (ICAP) made up of individuals with expertise both from the industry and outside of it, ensuring the balance is in the favour of those outside of the motor industry. While they cannot change a decision, they will review a selection of cases and key (non-financial) performance data to ensure TMO is maintaining its independence and impartiality while providing a consistent service to consumers with the results published via an ICAP annual report on the TMO's website.
- Transparency in how the ADR is performing via a Company Annual Report, which could include the following against a common set of performance metrics
  - Contact & case volumes.
  - Case timeframes.
  - Case outcomes.
  - Financial accounts.
  - Business compliance to decisions.
  - Businesses who have had sanctions placed against them.
- A comprehensive listing of businesses that are accredited to the ADR provider.
- A clear audit process via the Competent Authority with the results published on both the Competent Authority's website as well the ADR providers.

**All the above are already in place at The Motor Ombudsman.**

### **Business**

All of that covered within the consumer key requirements would also be valid to improve the confidence of businesses in the ADR process.

In addition, one of the key concerns of business relating to ADR is consumers bringing frivolous or vexatious claims. The concern from the business is that these cases tie up management time and if the business is charged by case, they are a way for a customer to vent their frustration even if the case has no merit.

The ADR Regulations already allow ADR providers to refuse to consider a case that is frivolous or vexatious, though TMO sees a low volume of cases falling into this category. There is also consideration of bringing in minimum thresholds for bringing a claim: however, claims with low financial values are not necessarily without basis, as it is not always the financial value of a complaint that is of most importance. As such, it is very important for ADR providers to have clear and consistent definitions of what falls into this category, as businesses may label a consumer as 'vexatious' or 'unreasonable' but actually there is a justification for their complaint – even if the individual making it may behave unreasonably.

**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?**

**TMO would agree that government should make business participation in ADR mandatory in the motor vehicle sector**

- The current voluntary nature of the legislation means that businesses can just ignore it. While the majority of Automotive Manufacturers, National Sales Companies and Franchise Dealers support ADR, there remains a small percentage that remain unconvinced regarding the benefits of signing up to an ADR provider.

- In the Independent Garage sector, be it service and repair or used car sales, the take up of ADR is significantly lower, with circa only 10% of independent garages being subscribed to an ADR provider.
- TMO currently handles about 40% of its total case enquiries (77K) from consumers where the business is not accredited to an ADR provider.

The outcome of the current ADR legislation is that if a consumer raises a case with an ADR provider and the business is not accredited, then the consumer will need to seek an alternative resolution which in most cases would be the court system. By allowing no other option other than the courts, a serious imbalance of power is permitted to continue between consumers and unaccredited garages, as they know that consumers will, in the majority of cases, not use the court system.

However, if accreditation is made mandatory and no action is taken to rationalise the number of ADR providers within the automotive sector, the number of providers will increase significantly as businesses see an opportunity to make money while having no knowledge of the sector, or any inclination or ability to enforce their decision or improve the level of service within the sector they are operating.

The existing ADR landscape for automotive already consists of more than 16 CTSI Accredited ADR providers comprising of Ombudsman, Trade Bodies, Consumer Champion Organisations and smaller organisations offering ADR in the automotive sector with different terminology and processes used to deliver ADR.

As we have already pointed out, the proliferation of ADR providers in the automotive sector causes confusion in the minds of consumers and reduces their confidence in both the ADR process and the automotive sector.

**If it is made mandatory without rationalising the number of ADR providers in the automotive sector, the sheer volume of ADR providers will reduce the quality of service provided to consumers as ADR providers compete to accredit as many businesses as possible. For many businesses, but especially for the 90% of independent garages not currently accredited to an ADR Provider, price will be the determining factor as to which ADR provider they join. It will also place the power in business' hands in terms of choosing the ADR provider that they feel may be most favourable to them. This could be a provider that does not have a Code of Practice, so does not set the highest standards of service, or a provider with a non-adjudicatory process or a process with a cost attached for the consumer.**

**Given that the Ombudsman model for provision of ADR, data collection and continuous service quality improvement in the sector they operate in is seen as best practice, then TMO would advocate that a single Ombudsman should be appointed to oversee ADR in the automotive sector.**

In this way, the resources needed to provide the level of service could be balanced with the necessary income generated.

**TMO does not agree that the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis is the best way to manage the cost on business.**

TMO feels that a hybrid model consisting of an annual accreditation fee and a case fee would be better suited to ensure consistent service levels are maintained within the automotive sector for the following reasons:

- As we have pointed out during our responses to this paper, the role of the Ombudsman is broader than just investigating and resolving complaints, it also involves identifying systemic issues at an individual business or sector level by collecting data and using that data to help improve service levels and complaint handling within the sectors the Ombudsman operates in.
- At TMO, we use the CTSI Codes of Practice and the data we gather from cases to work with businesses to improve their overall customer service levels and more broadly that of the



industry. In addition, we also work to increase awareness of ADR to consumers as well as providing consumers and business with knowledge about their rights and how to access ADR. We also operate a business compliance regime and ensure our independence and impartiality is maintained by operating an ongoing Independent Compliance Assessment Panel.

