# Responses to the call for evidence - EU proposals on Alternative Dispute Resolution

# AAT (ASSOCIATION OF ACCOUNTING TECHNICIANS)

**RESPONSE TO A DEPARTMENT OF BUSINESS, INNOVATION AND SKILLS CONSULTATION - CALL FOR EVIDENCE: EU PROPOSALS ON ALTERNATIVE DISPUTE RESOLUTION.**

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## Who we are

The Association of Accounting Technicians (AAT) is a professional body and money laundering supervisory authority for accountants. Established in 1980, the AAT has a worldwide membership of more than 120,000 members, including qualified accountants and students, the majority of whom reside in Europe.

We are responding on behalf of our members, many of whom provide accountancy services, including bookkeeping, payroll, accountancy and business advice to clients.

## Our interest

There are several aspects to our interest in this consultation, as follows:

1. Our members are service providers, so there is potential for them to provide services to clients in other European countries. The potential impact on, and opportunities created for, our members is of direct interest to us;

2. As a professional regulator, our primary function is to protect the public by taking measures to ensure that our members maintain appropriate standards of competence and conduct. One element of this is to receive and investigate complaints about our members and, where appropriate, to arbitrate such complaints. The receipt and determination of complaints is a very important source of feedback, enabling us, not only to identify deficiencies in individual members but trends in complaints and, therefore, areas of practice in which it may be useful to provide guidance to our membership as a whole. It could, therefore, be counter to the public interest if complaints against our members were to be diverted to other entities; and

3. In light of 2 above, we need to consider (as should other professional regulators) whether we should be the appropriate ADR Entity for our members (and possibly for accountants belonging to other smaller professional bodies).

## Our arbitration process

Our arbitration process is the final stage of a wider ‘fitness to practise’ process for considering complaints against our members.

The first stage is to receive a written complaint and the member’s response to it. These are examined by our Investigations Team. The Investigations Team’s first task is to decide whether the complaint, on its face, could amount to a breach of the AAT’s Code of Conduct

or evidence of incompetence. If not, the Investigations Team will dismiss the complaint. If so, the Investigations Team will consider the seriousness of the complaint should it be proven. If the matter does not disclose serious misconduct or incompetence, the Investigations Team may offer the member a specified sanction if s/he accepts the facts set out in the complaint. The Investigations Team will refer the complaint to arbitration if the member does not accept the facts set out in the complaint or if the Investigations Team deems the complaint to be of a serious nature.

The arbitration is formal, mirroring the civil court process. A Disciplinary Tribunal, consisting of professional and lay members, presides over an adversarial process, where the evidence presented by the complainant and member and any witnesses is tested by cross examination. The parties are usually represented by lawyers and the Disciplinary Tribunal is advised by a lawyer acting as Legal Assessor. Upon making a determination, the Disciplinary Tribunal hands down a reasoned decision, which may be challenged in the High Court by Judicial Review.

Our arbitration process is restricted to the consideration of our members' performance as professions, i.e. by reference to our Code of Conduct and/or standards of competence. It does not (currently) determine contractual right or award compensation.

**Question 1**

**(a) What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A?**

**(b) Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

**With regard to 1(a) above:**

We have not reviewed the survey evidence, the sample size, sample selection, the survey questions, the methodology of calculating the average or statistical analysis. We, therefore, cannot challenge nor concur with the survey's findings, nor the conclusions drawn.

However, from what we glean from the text of Annex A, we would suggest:-

- As regards the first paragraph, that the estimate of £17 billion saving to EU consumers if quality ADR is available may be a significant over-estimate. Our reason for this is that the average loss of £250 was scaled up to the total number of EU citizens over 15 years of age. We doubt whether many 15 to 25 years olds have the financial means to engage in cross-border transactions involving an average of £250.

- As regards the second paragraph, we think that the rationale cited is reasonable but we cannot express a view of the figures mentioned.

- As regards paragraph 3, although we cannot express any view on the figures mentioned, we would urge caution in accepting such figures at face value. An assumption has been made as to the average cost of ADR but that average figure has not been cited. Our own experience is that rigorous arbitration is costly. Also, our own recent costing of a one-day mediation, where the parties are in attendance, is between £1,750-£3,000 plus VAT. It may be that the EU Commission envisages a less rigorous, more 'rough and ready' model of ADR than we are used to. Although the Consultation Document refers to the need to maintain the standard of ADR Entities, the standard of rigor of process and procedure to be met has not been defined.

- As regards paragraph 4, again we view the average figure for businesses to provide information about ADR in their terms and conditions and on their websites to be an underestimate for UK businesses. The Averages seem to be for businesses across Europe and we anticipate that UK costs will be considerably higher.

**With regard to 1(b) above:**

We think that in principle, the Commission's proposals will benefit consumers and business and the Single Market. It is our belief that the availability of ADR will have 2 effects, namely:

1. to provide comfort for cross border consumers and traders, encouraging an increase in cross border trade; and

2. promote the availability and advantages of ADR generally, both for domestically and cross-border disputes.

However, we are sceptical about:

(a) the assumed costs of ADR; and

(b) the fact that it will be voluntary for traders;

(c) the over-laying of The Consumer Protection (Distance Selling) Regulations 2000.

We suspect that the cost of ADR has been underestimated, unless the model of ADR to be implemented is of the 'rough and ready' kind. We assume that arbitrations are to be conducted on paper only. Also, in relation to arbitration (not mediation), the decision of the arbitrator can be challenged in court (see ss. 68 and 69 Arbitration Act 1996) and so, after incurring the costs of arbitration, a certain percentage of disputes are likely to proceed to court post-arbitration, incurring further costs. Our fear is that the cost of the scheme (which will ultimately be borne by the tax payer) might outweigh the benefits.

The option open to traders to refuse to take part in the scheme may 'catch out' those consumers who believe that the scheme has universal application. Publicity may counter this belief. We suggest the application of a Kitemark to indicate inclusion in the scheme, the use of such Kitemark to be policed rigorously.

Rather than have a piecemeal layering of consumer protection law, we believe that a consolidated system of consumer protection would be less bewildering to consumers and traders alike. We also note that the scheme is to apply to 'all contracts' whereas the Consumer Protection (Distance Selling) Regulations 2000, for good reason, sets out exception to the contracts covered.

**Question 2**

**Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

**With regard to Annex B**

**Benefits**

The arbitration we conduct is to a high standard and is on a parallel to court proceedings. It is costly but some of our members' professional standing and ability to practice depends upon a thorough approach.

In our view, any benefit to consumers, traders and the Single Market would be far outweighed if such a high standard of ADR were to be adopted in relation to the EU scheme. Indeed, it would probably be impossible administratively, given the likely number of disputes.

Because mediation is not binding unless both parties agree for it to be so, we do not see mediation as viable, especially in relation to low value disputes. In our view, an ADR finding should be binding, for the sake of finality of outcome and costs.

In our view, the only viable ADR would be an arbitration determined upon written submissions, where the parties are invited to submit their written submission, for the arbitrator to take an inquisitorial approach and to clarify written submissions or ask for further evidence until satisfied that he understands the issues. This is similar to the Ombudsman scheme but with a binding outcome. In our view, this would be superior to the Ombudsman scheme, which has often been described by consumers as inadequate.

Although this model would not be as rigorous as one which receives live evidence, it would provide an accessible pathway for (no doubt, mostly low value) cross border disputes. Even if it were an 'on paper' arbitration (less probative than receiving live evidence), we believe that this would be embraced by consumers, leading to comfort in cross border trade. Paper determinations are necessarily 'rough and ready' compared to those based upon live evidence but the process is simpler and less daunting for lay participants, and therefore, more likely to be used.

We believe that the readily available ADR may lead to fewer disputes ending up in court, as many people would prefer to go to ADR than to court, but it would also lead to an increase in the number of disputes being actively pursued, as those who are deterred from going to court would not necessarily be deterred from going to ADR.

We agree that a correlation between ADR and an increase in cross border trade is plausible, particularly in relation to the supply of goods, but we cannot predict whether there would

actually be such an increase. We are sceptical whether there would be a significant increase in the cross border purchase of services such as accountancy. However, services such as IT, such as website building and maintenance, could flourish.

We would anticipate that there would be a spin-off benefit for domestic ADR providers occasioned by the increased publicity of ADR as a concept. This could lead to fewer court proceedings in relation to domestic matters. However, in our view, the only way domestic ADR providers could benefit from the EU ADR scheme would be by developing high volume 'paper only' ADR procedures (depending upon the standards of ADR envisaged by the EU Commission).

**Costs**

There can be little doubt that many consumers, particularly of low value goods and services, are reluctant to go to court, and that if consumers are willing to go to ADR there will be increased cost to business of having to compensate consumers for defective goods or services. However, in our view, this is not a valid or moral reason not to encourage ADR.

The information requirements could create one-off moderate costs to businesses but there could be a benefit thereby engendering customer confidence.

The cost of ADR will be extremely sensitive to the standard and procedures of the ADR adopted. However, we would envisage that even the lower standard 'paper determination' as described above could only be provided at significant cost. Also, as cost could be awarded against a trader, the cost of defending a dispute, particularly relating to a low level transaction, could deter traders from defending a claim by a consumer. Raising a dispute with a trader could then have a 'nuisance value' to the benefit of undeserving consumers.

As ADR will be voluntary for both traders and consumers, anything greater than a modest cost to the trader would encourage traders to brazen out any dispute in the knowledge that few consumers would be prepared to go to court, particularly in relation to cross border disputes, and particularly for low value transactions.

In our view, given the cost of providing ADR, there will be a permanent gap between the cost of its provision and any fees that could be recovered by the ADR Entity. Therefore, considerable public funds would be necessary on an on-going basis. Further public funds will be necessary to establish and maintain the Competent Authority.

**Annex C**

**Benefits**

We agree that it would not be necessary to signpost the ODR platform, as traders have to provide information about the ADR scheme by which they are covered.

**Costs**

We agree that the staffing costs of the facilitators could be reduced as suggested.

**Question 3**

**Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "charge back" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

In our view, consumers would welcome the opportunity to obtain redress against traders who have sold them deficient goods or services. The simpler and cheaper the means of redress, the more they are likely to be embraced by consumers.

Chargeback" is certainly arbitration but not ADR as defined in the EU proposals because the credit/debit card issuers are not independent, being jointly and severally liable for breach of contract by the trader. However, we doubt that consumers would be concerned about such technicality. The credit/debit card issuer is in a powerful position in relation to the trader and unlikely to lose out as a result of the dispute, save where the trader becomes insolvent. There is little reason to believe that the credit/debit card issuer would not make an impartial decision.

In our view, therefore, "chargeback" should be considered as ADR and the first port of call for consumers, where available.

**Question 4**

**What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently within the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

The proposed scope of the directive is that ADR will apply to all contracts. As stated above, there might be sense in restricting the scope for certain types of contract or where well established ADR Entities already exist, such as contained in the Consumer Protection (Distance Selling) Regulations 2000. We also have some concern about whether the proposal would divert complaints against our members away from us, thereby causing a loss of information about competence and ethics trends etc.

The proposals set out certain administrative requirements, such as independence and making certain information public, but they do not define the standard of decision-making or model of ADR, nor the number and value of likely disputes. As all depends upon these 3 factors, it is not possible to identify gaps in existing provisions or how much public subsidy would be required.

However, on the assumption that the number of disputes would be large and would grow over time, we have assumed that the required mode of ADR would be confined to a

consideration of the issue on paper and that standard of case reviewer would be to, at least, trained paralegal standard overseen by a lawyer. Even with these minimum requirements each dispute could be expected to cost hundreds of pounds. It could be that the degree of rigor and complexity of the ADR could increase according to the sums involved in the dispute but in any event, the cost of ADR is likely to be high and prohibitive unless financed by the public purse. We believe the requirement that the procedures are free of charge or at moderate costs for consumers (which is necessary for the success of the scheme) and the voluntary nature of traders' involvement makes a self-financing scheme an unrealistic expectation.

**Question 5**

**What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

We understand the standards/requirements for ADR entities to be:

With reference to Commission Recommendation 2001/310/EC and Commission Recommendation 98/257/EC:

- Impartiality
- Transparency
- Effectiveness
- Fairness

Such requirements are the least one would expect, and easily cited. However, the devil is in the detail of how these are to be achieved and monitored. Impartiality and Transparency are fairly easily achieved, we would suggest. The difficulties, we predict, would come in achieving and monitoring the closely related requirements of Effectiveness and Fairness.

To achieve Effectiveness and Fairness in the context of contractual rights, the ADR Entity needs to be well versed in contract law. This requires legal training and experience. It also requires, in the context of remote arbitration, an inquisitorial approach.

The finer detail of the requirements, in particular:

- Resolution of disputes within 90 days should be possible in a paper determination if all parties to a dispute co-operate in the provision of information. But to encourage prompt attention of the parties, there may have to be tight deadlines for the provision of information.

- The process to be free of charge or at a moderate cost is, in our view, unrealistic. The application of resources and care necessary to ensure a high degree of effectiveness and fairness is extensive and expensive. If the consumer or trader were required to cover such cost, this would discourage recourse to ADR, particularly in relation to low value transactions.

Our arbitration process already conforms to the requirements but we do not determine contractual disputes. Our Complaints process (described above) would be adapted to such a role with the appropriate legal advice. However, this would increase its workload and that of its administrative support staff. We could not estimate the costs of handling contractual disputes without information as to volume and complexity of disputes. Even so, it would require a change of culture for the AAT. Having said that, although we are not contemplating it at the moment, we would not at this stage rule out the possibility of adopting such a role.

**Question 6**

**What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

We believe that the existence of the Competent Authority is important in promoting consistency across ADR Entities. However, the description of the Competent Authority's processes of collecting performance indicative information from ADR Entities, although sensible if applied intelligently and with restraint, has the potential to turn into an unthinking administrative process, creating onerous red-tape for ADR Entities, distracting them from their core functions.

We would suggest the Administrative Justice and Tribunals Council as a possible Competent Authority because its mandate and experience is to ensure that tribunals maintain the core standards of impartiality, transparency, effectiveness, fairness advocated for ADR Entities. We could not estimate costs connected with this as we do not have sufficient information as to the number and complexity of ADR Entities to be included in the scheme.

**Question 7**

**Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

We believe that consumers would change their behaviour if businesses were required to inform customers about an ADR scheme and whether they would participate in ADR. Intuitively, one would think that consumers would have more confidence in traders willing to participate in ADR and would tend to purchase from traders committed to ADR and to shy away from business which are not. That commitment to ADR promotes confidence is evidenced by schemes operated by such organisations as Amazon, PayPal, Ebay etc.

**Question 8**

**What would be the costs to business of providing the additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

Cost would be those associated with:

- personnel time to draft amendments:
    - to terms and conditions of sale or service;
    - stationery;
    - website text.
- Printing costs of new stationery and term and conditions; and
- Costs associated in updating website contents.

Particularly with small or medium businesses, a key member of personnel must be diverted from other tasks to complete amendments. This could lead to delay in implementing the necessary changes but also in loss of revenue to the business due to diversion from income generating activity.

Costs associated with printing and updating web text will be one-off costs. We would predict a budget of £1,000 would not be an over-estimate of such costs, given the time of a key member of personnel, printing and the engagement of an external IT specialist to update web text.

It may be helpful if standard precedents or examples of the required text were provided to businesses for them to quickly amend if they so wish, rather than starting from scratch. This could save the time of a key member of personnel.

**Question 9**

**Do you have any other comments on the proposed Directive?**

We believe that any determination by an ADR Entity should be binding on the parties to a dispute, particularly in relation to low value disputes. This will bring finality to disputes and would be a proportionate response, saving the escalation of costs caused by further proceedings.

The requirement of Member States to ensure that consumers can obtain assistance with regard to a dispute relating to cross-border sales of goods and services is potentially expensive. However, organisations, such as the Citizens' Advice Bureau already exists to provide such assistance.

**Question 10**

**(a) What do you think about the proposals in the ODR Regulations?**

**(b) What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers?**

**(c) Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes?**

**(d) What would be the costs to businesses of these additional reporting requirements?**

**(e) Might these requirements mean business is more reluctant to trade online and cross-border?**

(a) Taking Ebay, PayPal and Amazon as examples, we believe that implementation of the ODR Regulations would create comfort for consumers and encourage on-line cross-border trade. We believe that this is a very positive proposal;

(b) Our first response to the proposals was that the ODR Platform, being a single portal for consumers to raise disputes was a good idea, simplifying matters for consumers. However, we now believe (as pointed out in the Consultation Document) that the fact that traders would have to state on their website whether they are committed to an ADR scheme and to identify such a scheme negates the need for the ODR platform. We, therefore, believe that the costs in establishing and maintaining the ODR Platform would not provide any significant benefits.

(c) ADR providers would be able to meet the 30 day deadline in the majority of cases but only if very tight deadlines are set for the parties to the dispute to submit their written evidence. Such deadlines would have to be strictly enforced.

(d) The form in which the extra reporting must be made has not been set out. However, we believe that if the extra information were to be submitted electronically on a spreadsheet asking standard questions which require very brief answers, the information requirements may be absorbed into business' existing administrations at little extra costs.

(e) We believe that businesses will not be deterred from on-line cross-border trading due to the red-tape generated by the ODR Regulations but we believe that red-tape should be kept to a minimum. It is apparent that on-line purchasing is a growing trend and the first choice for many consumers. We believe that business will follow trading opportunities.

## Conclusion

For the reasons stated above, we view the EU Proposals to promote ADR and ODR positively, although we do not think that our members (being UK-law-sensitive service providers) will be significantly affected in the short term. However, we believe that other sectors could benefit.

We believe that the estimates of the financial benefits expressed by the EU Commission are significantly over-stated. We also believe that success of the schemes will be dependent upon significant public funding and we fear that the overall cost will outweigh the benefit.

# ABI (ASSOCIATION OF BRITISH INSURERS)


Association of British Insurers

# Alternative Dispute Resolution

## ABI response to BIS Call for Evidence on EU proposals for Alternative Dispute Resolution (ADR)

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### Introduction

The ABI welcomes the opportunity to respond to the Department for Business, Innovation and Skills (BIS) Call for Evidence on EU proposals for Alternative Dispute Resolution (ADR).

The ABI is the voice of the UK's insurance, investment and long-term savings industry. It has over 300 members, which together account for around 90% of premiums in the UK domestic market. The UK insurance industry is the third largest in the world and the largest in Europe. Employing more than 300,000 people in the UK alone, it is an important contributor to the UK economy and manages investments of £1.5 trillion, over 20% of the UK's total net worth.

### General Comments

Alternative Dispute Resolution (ADR) can be a positive way of delivering efficient and effective outcomes to disputes between consumers and firms. ADR schemes- whether based on mediation, arbitration, negotiationetc- offer the potential for non-adversarial, cost-effective and prompt resolution of disputes. Every encouragement should be given to parties to attempt to resolve their disputes without recourse to litigation. So the ABI supports ADR and believes that Member States should have sufficiently resourced ADR schemes.

In the UK, all providers of regulated financial services activities fall within the compulsory jurisdiction of the Financial Ombudsman Service (FOS)[1]. This jurisdiction is set out in the DISP rules of the FSA Handbook. These rules apply to all activities carried out by an establishment within the UK, including incoming EEA and incoming treaty firms. Financial services firms in the UK are required to inform consumers of the existence of the FOS both at point of sale and when a complaint is received.

The combination of compulsory jurisdiction and consumer disclosure ensures that virtually all UK consumers of financial services are covered by an ADR scheme – even when the complaint is about a European firm that has passported into the UK. This provides consumers with a service that is familiar, universal and provided in their own language. This coverage helps to promote consumer confidence and ensures common standards of consumer protection; which in turn promote competition and are beneficial to existing and new market entrants. While we recognise this initiative may offer benefits to consumer in other market sectors, we believe that UK consumers of financial services already have access to a high quality redress service, tailored to the needs of the sector.

[1]With the exception of complaints about the management of occupational pension schemes. These fall under the Pensions Ombudsman.

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

The experience in the UK demonstrates that consumers are increasingly using ADR to resolve their disputes/complaints with financial services firms. Over the past 10 years, the number of complaints handled by the FOS has risen dramatically, up from 31,350 in the year ending March 2001 to 206,212 in the year ending March 2011. Furthermore, the FOS now receives in excess of a million initial enquiries from consumers each year, indicating a growing awareness of, and willingness to use, the FOS to try and resolve complaints.

Once ADR schemes are established, we believe consumers should be encouraged to use them. However, we are somewhat concerned that the Commission's impact assessment does not give proper consideration to the rise in on-going costs once schemes are established, and consumers become more aware of them. For example,a review by the National Audit Office (NAO) found that operating costs for the FOS (which is funded through a levy and case fees payable by financial services firms) have risen by 214 per cent in real terms over the past 9 years, from £27.2 million in 2001/02 to over £100m in 2010/11. Furthermore, the FOS are predicting a 75 per cent increase in operating costs for 2012/13 to £197.6 million. Fuller consideration needs to be given to any potential strain on funders of ADR schemes where the schemes, and therefore the costs, grow dramatically, over a short space of time.

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

We do not feel best placed to answer this question.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

As we understand it, the main objective of the proposal on ADR is to ensure that EU consumers have access to an effective and inexpensive way of solving their disputes with traders. We are therefore concerned that the scope of the proposal covers complaints filed by traders against consumers as well as complaints filed by consumers against traders.

In the UK, financial services firms do not have recourse to the FOS in the event that they wish to take a complaint against a consumer. Financial services firms (and businesses more generally) have other means through which to address disputes with their

customers. The ABI is concerned that under the current proposal the UK would be required to either adjust the application of the FOS or set up a new ADR mechanism dealing with complaints on behalf of financial services firms (paragraph 13 of the proposal).

Though there may be examples of ADR schemes, such as arbitration, which act as an intermediary between consumers and traders, no evidence is given to justify why the application of all types of ADR should be expanded, giving traders access to procedures which are, in essence, designed to enhance protection and redress for consumers. ADR schemes such as the FOS exist to tackle the asymmetry between firms and consumers and, as such, we do not support broadening the scope of the FOS or the setting up of a new scheme. We urge BIS to address the issue of scope when responding to the Commission on this proposal.

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

We are broadly supportive of the standards proposed for ADR providers. In particular, we welcome the requirement for ADR schemes to exchange information electronically. Currently, the FOS relies to an unusual extent on the postal service, adding unnecessary delay and concern over security. Exchanging information via e-mail would be more efficient and secure.

We also support the principle that ADR should be free of charge or at moderate cost to consumers. However, we do believe there ought to be a distinction made between the service being free for consumers and one which is free for profit-making organisations such as Claims Management Companies (CMCs). Almost half of the complaints now received by the FOS are from CMCs who charge consumers for helping them to take a complaint. CMCs often offer poor value for money, taking a considerable portion of consumers' redress payments, in exchange for providing a service which sometimes consists of nothing more than forwarding on a complaint letter to the FOS. Leaving aside our concerns about the quality of the service offered, we believe that CMCs are distorting the costs of providing ADR by making profit through charging consumers for a service that would otherwise be free.

We do not support the proposedrequirement on ADR providers to resolve disputes in 90 days. Figures from the FOS show that they resolve just 41% of their cases within 90 days. We support the principle that resolution of disputes should be fast and efficient and regularly encourage the FOS to reduce the time taken to resolve cases. However, we are concerned that such a tight timescale may place undue pressure on the FOS, potentially resulting in an adverse impact on the quality of decision making.