- While the “pay per case” model” has the benefit of apportioning the costs to the businesses who have the most cases, it would not provide:
  - for the ongoing business or sector wide initiatives to improve service levels,
  - the significant investment required in resource and innovation which would disproportionately impact Ombudsman in comparison to general ADR providers who do not routinely seek to improve the industry and are just providing resolution of individual complaints.
- In addition, an important part of the onboarding process for new businesses is the training and materials they receive to introduce them to the concept of ADR and their responsibilities both to inform their staff, but just importantly to inform consumers as to how they can access ADR in the event of a complaint. Ensuring that businesses comply with these requirements needs constant policing.
- The ability to maintain a consistent level of service for consumers and ensure compliance from all businesses requires a consistent level of resources to be able to support it. A fee structure based on a “pay as you go” model would not provide for this as staff would be continually recruited, trained and then let go as the case volume fluctuates.
- Another aspect of the “pay per case” across some 60,000 businesses would be the invoicing and debt collection costs, it could very quickly become reality that the collection of individual case fees across individual businesses becomes more than the cost of the case.

**To provide a consistent level of service to both consumers and businesses and reduce administration and debt collection costs TMO would recommend a hybrid model be adopted within the automotive sector consisting of an annual accreditation fee and a case fee.**

As a not for profit organisation, the revenue generated should cover the overheads of the business, provide for further investment in I.T. and services as required and provide reserves to ensure the business is viable and can weather any ad hoc concerns such as we have seen over the last 18 months with Covid-19.

There could also be the potential to have differing fee models according to the size of the business. A Microbusiness could have a different payment scale than a SME or Manufacturer – a balance would need to be found to ensure that Microbusinesses and SMEs, who most likely will have fewer complaints, are not disproportionately impacted by mandatory ADR provisions.

#### **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?**

Free access throughout the ADR process is a critical factor in the take up of ADR, for all consumers and even more so in the case of those who are vulnerable. The average caseload accepted by TMO for its free-of-charge service is 6,000, which is considerably higher than other ADR providers within the sector where there is a cost, no matter how nominal that may be. ADR is about access to justice that may otherwise not be open to consumers, and one of the key barriers to the court system is cost – so it is important that ADR avoids this.

While there is an argument that a nominal fee would deter consumers bringing frivolous or vexatious claims to the ADR provider, it is TMO’s experience that these consumers would not be deterred and the ADR Regulations already provide ADR bodies with the ability to refuse cases on this basis. However, the issue with frivolous and vexatious cases is that this is a subjective judgment. Some businesses might feel a consumer has raised a complaint without merit: the consumer could be

unreasonable or rude, or their complaint might be low-value or about something seemingly trivial. On the other hand, the consumer could feel extremely strongly about the matter and whilst they may not behave entirely reasonably, this does not mean their complaint is without justification. There is a crucial balance to be found between consumers feeling heard and businesses not being charged for cases that should not be investigated.

In terms of a minimum claim value, this assumes that a consumer's complaint is focussed solely on its monetary value. However, in the complaints seen by TMO, whilst financial remedies are most often requested, consumers are sometimes seeking apologies, recognition that an issue has been caused and an explanation. We are particularly seeing this in mediation, where the resolution of the complaint does not necessarily happen because of a financial offer being made, but because the consumer and business are able to repair their relationship. In addition, having a minimum claim value does not cater to complaints that have no financial value – for example, a complaint being handled poorly has not necessarily related in a financial loss, but nonetheless requires consideration. A low value claim also can be indicative of a wider pattern of behaviour. For example, a consumer complained that a garage stole a stick of chewing gum from their vehicle during a service. The stick of gum itself was worth pennies, but if the garage routinely stole items from customers' cars, this would clearly be a significant issue.

Instead, focus should be put on ensuring businesses have good complaint-handling processes that prevent cases they feel to be frivolous reaching an ADR provider. There could also be regard given to a 'reasonable prospect of success' test, where if an ADR provider receives a complaint and can see it is unlikely to succeed on face value, they would be able to refuse it. However, this would need to be strictly defined and there is a risk that by refusing a complaint solely on the basis of a consumer's evidence, or lack thereof, broader issues may remain uncovered and crucial data lost.

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

The current model of businesses voluntarily signing up to an ADR provider has on the whole not been successful. While the take-up has been positive in those businesses that value good customer service and recognise the importance and value of ADR to consumers and to promoting a positive image of the overall sector, there remain a high number of businesses, particularly SMEs and micro-businesses, who do not.