Finally, we are concerned about the potential impact on existing ADR arrangements and rules. In the UK, the FOS is established on the basis that a consumer must complain to the financial services firm first, which has a specified period of time within which to respond (currently 8 weeks). This gives the firm an opportunity to respond to the complaint before an ADR entity becomes involved and maximises efficiency since the

majority of complaints are resolved by firms. This process is set out in the FSA's DISP rules, which also sets time limits on the length of time consumers have to forward their complaint to the FOS (6 months for the date of the firms' final response).

Weare concerned that the Directive does not take into account existing rules within member states and would like clarity that they would not be affected. In particular, we would like certainty that the 90 day time limit (or 30 day in the case of ODR) does not include the period of time that a complaint is with a firm and that the statute of limitations on taking a complaint to the FOS will still apply. Finally, would expect that the FOS would retain the right to reject complaints that they consider to be frivolous or vexatious.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

We are concerned that the requirement for the Competent Authority indicates that it should be one entity, with responsibility for all ADR schemes. The UK has over 100 different ADR schemes dealing with a range of issues and we question whether it is appropriate for one authority to oversee all such schemes.

We are also concerned about the impact that this may have on existing governance and accountability arrangements, for example, the relationship between the FOS and the Treasury, the FSA and the Office of Fair Trading.

**Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

Figures available in the FOS 2010/11 Annual Report show that 20% of consumers who refer their complaint to the FOS heard about the service from the business they complained to, lending some weight to the view that firms should be required to provide this information. However, this figure is far less than those who hear about the service via the media(press, broadcast and internet). Almost half of complainants (46%) hear about the service through these channels suggesting that if the Commission really wants to drive changes in consumer behaviour, the media is the most effective means through which to do so.

**Question 8: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

Financial services firms in the UK are required topublish information setting out their complaint handling procedures. This must include information on the existence of FOS, and a consumer's right to have a complaint referred to it. The information must be made available in point of sale disclosure documents (e.g Keyfacts), on request and when acknowledging a complaint.

Where sectors already provide extensive information about the availability of ADR, we question how useful it would be for consumers torequire this information be made

available in terms and conditions and on receipts. Experience has shown that consumers often struggle to engage with lengthy documents such as terms and conditions. We therefore believe that the UK approach (requiring the information be provided in key disclosure documents etc) would be more successful at drawing consumers' attention to the existence of ADR. The Directive should give member states the option of requiring the provision of information in key documents or in terms and conditions and receipts, but it should not be prescriptive as this would be unduly burdensome.

**Question 9: Do you have any other comments on the proposed Directive?**

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

The FOS currently facilitates the resolution of cross-border disputes between consumers and financial services firms through its membership of FIN-NET. FIN-NET provides consumers with easy access to a cross-border complaint procedure so that if a consumer in one Member States has a dispute with a financial services provider in another Member State, FIN-NET will facilitate that complaint being directed to the appropriate FIN-NET member to consider the issues.

FIN-NET deals withall cross-border complaints about financial services firms (though there are gaps in geographical coverage) and it is unclear how it will operate alongside the ODR platform which will be responsible for dealing with complaints about online, cross-border purchases. There is the potential for confusion about which platform a consumer should be directed to,and duplication of effort if the ODR platform is dealing with complaints that are a subset of those financial services complaints already dealt with by FIN-NET.

With regards to the information requirements, clarity is needed as to whether the information should be provided to *all* customers of a firm selling online, cross-border goods and services or just those customers who have purchased goods or services online and from another country. Notwithstanding our comments about the most appropriate way to communicate this information to consumers (see Q8), it would be confusing if firms were required to provide information to home state customers about both ADR and the ODR platform.

The introduction of the ODR may require changes to firms' systems and literature so that they are able to accept and respond to complaints via the platform and inform consumers about its existence. We are concerned that the Commission has an ambitious timetable for adoption of the regulation which will then take direct, immediate effect. We believe firms should be given adequate time to comply with the requirements of the regulation.

Furthermore, we are concerned, from an accessibility perspective, about the requirement to submit both the complaint form and supportive evidence in electronic

format. This assumes a degree of computer literacy on the part of complainants, that they will have documents in electronic format and access to the necessary technology.

Finally, we are concerned about the requirement for ODR schemes to resolve the complaints within 30 days. This limit is somewhat arbitrary and is considerably shorter than the deadline under the ADR directive. We are concerned that such a short deadline will place undue pressure on ADR schemes, potentially affecting the quality of decision making.

# ABTA (ASSOCIATION OF BRITISH TRAVEL AGENTS)

# ABTA Submission to the Department for Business Innovation & Skills on EU proposals on Alternative Dispute Resolution (ADR)

This response is submitted on behalf of ABTA – The Travel Association. ABTA was founded in 1950 and is the leading travel trade association in the UK, with over 1,200 members and over 5,000 retail outlets and offices. Our Members range from small, specialist tour operators and independent travel agencies through to publicly listed companies and household names, from call centres to internet booking services to high street shops. ABTA Members provide 90% of the package holidays sold in the UK as well as selling millions of independent arrangements for travel both in the UK and overseas.

ABTA has been at the forefront and offered an Alternative Dispute Resolution scheme for over 40 years. We provide advice and assistance to customers on how to resolve disputes with ABTA member travel agents and tour operators - see http://www.abta.com/consumer-services/travel problems. If a customer is unable to resolve their dispute amicably, then they have the option of pursuing this through more formal channels such as the ABTA arbitration scheme - see http://www.abta.com/consumer-services/travel problems/arbitration.

ABTA keeps its ADR scheme constantly under review.

## Responses to Questions listed in Annex D

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

Whilst we do not wish to comment on the Commission's financial estimates, we do believe that ABTA's ADR scheme is cost effective to both consumers and business. It also has the benefit of being confidential to the parties concerned and provides a simpler and less formal alternative to the Courts.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?

We provide advice and assistance to customers on how to resolve disputes with ABTA member travel agents and tour operators - see http://www.abta.com/consumer-services/travel problems. If a customer is unable to resolve their dispute amicably, then they have the option of pursuing this through more formal channels such as the ABTA arbitration scheme - see http://www.abta.com/consumer-services/travel problems/arbitration.

The ABTA scheme has been in existence for over 40 years and isconstantly under review. For example, we have recently moved part of the administration of the arbitration scheme from IDRS to CEDR Solve, with ABTA handling the initial casework. This has resulted in cost savings which have been passed on.

***Cost***

The cost of the ABTA arbitration scheme depends on the amount claimed by the consumer:

| Total amount of claim | £1 - £2,999.99 | £3,000 - £7499.99 | £7,500 - £25,000 |
|---|---|---|---|
| Cost to claimant under ABTA scheme | £108 (including VAT) | £180 | £264 |
| Cost to member under ABTA scheme | £252 (including VAT) | £180 | £96 |

The average claimed under the ABTA scheme is £2,762 which per the above would cost the claimant £108. The Small Claims Court uses a different scale but a similar claim would cost:

- Issuing the claim - £95
- Allocation to track - £40
- Pre-trial checklist and hearing fee - £165 **Total £300**

Under the ABTA arbitration scheme, either party has the right to appeal the award if application for appeal is brought within 14 days of the original award being issued. The cost to whoever brings the appeal is £350 + VAT. This might seem high but there is felt to be merit in charging such a fee to act as a deterrent to frivolous claims.

***Timing***

From the receipt of the completed application form by ABTA, we will request the defence from the ABTA Member to be received within 28 days. In exceptional circumstances, the ABTA Member may request an extension of 14 days in which to submit their defence. Once we have the defence, that along with the claim is despatched to CEDR Solve. CEDR Solve acknowledge receipt and contact the consumer from their comments on the defence and payment. Should CEDR Solve not receive comments from the consumer to the defence or payment within 7 days, the case will be withdrawn. Once CEDR Solve receive the consumer's comments, a copy will be sent to the ABTA Member for them to highlight any new content, evidence or claim. The ABTA Member may not introduce any new matters or evidence or points of defence.

The case is then allocated to an arbitrator who has up to 28 days in which to make an award.

Per the Ministry of Justice, average hearings for claims brought under the Small Claims track (under £5,000) of the Court process took place 30 weeks after the claim was originally submitted. For higher value cases, the time taken was in excess of one year.

***Number of cases***

In 2010, ABTA dealt with 12,702 cases of which 221 went through the full arbitration process. Of these 194 (88%) of cases were found in favour of the customer.

In 2011, ABTA dealt with 11,783 cases of which 113 have so far gone to arbitration. Of these 95 (84%) of cases have so been found in favour of the customer. To note there are likely to be more cases to come as consumers can bring a claim up to 18 months after the return date from their holiday.

We are seeing a reduction in cases as our Member travel agents and tour operators have increasingly sought to resolve the disputes without recourse to formal action. The reduction in arbitration numbers has been further helped by the use of the ABTA pre-arbitration notice which is sent to the consumer prior to the arbitration pack being sent; we anticipate that this accounts for a reduction of 10%.

**Question 3**: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

No. We do not consider that a claim under Section 75 of the Consumer Credit Act is impartial.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

We agree that there should be ADR for consumer disputes in all sectors but believe it should be down to individual businesses to source an ADR service that fulfils the criteria. We understand that there is provision for Member States to create a default system if there is no existing ADR so feel that this is sufficient.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

We believe the ABTA scheme as it currently stands would meet the Commission's criteria.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

We support transparent schemes; statistics of the ABTA arbitration scheme are published in ABTA's annual report. We are looking to further develop this by the publication of anonymised cases and awards. We have no views on who might take the role of Competent Authority and feel this would be of greater interest to the ADR provider i.e. CEDR Solve.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We believe that businesses should be required to inform consumers when they are part of an ADR scheme.ABTA Members make reference to the ABTA schemeson their own websites and in written material, such as brochures, their terms and conditions.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

We believe the cost of business is negligeable.

**Question 9**: Do you have any other comments on the proposed Directive?

We feel there should be greater consumer awareness and that Courts, lawyers and citizens advice services should encourage the use of ADR. Self-regulatory mechanisms should be introduced so that if a consumer asks for an ADR, then where one exists, it should be used.

A one stop shop such as the UK's Consumer Direct (http://www.consumerdirect.gov.uk) would be helpful to signpost consumers to an ADR. Their role should be limited to providing information.

Regarding funding of ADR schemes, we believe strongly that both parties involved in the dispute should pay for its cost. Charging a fee to consumers acts as a deterrent to frivolous or ill-prepared claims; this would also encourage efficiency in the resolution process. Consumers have an interest in keeping overall costs low.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border

ABTA currently has an online dispute form which we encourage consumers the use. We are developing processes in order to make the ABTA scheme available and easily accessible online but, as with any IT project, this will take time.

ABTA's scheme is cross-border in as much as ABTA Members sell their product to consumers resident outside the UK. Travel agents and tour operators are aware that by joining ABTA they are automatically accepting adherence to ABTA's ADR (this is one of the benefits to consumers of doing business with an ABTA member).

Whereas the arbitrator is required to deliver the award within 28 days, we do not consider that a 30 day deadline for the whole is feasible, or reasonable, taking into account the time necessary to investigate and put in a defence to the consumer's claim.

Thank you for taking our comments into consideration.

**Further Information:**

Susan Parsons, Manager, Trade Relations, ABTA – sparsons@abta.co.uk or 020 3117 0524

Charles Fachiri, Consumer Affairs Manager, ABTA – cfachiri@abta.co.uk or 020 3117 0552

31 January 2012

# ANGUS LOGAN - SOLICITOR

Discussion Paper

Response to European Commission Proposals on Online Dispute Resolution

We are of the view that the ODR proposals for EU Consumers are in general for the benefit of consumers but there are a number of concerns. The concept of online negotiations between perhaps a large commercial organisation and a small individual consumer or customer is likely to put the individual consumer in a position of potential disadvantage. Most of us who have had dealings with large corporations online over the years have often found it quite difficult to find a way to make complaints or to obtain access to a manager or person in charge if there are any problems with the transaction.

These problems are likely to be made worse if there are cross border aspects to the online Dispute Resolution System.

The Commission envisages that low cost fees should apply so that the new ODR system is not expensive. However, at the same time the Commission expects that the usual Court Procedures within Member States would still be available to consumers and to traders if they wished to do so. The ODR system would not therefore be mandatory on the parties.

We also think that where cross border parties are involved in the dispute, the need for accurate translations and exchange of information between the parties so that neither party is put at a disadvantage because of a lack of linguistic understanding would be a real difficulty. Any system would have to take into account the need to provide language and translation facilities.

The proposed ODR system does not rule out the use of Lawyers. However, a low fee system of online resolution is not in the first place one that would be likely to be very attractive to lawyers. Some disputes which are initially attempted to be resolved by online dispute resolution might well become very complicated and it might be that lawyers need to be involved in the process at a later stage.

If the Commission proposes that no cost or low costs in terms of fees are the ideal then it should be aware that whereas out of Court dispute resolution procedures might be offered at a low fee or no fee to consumers, even low value disputes can turn out to be very complicated.

It has also been pointed out elsewhere that experienced and well established dispute resolution professionals tend to charge a relatively high hourly rate for their expert services.

Lawyers for example and other alternative dispute professionals are unlikely to give of their knowledge and valuable time in a complicated online dispute or in an online dispute which is giving rise to possibilities of appeal, without the possibility being available of receiving a realistic commercial fee for their expertise.

The Commission is proposing that written outcomes should be made available to the parties stating the grounds of decision. However, this already creates the possibility of a further dispute as to the findings and as to the resolution which has been made. The Commission sets out the right to seek independent advice before agreeing or rejecting the solution proposed but this to may give rise to the need for legal advice from lawyers or other expert dispute resolution professionals.

It is the suggestion of this paper that in any directive, the European Union should make provision for :-

(A) the reasonable remuneration of lawyers and other alternative dispute resolution professionals in giving advice on matters of reasonable complication in the dispute resolution process and that the party who has effectively won the dispute should be giving the financial means to seek such legal or other professional advice.

(B) facilities for translation and competent interpreting of documents and of procedures in any ODR Processes should be funded by the EU.

(C) Steps should be taken by the European Commission to institute within the Member States and in the legal professions and alternative dispute resolution professions training and courses in the new ODR Procedures and their ramifications.

Our submissions in this paper are based on the need to protect the consumer in the EU Member States from the possibility and indeed likelihood that he or she will be at a disadvantage when dealing online with greater expertise and financial strength against a large company or corporation and whether the dispute is dealt with online or by way of court procedures.

It is our concern that language and interpreting facilities should be made available and funded not least for the consumer.

It is our concern also that whereas a low fee and low cost system of ODR should be available, that there should be the reasonable right for parties to seek advice from lawyers and other ADR professionals.

Our general view is that the proposed directive has much merit on its side but our concerns are ones that we would like to be addressed in any final directive.

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# BBA (BRITISH BANKING ASSOCIATION)

The voice of banking & financial services

Dr. Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
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**SENT VIA E-MAIL:**
Heidi.Munn@bis.gsi.gov.uk

2 February 2012

Dear Heidi,

**BBA response to the *BIS call for evidence on EU proposals on Alternative Dispute Resolution (ADR)***

The BBA is the leading trade association for the UK banking and financial services sector. We represent over 200 banking members, which are headquartered in 50 countries and have operations in 180 countries worldwide. These member banks collectively provide the full range of banking and financial services and make up the world's largest international banking centre.

We welcome the opportunity to respond to this BIS call for evidence on the EU proposals on Alternative Dispute Resolution (ADR). Our response has been drafted in consultation with our membership. We provide some general comments below, before addressing the specific questions raised in the paper.

1. The BBA and our members support the principles put forward by the European Commission regarding Alternative Dispute Resolution schemes ("ADR schemes"). However, whilst recognising the value of these mechanisms, it is important to note that ADR is just one element within a suite of dispute resolution tools available depending on the situation at hand; therefore it may not always be the preferred option.

2. Despite what is stated in Recital (7) of the European Commission's proposal for a Directive on ADR (the "Directive"), we would question the appropriateness of a compulsory ADR scheme, under which, firms are directed to bring complaints against their customers.

3. Article 8(d) of the Directive must be withdrawn as a time period of 90-days is not sufficient, particularly for complex financial cases. It is the responsibility of the Financial Ombudsman Service (the "FOS") to ensure the 'right' outcome as opposed to a 'hurried' one. Instead we suggest that the 90-day limit relates to the maximum period allowed before an ADR provider must commence its investigations. In the UK, specific case types have experienced long delays before commencement with the ADR provider due to extremely heavy volumes being received (e.g. PPI cases)

4. We have concerns around home versus host rules, in regards to cross-border disputes and arbitration. The FOS currently does not have the capacity and capability to arbitrate over cross-border disputes. There are, in addition, challenges that will be faced by the FOS in interpreting and integrating differing legal frameworks existing across the EU in the space of financial dispute mediation; and

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5. Regarding the operation of On-line Dispute Resolution schemes ("ODR schemes"), there are concerns over the use and protection of personal customer and commercially sensitive data. Any and all information transmitted to an ODR scheme, must be protected under the Data Protection Act and under the rules for exemptions under the Freedom of Information Act.

We hope that you will find our views, below, helpful. Should you need any further information from us regarding any of the issues raised in this submission, please contact Laura Whiskerd, Policy Advisor, on 020 7216 8860 or laura.whiskerd@bba.org.uk in the first instance.

Yours sincerely,

**Laura Whiskerd**
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**BBA response to specific questions arising in the call for evidence**

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

The estimates indicated within the Impact Assessment (the "IA"), i.e. 1.75 problems per person per year and the estimated cost to business of about £217, are not provided in an appropriate context. For instance, is this the estimated number of problems and costs to businesses in cross-border disputes or simply within a national regime? Additional details are therefore needed, on how these figures were generated.

General benefits to businesses of Alternative Dispute Resolution schemes ("ADR schemes") are well documented as the cost of litigation can be extremely high, and may become prohibitive. Businesses may write off losses rather than raise court action because the costs outweigh the benefits and therefore small businesses, where the impact of these losses would be highest, would have the benefit of being able to refer cases to ADR schemes.

Companies defending cases would have reduced costs, because any fees payable to the ADR service for dealing with the case are likely to be significantly less than the cost of engaging solicitors.

Costs of raising awareness of the ADR service would depend on the facilities available. The financial services scheme provider, the FOS, provides leaflets and full details on their web-site.

Overall, the cost savings would depend on consumer's perception of the services. If the consumer perception remains focused on the differences between domestic laws, it is difficult to see that this will increase cross-border commerce. Small businesses are most likely to take advantage of the cross-border benefits.

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

Using FOS as an example, a greater awareness of the service has resulted in a 376% growth in cases since 2001-2002, with one million enquiries received each year and 206,121 cases taken on

for investigation in 2010-2011. This has resulted in an external audit of FOS' processes in order to ensure FOS is able to cope with demand. For example, mass complaints were highlighted in the National Audit Office (the "NAO") report *Efficient Handling of Financial Services Schemes*, where the NAO suggested that FOS should evaluate if its current charging structures are fit for purpose.

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If no, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this available, rather than using ADR to resolve a dispute? Why?**

An ADR scheme can often involve an independent, third-party acting as an arbitrator. In the case of chargeback services, the card company will normally refund the customer, investigate the claim and then recover the sums from the trader. This process does not involve a third-party acting as an independent arbitrator.

Moreover, as evidenced by data from the Payments Council, the largest method of payment used by consumers is liquid money (i.e. cash). A chargeback process will not therefore, be a viable alternative for the majority of consumers.

Irrespective of the method of payment however, an ADR scheme must be available to all consumers.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

To avoid unintended consequences, it is important that the scope of the Directive is restricted to contractual disputes arising from the sale of goods or provisions of services by a trader established in the EU to a consumer resident in it.

It is questionable whether it is appropriate for an ADR scheme in a European Union member state to deal with a dispute in relation to a contract in the UK. It is not entirely clear what opening up of ADR schemes to nationals of other EU Members States means in practice. There is therefore, a concern, for example, if citizens of other EU states were able to make complaints to the FOS about products or services they had bought from UK-headquartered, overseas subsidiaries.

As there is an element of adjudication in ADR (i.e. someone sits in judgment on a complaint as opposed to just mediating), the proposed scope would require FOS to understand and then weigh up the applicable laws and regulation in the other country in deciding what is "fair and reasonable".

The financial services industry is not confident that the FOS would have the relevant expertise to undertake such extension of its scope. In order for the ADR to function therefore, FOS must only have jurisdiction in disputes where the parties have agreed that UK law will govern the transaction.

Additionally, the European Commission needs to ensure that it does not devise a system which would enable the consumer to access more than one ADR scheme for each complaint.

The current FOS funding model, i.e. an industry levy, is a model supported the financial services industry.

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are**

**not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

For the FOS, the main challenge of the proposals under the Directive is the requirement to settle disputes within 90-days. The FOS will have difficulty achieving a resolution within this time frame. It has been publicly acknowledged that some of FOS' more complex complaints can take up to a year (or more) to resolve and therefore, the timeframe in the Directive is overly ambitious. It is vital FOS is able to come to the 'right' outcome' as opposed to a 'hurried' one. Instead we suggest that the 90-day limit relates to the maximum period allowed before an ADR provider must commence its investigations. In the UK, specific case types have experienced long delays before commencement with the ADR provider due to extremely heavy volumes being received (e.g. PPI cases).

In any case, firms seek confirmation that any proposed time limit would not have an impact on the existing 14 day turnaround for information requests made to firms by the FOS, as this is already very tight for firms to comply with.

For larger ADR scheme providers, such as the FOS, the requirements in Article 7 and 8 are unlikely to be an issue.

FOS deals with queries received by e-mail, but formal referrals must be made in writing and communicated via post. FOS is looking to 'e-enable' their service and, in their recent *Corporate Plan & Budget* consultation paper, they provided an update on this.

In relation to cross border disputes, there are concerns that this will open a new wave of challenges and it will be difficult to maintain data security, verify the identity of the complainant, and ensure the ADR scheme only receives personal data suitable to their jurisdiction.

FOS was set up by UK legislation and, as previously stated, it may not be appropriate for them to deal with cross-border complaints which are governed by non-UK regulations. This will need to be reviewed as part of the process to adopt the Directive.

ADR services should be appropriate to the jurisdiction of the dispute; otherwise the reputation of the ADR scheme provider, as subject matter specialists, will be undermined.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

There is no Competent Authority, currently existing, to cover all ADR schemes within the UK. The FOS is currently regulated by the Financial Services Authority (the "FSA") and, as proposed under the Financial Services Bill, the Financial Conduct Authority (the "FCA"), going forward.

For the FOS, we believe the FCA is the most appropriate Competent Authority to regulate and have oversight of the FOS. Due to the particular nature of financial services disputes and their sensitive nature, a dedicated Competent Authority, such as the FCA, is the most appropriate Competent Authority.

**Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

There is already a requirement for financial services businesses to inform their customers of their recourse to the FOS as an independent, third-party ADR scheme.

This being said, at a recent meeting of stakeholders, hosted by the FSA's redress team, over 90% of consumers surveyed said they do not use complaints data to make decisions on whether to purchase particular financial products. This is because there is a vast array of other factors, such as length of maturity of the product or the APR available on the product, which are more pertinent to consumer decision-making as opposed to complaints data.

There is a concern that the simplification of the complaints process (as will occur with the proposed Directive) is going to increase the activity of claims management companies ("CMCs") and over burden the FOS (as well as business). This unintended consequence will require careful consideration as to ensure the benefits of the ADR scheme is realised.

**Question 8: What would be the costs to businesses of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small and medium businesses?**

The FOS already requires financial services businesses to provide this information to customers. There will therefore, be no additional cost to financial services firms.