TMO has had an active new business recruitment initiative in place since its inception in 2016 and while there were some early successes, the number of automotive SMEs and micro-businesses who are not signed up to any ADR provider remains at circa 90%.

For these reasons, TMO would recommend that ADR should be mandatory within the automotive sector and the Ombudsman model be adopted with a single Ombudsman responsible for the automotive sector as already outlined in this response. In this sense, it would not be for government to 'encourage' ADR in sectors that are mandatory, but to enforce it and ensure that adequate resources are directed to this. The goal will be for businesses to embrace the change and engage with the process.

By providing the right level of legislation to support mandatory ADR, it would then be the responsibility of the sector's ADR provider to educate businesses to its benefits.

The more critical part of the legislation would be what happens where businesses still refuse to sign up to ADR or who sign up, but do not comply with the case outcome. Making ADR mandatory is only one part of the puzzle: for the ADR process to hold value, consumers will need to be reassured that outcomes can be enforced and that business non-engagement will not be tolerated, with sanctions applied. This will need to be decided at the policy level and will likely need some statutory or regulatory backing in order for ADR schemes to be empowered. Were multiple ADR providers exist in each sector, the proliferation of enforcement powers could be an issue – however, with the appointment of one ADR body per sector, with appropriate legislative authority, this could streamline

the process and ensure that ADR truly remains an alternative to the courts, instead of merely a precursor.

#### **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?**

Broadly, TMO would be supportive of opening up additional or strengthened routes of collective redress. At the moment, Group Litigation Orders are often led by law firms with a vested financial interest in the case. When consumers are successful, they must pay a significant proportion of any award towards the legal costs, and must also navigate an often complicated and lengthy court process.

Even where public legal action is taken, this is not necessarily to secure redress but is to identify a breach of consumer law and enforce compliance. Some ADR schemes, for example the Financial Ombudsman Service, have been able to group cases together and issue a lead decision that can apply to each case, but this is not consistently applied across the ADR landscape, and is not always possible.

There are a number of considerations to be made:

- Who would have the authority to launch a collective redress scheme – would it be appropriate for an ADR body, would it only be the CMA or would other organisations be given these powers? What safeguards would be in place to ensure that any actions launched have a reasonable prospect of success to ensure management of consumer expectations and the appropriate use of resources?
- Cases that look similar can sometimes be very different. The same situation can cause a variety of differing impacts depending on a consumer's individual circumstances – using the airline refund example again, a failure to provide a cash refund could have been a minor inconvenience for one consumer and the difference between feeding their family or not for another. How will collective redress schemes cater to unique situations?
- Should ADR bodies be given this power, or is it something better left to a regulator? There could be some benefit in allowing ADR schemes the ability to launch action, particularly where their cases show evidence of a trend, but this would require significant resources and statutory authority to do so. There is also a risk that an ADR scheme, particularly an Ombudsman, may be seen to compromise its impartiality were it to pursue legal action on behalf of consumers, so this would need to be carefully managed.
- Would powers be given at the local level i.e. Trading Standards officers – on what scale is this collective redress envisioned? Were it to be at the local level, this would add to an already stretched enforcement landscape, and would require additional investment in order to work.

#### **Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?**

**Consumers** could benefit from private organisations and consumer bodies being able to pursue a collective redress on their behalf due to the following factors:

- Consumers may not always understand or wish to navigate the regulatory landscape and are more likely to interact with a private organisation or consumer advice service.
- They may well feel more supported, have better access to guidance and advice throughout the process, and will probably recognise and have more awareness of these organisations than a public enforcer.

However, consumers will only benefit if private organisations and consumer bodies are given the same legal powers as public enforcers. If not, it would effectively create a 'two-tier' regime where a consumer using a public enforcer's collective redress scheme will have more rights than a consumer using a private organisation or consumer body's scheme.

In addition, as seen in the current ADR landscape,

- Having multiple routes of access to a collective redress scheme could cause further confusion as to how to access it.
- Could multiple collective redress schemes for the same issue be led by different bodies? This would obviously not be desirable and would only add to consumer confusion.
  - There is merit in having a single point of access to such a scheme and having private organisations and consumer bodies acting as channels into the scheme.

**Businesses** will need to have confidence that they will be treated fairly in the establishment of a collective redress scheme.

Were a private organisation to launch collective redress action, a business would need to be able to understand the basis on which a scheme:

- Can be launched,
- How it will be established that they are liable,
- Which organisations and consumer bodies they would be held liable by.
  - Citizens Advice, for example, is a national advice service and therefore it would be logical for them to be able to launch collective redress in any sector against any business. However, a private organisation, such as an ADR scheme, would presumably only be able to launch action against businesses that are members for the sector the ADR scheme operates which if not mandatory would lead to businesses who are not accredited to the ADR scheme escaping the consequences even if they are equally culpable.