**Question 9: Do you have any other comments on the proposed Directive?**

Despite what is stated in Recital (7) of the European Commission's proposal for a Directive on ADR (the "Directive"), we would question the appropriateness of a compulsory ADR scheme, under which, firms are directed to bring complaints against their customers.

Although generally supportive of the Directive, there are concerns around home versus host rules, in regards to cross-border disputes and arbitration. The FOS currently does not have the capacity and capability to arbitrate over cross-border disputes. There are, in addition, challenges that will be faced by the FOS in interpreting and integrating differing legal frameworks existing across the EU in the space of financial dispute mediation.

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

In regards to the operation of On-line Dispute Resolution schemes ("ODR schemes"), there are concerns over the use and protection of personal customer and commercially sensitive data. Any and all information transmitted to an ODR scheme, must be protected under the Data Protection Act and under the rules for exemptions under the Freedom of Information Act.

It is only appropriate and necessary for the ODR facilitator to choose the relevant ADR for cross-border disputes.

For many ADR schemes, particularly the FOS, the 30-day deadline for concluding cross-border disputes is unrealistic. For some complex disputes, the FOS process currently takes over 12-months. It is vital that ADR providers are able to come to the 'right' outcome' as opposed to a 'hurried' one.

The existence of an ODR scheme will have little to no impact on the willingness of businesses to trade across borders. With this said however, there are concerns over the schematic to be used by the ODR scheme in selecting the appropriate ADR scheme in taking forward the dispute. The location of the business must be the deciding factor when the ODR selects the appropriate ADR scheme to take forward the dispute.

Finally, there are concerns over the type and quantity of information to be published by the ODR scheme. If the ODR scheme is to publish outcomes of disputes, any such information must be restricted on the grounds of the Data Protection Act and the rules for exemptions allowed under the Freedom of Information Act.

**ENDS**

# BCC (BRITISH CHAMBERS OF COMMERCE)

**Call for Evidence: EU Proposals on Alternative Dispute Resolution**
**Response from the British Chambers of Commerce**

Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

**We know that the two factors that deter consumers from shopping across borders are concerns regarding delivery of goods or service or lack redress should non-conformity of contract arise. We also know that some consumers and businesses (particularly in those member state where ADR is not compulsory) do not have access to ADR. It is a reasonable assumption that if high quality but affordable mediation is made available to consumers, confidence in cross border shopping could increase with the obvious ensuing benefits for traders in the Single Market.**

**Equally it is reasonable to assume that businesses can save money from going to Court through high quality and affordable mediation. There is evidence that because the agreement is mutual, it is more likely to be honoured. Moreover from an access to justice perspective, it is of benefit to businesses particularly smaller businesses with smaller claims: they might be deterred from take a low value complaint to the Small Claims Court and compensate instead. If cost effective mediation is available, it might well be an attractive option for smaller claims.**

Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?

Question 3: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

**The BCC does consider that such processes should be considered as a form of ADR. Moreover as the already work on a cross border basis they are attractive form of resolution of disputes for smaller businesses and consumers alike. However they are only one form of ADR.**

Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

**Given that only 1% of disputes go do ADR in the UK there are clearly gaps in ADR provision in this country. Moreover we believe the market for low cost mediation for low value claims is far from established and will require a mix of public subsidy and private investment to get off the ground. That also raises the question of how to avoid an increase in costs on business who might end up paying more redress than they would have done had ADR not been available. It will also be important to weed out spurious claims so that the costs on business do not increase disproportionately. This might involve a de minimis claim value and/or a moderate cost to the consumer. We would refer the Consumer and Competition Policy Department to the BIS tender for employment mediation pilots for an idea of the public investment required and for the key role the Chambers, as the voice of local business, could play in building a market.**

Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

**The BCC does not itself provide ADR. However Business West in conjunction with the ADR Group provides ADR for its members. I refer the Department to their separate response for the detail. However it is vital that high standards are achieved in ADR for it to become a trusted form of redress for businesses and consumers in order to justify the public and private investment. The standards required by the directive are reasonable.**

Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

**The BCC believes the UK European Consumer Centre is well placed to take on this role.**

Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

**Awareness will be a vital element of building a viable market in ADR in the UK. It will not be enough for businesses to inform consumers or customers of their participation in a scheme. There will need to be information campaigns carried out by the competent authority and/or**

**government and/or representative bodies such as Chambers of Commerce and trade associations.**

**Moreover ADR will need to be accessible and cost effective to smaller businesses in particular.**

Question 8: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

**The BCC believes that the costs proposed by the Commission are on the conservative side, particularly if duplicated in the ODR regulation. We believe that the information requirements in the ODR are unnecessary given the amount of information that will be available through the ADR directive.**

Question 9: Do you have any other comments on the proposed Directive?

Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding crossborder disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross border.

**The BCC believes that the ODR platform will only be of use it is more than a signposting entity. It will need to be able to provide translation (difference in languages across the EU will deter many consumers and SMEs from entering into mediation) and some form of independent adjudication. This will obviously increase the costs of the platform. Thirty days is a reasonable deadline for concluding cross border disputes online and will be able to be met by any high quality ADR entity. The additional reporting requirements for business are wholly unnecessary given the information already required to comply with draft provisions of the ADR directive. They should have to provide one or the other, not both. These requirements will increase costs for businesses but they are unlikely, in themselves, to deter businesses from trading across borders or online. There are far greater set up costs involved in trading online for example and presumably far greater benefits to be had in terms of increased trade.**

February 2012

# BIOA (BRITISH AND IRISH OMBUDSMAN ASSOCIATION)

**British and Irish Ombudsman Association**

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**Secretary:** Ian Pattison

**Call for evidence – On EU proposals on Alternative Dispute Resolution (ADR)**

**Submission by the British and Irish Ombudsman Association (BIOA)**

This submission is made on behalf of the Chair and Executive Committee of the Association which was established in 1991 and includes as members all major ombudsman schemes and complaint handling bodies in the United Kingdom and Republic of Ireland. The Association's objectives include:

- encouraging, developing and safeguarding the role and title of Ombudsmen in both the public and private sectors
- setting criteria for the recognition of Ombudsman offices by the Association
- formally recognising those persons or offices who satisfy the criteria
- facilitating mutual learning and providing services to members designed to develop best practice
- working to raise the profile of Ombudsmen and the understanding of their work

The Association welcomes this opportunity to comment on the EU proposals on ADR, particularly in respect of Ombudsman schemes.

We believe there should comprehensive access to Ombudsman schemes for all public services, and such access should also be extended to include all services which have been privatised. We also support the extension of access to provide coverage across the consumer landscape.

**Ombudsman schemes**
We would welcome the extension of independent consumer redress schemes into other areas of consumer goods and services, as envisaged by the proposals. Although we accept that there will be some circumstances when a full Ombudsman service may not be appropriate, and an alternative form of ADR may be preferable, nevertheless the BIOA compliant Ombudsman model should be the preferred model for most sectors. Compliant schemes must meet the following five key criteria:

- Independence
- Fairness
- Effectiveness

- Openness and transparency
- Accountability

This is the model endorsed by the Cabinet Office in its 'Guidance to Departments' on Ombudsmen (copy enclosed). Paragraph 4 of the Guidance states:

*An effective (and BIOA compliant) Ombudsman scheme can be the hallmark of fair redress. It is important therefore that anyone establishing such a scheme should consult with the Cabinet Office which acts as the Government liaison point on Ombudsman matters, and also provides the channel of communication with BIOA.*

The full Criteria for the recognition of Ombudsman Membership of the Association is in Schedule 1 to the Association's Rules (copy attached).

As indicated in the Cabinet Office guidance, there is a recognised channel to BIOA and both we and our member schemes welcome continued dialogue with all Departments, especially BIS, on the merits of and procedures for setting up independent BIOA compliant Ombudsman schemes.

**Multiple redress schemes per sector**

We wish to take this opportunity to discourage strongly the further establishment of multiple redress schemes (whether Ombudsmen or not) within a single service sector, such has already happened with property and telecommunications. Ofcom decided to approve both the Telecommunications Ombudsman (now Ombudsman Services: Communications) and the Communications and Internet Services Adjudication Scheme (CISAS). The OFT, under the CEAR Act 2007, despite opposition from consumer bodies (such as the NCC as it was then) and others, decided to approve both the Ombudsman for Estate Agents (now The Property Ombudsman) and the Surveyors Ombudsman (now Ombudsman Services: Property). Ofgem sensibly, in our view, decided to approve only a single redress scheme, the Energy Ombudsman (now Ombudsman Services: Energy).

Although the schemes currently involved are all sound and reputable, the Association, and others, feel strongly that it is not in the interest of consumers to have multiple redress schemes. It is very confusing in an already confused consumer redress landscape. Moreover, it permits less scrupulous providers to choose to join whichever redress scheme is more (financially) advantageous to them, rather than to the consumer. This surely cannot be the intention of the legislation. We particularly feel that, whilst the OFT favours competition in markets for consumers of commercial services, it would be a mistake to suppose that competition would deliver any comparable benefits for consumers in this context.

**Proliferation of schemes**

Equally important we feel is the need to prevent proliferation of schemes, where existing schemes could usefully and sensibly widen their jurisdiction. This has already happened in some cases with the former Telecommunications Ombudsman (Otelo) now taking on complaints about retail energy suppliers and surveyors/estate agents as Ombudsman Services. Ten years ago, a very sensible decision was taken to combine all existing Ombudsman schemes, both voluntary and statutory, operating in the financial services industry into one single Financial Ombudsman Services.

In the case of privatised former publically run services such as health and network services (eg transport, water, etc) which are not yet covered by an Ombudsman, these could/should also usefully be covered by an existing Ombudsman scheme.

**Comments on the draft directive**

Article 6 of the draft ADR directive: BIOA has a well-established set of principles of good governance for ombudsman schemes (copy attached). A key principle is the independence of the ombudsman. Though independence was a criterion in European Recommendation 1998/257/EC, it does not appear in the new draft directive. Article 6 (which currently deals with expertise and impartiality) should be extended to provide that the natural persons in charge of the alternative dispute resolution should be appointed by someone who is (or a body with a majority which is) independent of those subject to investigation - and the appointment should be for a term sufficient to ensure their independence.

Article 5(1) of the draft ADR directive: It is unclear how the obligation imposed on member states to make ADR available works in cross-border cases, where the trader is in one member state and the consumer is in another member state. We assume that - in accordance with current EU practice - the obligation to ensure the availability of ADR falls on the member state where the trader is, rather than where the consumer is, but this needs to be made clear. The ADR scheme in the member state where the trader is likely to be best-placed to get the trader to comply with any decision by the ADR scheme.

Recital 7 of the draft ADR directive: This says that the proposal covers not only disputes initiated by the consumer against the trader but also disputes initiated by the trader against the consumer. Ombudsmen schemes were created to level the playing field between (weaker) citizens/consumers and (more powerful) institutions. It would be inconsistent with how ombudsmen operate for them to handle complaints by institutions against consumers, it is unclear how any decisions could be enforced against consumers and there is a risk that complained-against traders might seek to confuse issues by counterclaiming against the consumer.

Draft ADR directive and draft ODR regulation: Both provide for maximum resolution periods (90 and 30 days respectively). It is doubtful whether these are practicable across the broad range of disputes that might arise. More particularly, they make no provision for cases where the consumer contacts the ADR scheme before complaining to the trader - where, in accordance with normal ombudsman practice, the ombudsman would allow the trader a reasonable time to resolve the complaint itself. Otherwise, the ADR system would be uneconomically overburdened by cases that the trader was able and willing to solve.

Article 8 of the draft ODR regulation: In a number of fields (including financial services and credit, lawyers, estate agents and telecoms) UK traders are already subject to mandatory ombudsman schemes. The choice-of-ADR provisions do not allow for this.

**Quality standards**

The proposed quality standard requirements set out in Chapter II (Access and principles applicable to alternative dispute resolution) cover access, expertise and impartiality, transparency, effectiveness and fairness. These are broadly similar to, but do not go as far as, the BIOA principles of good complaint handling (copy attached) which are:

- Clarity of purpose – a clear statement of role, its intent and scope
- Accessibility – a service that is free, open and available to all who need it
- Flexibility – procedures that are responsive to the needs of individuals
- Openness and transparency – public information which demystifies the services
- Proportionality – process and resolution that is appropriate to the complaint
- Efficiency – a service that meets challenging standards of good administration
- Quality outcomes – complaint resolution leading to positive changes

**Implementation in the UK**

The existing ADR landscape in the UK has developed in a piecemeal fashion - with significant gaps and overlaps (and significantly different powers) even in areas where there are mandatory ombudsman schemes. We strongly urge to BIS use this as an opportunity to review the overall landscape - with representatives of business, consumers and ADR professionals - to see how it can be made more coherent and cost-effective, rather than (for example) going down the default-ADR route.

BIOA is keen to remain involved in this matter and willing to participate as required in future consultations and discussions.

Ian Pattison
Secretary
British and Irish Ombudsman Association

January 2011

Enclosures:
Cabinet Office Guidance to Departments (November 2009)
Schedule I to the BIOA Rules (Criteria for recognition of Ombudsman Offices)
BIOA Guide to principles of good governance
BIOA Guide to principles of good complaint handling

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# BRC (BRITISH RETAIL CONSORTIUM)

BRITISH **RETAIL** CONSORTIUM
for successful and responsible retailing

# European Commission Proposal for a Directive on ADR and a Regulation on ODR

## January 2012

## BRC Position

The British Retail Consortium is the lead trade association representing the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and virtual stores.

Contact:

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**European Commission**
**Proposal for a Directive on Alternative Dispute Resolution and a Regulation on Online Dispute Resolution**

**BRC Position**

The BRC agrees with the Commission that consumer confidence plays an important role in a modern economy. Empowered consumers help drive competition and at the same time competition helps empower consumers through the choices it makes available.

The BRC supports the development of ADR. As it already exists in the areas of greatest consumer detriment and complaint, there must be some question as to whether universal coverage is really necessary. Nevertheless we recognise that if there is a universal system, consumers will be more likely to use ADR and be aware of its potential.

We welcome the fact that in the proposal the use of ADR is not compulsory for the trader or consumer and that its use is restricted to contractual disputes. However, there may be a good reason why such disputes are not always settled completely online– namely that they relate to defective goods or non delivery of goods and to prove a good is defective or has not been delivered may require something more than online resolution.

## Putting things right for consumers

The BRC strongly believes that consumers who suffer economic damage as a result of something going wrong are entitled to redress and to have their position returned to what it would have been if nothing had gone wrong.

There are literally millions of transactions every day between consumers and businesses. The vast majority of these are completed to the satisfaction of the consumer and the business. If they were not, the redress systems would simply be overwhelmed.

In most cases, when something goes wrong, the matter is resolved amicably between the business and the consumer directly. Businesses rely on their reputation and have no desire to put it at risk. Indeed many businesses go well beyond their strict legal obligations in order to win and keep customers in a highly competitive market place. For example, they allow customers to bring back goods simply because they have changed their mind rather than just because the good is defective.

One large retail business advises:

- Annual number of products sold - approx 50 million
- Annual number of orders processed - approx 15 million
- Average product price - approx £35
- Average order value - approx £120
- Number of customer queries with problems received annually - approx 40,000
- Number of court claims commenced by consumers annually - approx 50

Another reports

- 130m Transactions
- 4m orders for home delivery
- 280,000 Customer issues per year

- 40 county court cases - of whch 27 were admitted/settled straight away

- Average unit price is c£15

This context is relevant because it must be accepted that we are considering the very small minority of cases where no agreement can be reached between a business and a consumer. In some of these cases, the consumer will be dealing with an irresponsible or rogue business – and in that case no amount of ADR will help resolve the matter because it is unlikely the business will agree to ADR, even if the business still exists.

The role played by in-house customer complaint systems among reputable businesses is important and should be formally recognised as part of the context for ADR. Where a business operates as a multi-channel business and has a bricks and mortar operation this in-house system will usually also apply to on-line and off-line sales.

It is possible that stronger promotion of these in-house systems to consumers buying across borders and the role they play may assuage the fears of some when buying cross border – and that traders could be encouraged to make sure that those buying cross-border are aware of their potential.

**Shopping across borders: redress just one problem**

We recognise that when consumers decide whether to shop across borders, they may hold back due to a concern over resolving any problems with the goods. It is hardly surprising that 71% of consumers would consider the resolution of problems more difficult when shopping abroad. This is almost self-evident! It does not mean they are necessarily put off buying as a result or that the problems go unresolved any more often than those experienced domestically.

In our view, there are many reasons why consumers may choose not to shop across borders. Language, different technical standards, the difficulty of exercising withdrawal rights, lack of recognition of the name of the trader (many successful e-commerce operations rely on a retailer having a reputation through its bricks and mortar operation and so if these retailers only have such an operation in one Member State name recognition is lacking), payment systems and card costs for currency conversion and costs of delivery all have a role to play – and probably a more important role.

For this reason, we are sceptical of the argument that improving redress systems will have a huge impact on cross border sales. Nevertheless, it is an important part of the consumer protection framework and it is right that consumers should have access to effective redress systems whether or not they contribute to cross border trade.

However, we do not believe that problems with purchased goods often go unresolved and are sceptical of the claim that consumers do not engage in cross border purchases because they are worried about what will happen if there is a problem.

The latest BRC Google Online Retail Monitor shows total retail search volumes grew 24% in the fourth quarter of 2011 compared with the same quarter a year earlier. The increase was driven by a rise in mobile/tablet search volumes which grew by 169% year-on-year.

In the fourth quarter, total searches for food and drink related items had the fastest rate of growth, up 29% year-on-year, while on mobile devices searches grew fastest for homeware products, up by 189% year-on-year.

The significant growth in searches from countries such as Brazil and Russia shows the opportunities presented by emerging economies even without EU protection. For many retailers, tapping into these booming consumer markets is an increasingly important strategy for growth.

This suggests a high degree of online confidence by consumers even without a fallback ADR but with confidence in the reputation of businesses with whom they contract.

Moreover, previous Monitors have shown the number of cross border searches has also increased year on year.

**The key requirements**

The Commission points to the wide variety of a large number of existing ADR schemes. In this case, variety is indeed the spice of life. The whole nature of ADR schemes should be that they present a whole range of different ways of resolving disputes.

If ADR schemes are to expand, especially cross border, several issues will need to be addressed. These include:

- A recognition by business, consumers and consumer advisers that ADR provides a fair, effective and cost efficient way of resolving disputes.
- Improved awareness of the schemes that are available and an easier way of identifying which scheme could be relevant in a particular case
- A set of standards, at least at the EU level, that schemes must meet, together with some sort of monitoring mechanism to ensure they do so
- A funding mechanism that is fair to businesses and consumers and that discourages unreasonable claims but yet does not prevent consumers from using the opportunities provided.
- Language issues – many ADR schemes are not equipped to deal with complaints in languages other than their own
- The legal base – In the absence of fully harmonised consumer rights, consumer rights are based on the national law of the consumer. Disputes should be resolved on that basis – and even if ADR does not necessarily strictly follow the law, it must at least strongly reflect it. A British consumer, for example, has a right to reject. This may not easily be understood by ADR schemes in other Member States.

In particular, businesses will expect decisions to be based on the law, even if balance of probabilities and common sense have a role to play. In the absence of that, decisions are random and competitors may find that decisions on the same issue or problem are dealt with quite differently.

Also decisions by ADR schemes should not in any way form a precedent for court based decisions. If they do, businesses will feel compelled to argue the case in a legal fashion and if necessary refuse to accept the outcome.

It is our view that to ensure confidence by both consumers and businesses, especially in the cross border situation, schemes should have to adopt clear standards set down by the Commission and they should be audited against those standards if they wish to participate in cross border redress.

**Information: when and how**

In reality, consumers are unlikely to be interested in ADR schemes unless and until they actually have a problem. It is unlikely that consumers in general will ever be aware of the plethora of potential schemes.

The important point is that consumers should know where to go for advice when they have a problem.

Ideally their first port of call should be the retailer from whom they purchased their goods. Most responsible retailers will go the extra mile to protect their reputation and ensure the customer returns because they are satisfied with the outcome. This should apply online as well as offline.

Retailers themselves can have a role to play in informing customers whose complaints cannot be resolved of their options for the next stage – the ADR schemes that might be available to them – but this should only be required offline once there is a failure to agree between the business and consumers.

There should be no requirement on businesses to inform their consumers unless and until the consumer has a problem. At that point, businesses should want to advise their consumers of how the dispute might be resolved. Many businesses might well want to advertise they are part of an ADR scheme as part of their competitive positioning and in order to show they have confidence in their offer. It is not clear how being compelled to advertise membership would work offline

There would be little interest among consumers in general about the main features of any particular scheme unless and until they had a problem The most appropriate time for providing information is at the point of potential use.

It will be easier if there is universal coverage of ADR schemes on a fallback basis. Consumers then only need to know that such schemes exist in every Member State, and that they can be accessed across borders – and then when they have a problem who to contact to direct them to the most appropriate scheme.

We would emphasise, however, that there is no implication here that we could support compulsory ADR. It should remain a decision of both the consumer and the retailer as to whether ADR is acceptable in any given circumstances.

**Cost effectiveness**

Traders will be willing to use schemes if they provide a cost effective means of resolving disputes that is fair to both the trader and the consumer. They will be unwilling to join schemes where they are expected to pay simply to have the case resolved whether or not they believe there is a reasonable case. For example, in the UK in the consumer credit area the Financial Ombudsman requires a deposit of £500 that a company has to pay win or lose when a consumer complains. Consumer advisers now regularly put in claims for £400 or so in the knowledge it is cheaper for a business to settle than go to the Ombudsman.

In our view, there should be some incentive to deter unreasonable claims by consumers.

**A non compulsory approach**

We support a non compulsory approach. Businesses that treat their customers well and provide good value goods and services should in a competitive market prosper better than those which do not do so.

There should be no mandatory requirement that decisions be binding on either party. This should be up to the scheme to provide.

It should be possible for both the trader and the consumer to agree to be bound by a decision if they agree prior to the case being taken.

In that case, the decision should be enforceable.

**Universal ADR**

We agree with the Commission's approach that the most efficient way to establish universal ADR access would be through a public or private fallback scheme; encouragement for specific schemes in areas where there is evidence of a high degree of consumer detriment; and recognition of current schemes that meet certain standards..

However, it needs to be recognised that not every B2C transaction is appropriate for ADR. For example, very small value household goods may result in disputes but they are hardly worthy of an ADR scheme.

The important thing is that there be schemes in those fields that evidence shows are most likely to result in consumer detriment.

This should be complemented by effective public enforcement of consumer protection rules which can act to mitigate the effects of breaches on consumers both individually and collectively.

**Funding**

ADR schemes are not cheap to operate. £500 is the going rate in the credit industry but credit cases may be more complicated than some others. However, with the cross border implication costs could rise.

Clearly consumers will not wish to bear such a cost – and it is not fair that businesses should have to pay that sort of sum whether or not the case is justified.

Although there are attractions to a free scheme, we believe there should be some disincentive to consumers who might pursue spurious claims. A deposit refundable if successful – or if directed by the scheme because the case was reasonable even if lost - is probably the best way forward.

There is no obvious reason why an industry funded ADR scheme should not be independent as seems to be the suggestion in the proposal. If the standards that are set are applied, monitored and audited this should ensure independence. In our view the auditing process should be paid for by the ADR scheme.

**The Proposed ADR Directive: some changes**

The BRC believes there are some refinements needed to the proposal. There should be:

- A requirement for a consumer to try to resolve the issue directly with the business prior to going to ADR. A minimum of evidence of direct contact and submission of the complaint and a response within a limited time should be required, as in the UK credit industry. It would be unfortunate if the current rate of resolution of disputes directly between a company and a consumer were undermined and consumers turned first to ADR.

- Some recognition of existing methods to resolve a dispute in the Information requirements – in the UK Section 75 of the Consumer Credit Act with its joint and several liability and almost universally the chargeback schemes operated by Mastercard and Visa, for example.

- A minimum amount in dispute – say Euro 30

- More stringent rules for Member State monitoring of the ADR systems operating in the context of the ODR Regulation to ensure they meet the requirements of fairness and competence and more specific requirements to underpin the general concepts of fairness and competence.. There needs to be some thought as to how this might work in practice.

- A requirement that the schemes settle a dispute in a fair, practical and proportionate manner ***taking into account the consumer's legal rights***. This is important to avoid unfair competition with one ADR scheme providing substantially different outcomes compared with another. There should be a degree of consistency.

- A change to the Information Requirements for offline businesses so that they are required only to advise a consumer of their own customer complaints contact details and whether or not they subscribe to an ADR scheme. The more detailed requirements should only need to be supplied either on request or when a consumer has made a complaint that is not immediately resolved. It is well documented that consumers are overwhelmed by the amount of information they receive and tend to ignore it. To require all the information proposed by the Commission to be placed on the receipt for every transaction (such as a supermarket receipt) is disproportionate. There would also be difficulties if the receipt were for a multiple transaction where several ADR systems might apply.

- Clarification of whether the information requirements in other Directives (e.g. Consumer Rights) to the effect that a business must advise a consumer of the ADR schemes to which it subscribes will in future ***only*** apply to ADR schemes recognised under this Directive. If not, there will be confusion when the business has to state it supports an ADR scheme but does not support one within the meaning of this Directive.

- The requirements for recognised ADR schemes in terms of their administrative capacity are quite high and potentially costly. It would be unfortunate if schemes priced themselves out of the market by having to implement costly procedures or if existing schemes unable to meet the full requirements (e.g. acceptance of cross border complaints) came to be viewed as second class. For example, funding should not be equated with independence. The key is independence and auditing the standards.

- Clarification of the basis on which cross border disputes should be settled, given the lack of fully harmonised consumer rights in the area of supply of goods and services, and indeed the potential for a second regime under the Common European Sales Law. Consumers have different rights in different Member States.

- Amendments to the requirement in Art6.2 for an equal number of consumer and traders representatives in a collegial body as this would seem to rule out law firms for example, which is rather surprising.

- Clarification of Art 8 as to how the procedure can be easily accessible to both parties irrespective of where the party is situated when taken with the Art 9.1 definition of fairness as ensuring the parties have the possibility to express their point of view and HEAR the arguments and facts put forward by the other party.

- Some disincentive for unwarranted claims such as a deposit refundable in the case of a proven claim or where the ADR system believes the case is reasonable even if the claim is rejected.

- A right for a claim to be dismissed by the ADR without further ado where it is clearly capricious.

**The ODR Regulation**

The BRC supports the concept of an online dispute resolution system for cross border sale of goods and services. However, we believe the system proposed may be excessively complicated – for example with consumers having a choice of ADR schemes in other countries and having to decide whether to accept one or the other.

In our view it might be far simpler

- To establish a *single point of contact* in every Member State and to nominate or establish a fallback scheme.

- A consumer would complain to the fallback scheme in his Member State. As the consumer rights to apply should be those in the consumer's Member State under Rome 1, the fallback scheme would be responsible for pursuing the complaint.

- It should have the capacity to act as gatekeeper and reject a claim as without foundation if it sees fit.

- It would submit the complaint to the single point of contact in the company's Member State which would then ask the company if it would accept the fallback scheme of the consumer's Member state. If it refused but suggested an alternative the Single Point of contact would give advice to the consumer on the acceptability of the alternative.

**Issues to be resolved**

- Which law will the adr resolution be based on?

- How can issues be resolved entirely online if they involve disputed claims for defective products

- Who will be responsible for translation costs and accuracy

- How will the system work where a Member State requires that ADR be mandatory or that the outcome is binding on traders where this is not the case in the Member State of the other Party, be they either the Trader or the Consumer

- What is the meaning of Art8.3 – 'the need for the physical presence of the parties or their representatives, if applicable' given the whole idea is that this should be online resolution

- How could a cross border dispute be soluble in 30 days when a domestic dispute may take 90 days.

# BRITISH SKY BROADCASTING LIMITED

**BIS' Call for Evidence on EU proposals on Alternative Dispute Resolution**

**Sky response**

1. This is the response by British Sky Broadcasting Group PLC ("Sky") to BIS' Call for Evidence on EU proposals on Alternative Dispute Resolution ("ADR"). We have not responded to BIS' specific questions but we would like to make some brief observations on the European Commission's proposals. Our response relates to two areas: the proposed 30 day online resolution service and the concept of a "Competent Authority" to govern each Member State's ADR organisations.

**Online ADR**

2. Sky supports consumers' rights to take unresolved complaints to ADR. BIS will be aware that in the UK telecommunications sector, General Condition 14 ("GC14") requires that providers must be members of an ADR scheme, either CISAS or the Communications Ombudsman Service. GC14 also prescribes a specific complaint handling procedure requiring providers to have procedures in place to comply with Ofcom's approved Code of Practice for Complaints Handling. This code includes the requirement that providers inform their customers in writing that they have the right to go to ADR if their complaint remains unresolved after 8 weeks or sooner if efforts to achieve a resolution reach deadlock. Sky is a member of the Communications Ombudsman Service which already offers an online ADR process[1]. Whilst we note that the proposed Directive on consumer ADR accepts that Member States may use existing ADR entities, it remains unclear how the new online ADR service would meld with the current arrangements. For example, whilst GC14 sets out the steps that providers must take in order to resolve complaints before a customer takes the issue to ADR if still unresolved after 8 weeks, the draft Regulation on consumer Online Dispute Resolution ("ODR") does not explain whether that timeframe would be reflected in an online EU ADR scenario. For cross-border transactions, would non-UK customers be subject to a different timeframe or would they also need to wait for a deadlock letter to be issued after 8 weeks? Sky considers that further thought needs to be given to the way in which current processes would work with the Commission's proposals. No doubt these procedures will differ across the various industry sectors and their corresponding ADR schemes.

3. We also note the that the draft Regulation on consumer ODR requires that the competent ADR scheme will seek the resolution of the dispute in accordance with its own rules of procedure within 30 days from the date of receipt of the complaint. We consider this timeframe to be extremely challenging. As we have noted above, in the telecommunications sector, providers and their customers have 8 weeks to resolve complaints and whilst these complaints are often remedied much more quickly, we would question whether 30 days is a realistic proposal.

4. Sky queries whether the draft Regulation on consumer ODR will achieve its stated aim of increasing trade across Europe by implementing an ODR system. We note that whilst traders are required to inform customers that there is an ODR process, the proposed Article 8 2(b)

[1] Online complaint form http://www.ombudsman-services.org/forms/complain/communications/

states that if no competent ADR entity is identified or the parties fail to agree on one competent entity, the complaint will not be processed further. Similarly, Article 8 4 states that where parties fail to reply to the online platform then again, the complaint will not be processed. Sky suggests that whilst reputable companies are likely to apply the ODR process (although more than likely they will have sought to resolve a complaint before it even reaches that stage), other traders may not. This appears to create a loophole which fundamentally undermines the very purpose of implementing the new Directive. We also note that recital 23 of the Directive on Consumer ADR states that "This Directive does not prescribe that participation of traders in ADR procedures be mandatory or that the outcome of such procedures be binding on traders, when a consumer has lodged a complaint against them."

5. Sky is concerned that the proposed Directives will apply new regulatory obligations on traders that already comply with current law and have sophisticated complaints handling processes in place as a matter of best practice, whilst traders who do not operate in such a way will not be mandated to abide by the ADR/ODR procedures or findings.

**"Competent Authority"**

6. Sky notes that the Commission is proposing that a new "Competent Authority" be established in each Member State to monitor and report on the ADR entities in that jurisdiction. Articles 16 and 17 of the proposed Directive on Consumer ADR set out a long list of requirements to be notified to the "Competent Authority" by the ADR entities and detail how the "Competent Authority" will fulfil its role and report on the functioning of ADR in that Member State to the Commission. We also note the proposal that every three years the Commission will report to the European Parliament and the Council on the application of the Directives which we envisage would filter down to each Member State's "Competent Authority" in the form of a numerous reporting requirements. Whilst Sky accepts that this is an EU proposal, we are mindful that the UK Government has been championing a "one in, one out policy" for primary and secondary legislation in this country in order to relieve the regulatory burden on UK businesses and has committed to a more rigorous approach to EU Regulations including engaging earlier in the Brussels policymaking process. We therefore welcome BIS' Call for Evidence and hope that our comments may prove helpful in discussions with the Commission on these issues.

**Sky - 31 January 2012**

# BUS USERS UK

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Stephen Morris

Organisation (if applicable): Bus Users UK

Address: PO Box 119, Shepperton TW17 8UX

Telephone: 01932 232574

Fax:

Email: enquiries@bususers.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☒ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: This is based on our complaint-handling experience

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

Mediation and arbitration

b) How much does it cost you to provide these services each year?

£200,000

c) What fees do you charge per dispute to whom for these services?

None, though bus companies provide the bulk of our funding, except in Wales and Scotland where devolved Government provides most of our funding. There is no direct charge to any party for these specific services, which are part of a package of bus passenger representation.

d) Approximately how many disputes do you seek to resolve each year?

800 (500 in England outside London, 300 in Wales: Scottish Government provides this service in Scotland and the publicly-funded London Travelwatch in London).

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

The majority of cases are solved by mediation to mutual satsifaction. Where the case is escalated to arbitration bus companies are bound by terms and conditions of their trade association membership. In a very few cases where companies do not abide by our arbitrated decision they are referred to the Traffic Commissioner who has powers to fine them or revoke their operator's licence, though a meeting with the Traffic Commissioner has always proved sufficient for them to comply without the Traffic Commissioner having to apply sanctions.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

We are limited to helping passengers on scheduled bus or coach services outside London (though we will exceptionally help excursion coach passengers if we can). Our work in Scotland relates to other areas of bus passenger representation, as there is a statutory body in Scotland to deal with disputes there. We have no role in London, which also has a statutory body. In England we will not deal with a case unless the bus company has been given the opportunitity to resolve it first, though Welsh Government funding requires us to be involved in all complaints referred to us in Wales.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

As our work is essentially localised and is on a fairly small scale we have little impression of the larger Europewide picture. However the figures appear reasonably robust. Government decided not to introduce a statutory service for England (outside London) as empowered by the 2008 Local Transport Act as it was apparent that we could provide an adequate service at substantially lower cost, which would bear out the assumption of the savings to be made by an 'alternative' approach. Only a very tiny proportion of our work would involve cross-border issues, though we have successfully negotiated settlements for passengers of an Italian-based express coach operator active in the UK and occasionally for passengers on the Eurolines trans-European network.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

In practice we are dealing in the main with very small amounts based on small transactions for which court involvement would not be appropriate. We are also working in highly localised situations where, because of the nature of the 'product' with which we are dealing there is little clear evidence of who is to blame in many situations. (This is not like a tangible defective product and judgements often have to be reached slightly informally on the balance of probability, eg was the driver rude to the passenger because he's a rude driver or because he was provoked by the passenger?) As such it is difficult for us to quantify the relative costs of other methods of redress or to seek to apply an absolute standard to be applied in Penzance and Prague.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Chargeback is not generally applicable in our sector; most transactions are small and in cash.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

It seems comprehensive. We currently receive no public funding in England, and DfT via Passenger Focus is already ensuring that we meet certain standards (Welsh Government does the same in Wales): the requirements of this directive would be more onerous though we have little idea of what the likely cost to Government might be.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

The standards seems reasonable, though given the very local nature of bus travel we see little justification for any cross-border implication of what we do. Our strength lies in a thorough knowledge of the local market and a working relationship with the relevant people in the UK industry. It would be unworkable and to little benefit to develop similar expertise of all European markets.

We cannot currently meet all the requirements; we do not yet have a website for direct input of complaints, though this will be addressed in the first half of 2012. We do however have electronic means of communication and comply with relevant data protection legislation. Formalising cross-border dispute acceptance will however be difficult: at present we cannot even intervene in disputes in Greater London, let alone across country boundaries, though we would deal with customers of UK bus services living in other member states and can get invovled with UK-operated international express services (or UK internal services provided by overseas-based operators).

We are always willing to develop our services to meet external requirements, though we could not realistically develop expertise covering all member states of the EU. Indeed the basis on which bus services are provided in many European states is on an entirely different basis from that which obtains in the UK: that in the UK operates on a commercial basis whereas much of Europe works on public-sector-specifed services provided under contract to private sector operators.

Timescales suggested for resolution are entirely achievable in all but the most complex of cases.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

A Competent Authority would bring some rigour to the processes involved. It would seem that a publicly-funded fully independent entity would be best

placed to undertake this function, though that type of entity is of course not favoured by the current Government.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

Yes. We are aware that we receive few complaints about certain bus companies that we know are not as perfect as their record might suggest, which suggests these companies are not telling customers about us. Many of our complaints are forwarded to us as the result of bus companies or local authorities actually advising passengers to contact us.

Towards the end of 2011 we mounted a campaign to get bus companies and local authorities to improve our presence on their websites and although it is early yet to draw conclusive trends, in the first weeks of 2012 we have seen a 38% year-on-year increase in our caseload volume The same period of 2011 saw an increase in complaints of service disruption caused by adverse weather, which has not yet been the case in 2012: we would on that basis have expected a reduction rather than an increase this year.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

They are not likely to be great. We still hold to a principle that bus companies should be given the opportunity to deal with the complaint properly before we get involved, so the most significant means of communicating our service is at the point where the bus company has gone back to the complainant. Having our details on their websites is a significant point of contact, the cost of which is minimal, and many local authorities are prepared to put our details in timetables as 'fillers' at next to no cost.

**Question 9**: Do you have any other comments on the proposed Directive?

We would welcome anything that enables us to give an improved service, but the nature of what we do is essentially local and the ability to function at a local level remains essential to us, as does the ability to reach a mutually satisfactory outcome quickly and simply even where it is impossible to gather sufficient evidence for a watertight conclusion, given the small scale of most of the claims we handle and the reliance of one person's word against another. Clearly where evidence is available we use it (eg CCTV footage) but often disputes only come to us because there is no real proof of what has happened on either side.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to

meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

This would be of limited benefit to the sector in which we operate, due to its essentially local market, but for the rare occasions where it would apply it could be beneficial. However the case of the UK bus market all services ordered on line would be consumed within the UK and we would expect to deal with any disputes that arose in the same way as we would for a UK customer.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☐ Yes ☐ No

# BVRLA (BRITISH VEHICLE RENTAL AND LEASING ASSOCIATION)


Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor,
1 Victoria Street
London SW1H 0ET

9 February 2011

Direct Dial: 01494 545706
Email:jay@bvrla.co.uk

Dear Dr Munn,

## Call for Evidence – EU's proposals on Alternative Dispute Resolution

We thank you for your invitation to comment on the EU's proposals on Alternative Dispute Resolution (ADR) schemes and how this could be transposed into the UK.

### BVRLA Position

The BVRLA believe self-regulation is a responsive and effective way to deliver consumer protection and deliver high standards of service. The BVRLA's conciliation service is not only a highly regarded model but helps offers a cost effective and efficient alternative for consumers and businesses seeking to resolve disputes, which they cannot resolve between themselves.

### Background

The British Vehicle Rental and Leasing Association is the trade body for companies engaged in the leasing and rental of cars and commercial vehicles. Its members provide rental, leasing and fleet management services to corporate users and consumers in the UK.

### BVRLA Conciliation Service

The BVRLA established its conciliation service, to support and strengthen our mandatory Code of Conduct, over 15 years ago, as a cost effective and efficient alternative to the law courts.

The service is available to any customer who has exhausted our members' complaint procedures but where a satisfactory outcome has not been reached. The service is free of charge to the customer. Either the customer or the member can refer the matter to us.

Customers are made aware of the conciliation service either by our members or as publicised by the BVRLA directly on our website and through consumer bodies, such as Citizen Advice Bureau or Consumer Direct. In addition, the European Consumer Centre and

the European Commission are aware of the conciliation service and can refer customer to us.

Our Code of Conduct (as attached at Annex A) is mandatory on our members and adherence to it is a strict condition of membership of the BVRLA. As part of our Code of Conduct, our members are required to ensure that they have in place an effective complaints procedure which must include access to the BVRLA's conciliation service for any of their unsatisfied customers.

The conciliation service in the first instance provides an informal conciliation procedure, where information is requested from the member and the complainant with regards to the unresolveddispute. The BVRLA then delivers its comments and recommendations based on the informationgiven by both parties.

If either party is not happy with the outcome of the informal conciliation service, a formalconciliation procedure can be invoked. All relevant details will be promptly forwarded to aConciliation Committee, a body whose members are appointed by the Committee of Managementof the Association.

On average the BVRLA looks at approximately 400 complaints per annum(see attached at Annex B).

The BVRLA's conciliation service is pleased to note that it has received positive feedback from the European Consumer Centre in Spain and Ireland in its reports on car rental. The European Consumer Centre in Ireland recommended that the BVRLA conciliation service model was developed in the Republic of Ireland. The Spanish ECC report was complimentary about the BVRLA's development of a standard rental contract in conjunction with the UK's Office of Fair Trading.

**ECRCS**

European Car Rental Conciliation Service was launched on 1 July 2010 to help rental customers with unresolved complaints concerning cross border vehicle rentals within Europe.

The following European vehicle rental operators, Avis, Budget, Europcar, Hertz, Sixt and Alamo currently offer this service to their customers who have exhausted the companies own complaint procedure and the matter remains unresolved.

The above-mentioned rental firms have appointed the British Vehicle Rental and Leasing Association,in light of the experience in operating a conciliation service, to manage and operate the ECRCS.

The ECRCS aims to resolves disputes between the participating rental company and their customer in an efficient and cost effective manner.

The service is an alternative dispute resolution service to formally legal proceedings and there is no cost imposed on the rental customer for using this service.

The service investigates potential breaches of the agreed Code of Best Practice, which sets out the standards it expects from the vehicle rental industry. These standards cover areas including advertising, customer information, vehicle condition, pre- and post-rental inspections and billing.

The conciliation service is unable to investigate any matters which are criminal in nature or fall outside the scope of the code of best practice. The conciliation scheme does look at securing restorative justice.

## Specific Questions

1. *What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?*

The introduction of ADR schemes in the EU will assist in driving down the costs involved with complaints and disputes resolution. This allows the conciliation service to be accessible to all consumers, which in turn aids the development of the Single Market.

2. *Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?*

Thereis no cost by either our members or their customer to access the BVRLA's conciliation service. The cost of offering this service is included within the annual membership subscription fee. This is a vital model as it assures accessibility to all members and their customers.

3. *Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?*

The "chargeback" process may be suitable alternative to ADR but this seems to be a voluntary scheme and it would appear that they may not be able to deal with the potential demand of all ADR claims. Section 75 of the Consumer Credit Act is limited to misrepresentation and breach of contract and has a limit on claims over £100 but not exceeding £30,000. If a claim under section 75 were available then a proportion of claims may be dealt with this way instead of ADR.

4. *What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?*

The proposed Directive would align all ADR schemes under the same core criteria.

***Summary of key proposals in the draft Regulation on ADR***

5. *What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?*

Currently the BVRLA operate a conciliation service which complies with some of the criteria at present. We already produce reports on the number of disputes received, number of disputes solved and the average time taken. Our conciliation service is free of charge to consumers and our Members cover the costs of claims made against them. We aim to resolve all complaints within 30 days. At present complainants can complete an electronic form available from our website and can be emailed to us.

6. *What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?*

It would depend whether the Competent Authority for each territory covers all areas of ADR complaints or if there is a Competent Authority for sector. The Citizens Advice Bureau may be a suitable placed organisation to deal with responsibilities required of a Competent Authority. The CAB deals with similar issues as present. However, it would need to be a financially sustainable as the CAB is a registered charity. I am unsure whether that would be a viable business for the CAB to carry out, it may have to be carried out by a profitable organisation instead, a similar organisation to the Financial Ombudsman may be a suitable organisation.

7. *Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?*

We are not entirely sure that if consumers are made aware of the appropriate ADR schemes available that it would encourage consumers to participate in ADR.

8. *What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?*

The additional information that businesses would be required to provide to the consumer could be incorporated into the agreement for example in the rental industry this could be incorporated into the rental agreement. Alternatively it could be included on the consumers receipt.

9. *Do you have any other comments on the proposed Directive?*

It would seem that the Competent Authority needs to be a central organisation that is financial sustainable. As in order for consumers to use ADR as an alternative to litigation then it will have to be cost effective. If businesses were to cover the ADR fee this would allow all consumers access to the ADR scheme. This in turn would encourage the development of a Single Market.

***Summary of key proposals in the draft Regulation on ODR***

10. *What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?*

The ODR Regulation would reduce the running costs of ADR schemes and make them accessible to far more consumers. We currently do not have an online system but we still manage to deal with claims within a 30 day time period for all cross border disputes.

We trust our comments add value to the deliberations of the European Commission on raising awareness of ADRs and are happy to supply further data on the BVRLA's conciliation service if this would be of benefit.

Yours sincerely

Mr Jay Parmar
**Legal and Policy Director**

# CAA (CIVIL AVIATION AUTHORITY)

**Regulatory Policy Group**

3 February 2012

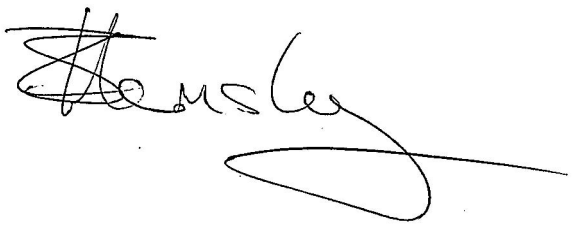
Dear Dr Munn

**Call for Evidence: EU proposals on Alternative Dispute Resolution**

Thank you for the opportunity to respond to your call for evidence in relation to the European Commission's draft Directive on alternative dispute resolution for consumer disputes. The response of the Civil Aviation Authority can be found in full in Annex 1.

If you would like to discuss this response or have any questions please feel free to contact me.

Yours sincerely



Chris Hemsley
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**Annex 1**

## CAA's response to the EU proposals on Alternative Dispute Resolution

### Who we are and what we do

I am writing to you on behalf of the Regulatory Policy Group (RPG) at the Civil Aviation Authority (CAA). This group is a new unit that includes roles previously organised as the Economic Regulation Group. RPG has responsibility for dealing with passenger complaints and ensuring compliance with passenger rights legislation as well as the economic regulation of the major airports and NATS, and providing policy advice to Government.

In order to most effectively represent consumers, within RPG we have established a Consumers & Markets Directorate. This team brings together colleagues carrying out complaint handling, the Passenger Advice and Complaints Team (PACT), formerly the Air Transport Users Council (AUC), with those responsible for policy and enforcement. This allows us to identify passenger issues at an early stage and have a more integrated approach to resolving these issues, so as to provide better support to passengers who experience problems.

To complement the information received from complaints, the CAA is currently setting up a Consumer Panel that will act as a critical friend to the CAA and advise the CAA on issues facing consumers and how the CAA incorporates consumer interests into its regulation.

### Passenger Advice and Complaints Team

The AUC was set up in 1972 to deal with passenger complaints and to provide consumer advocacy. However, in 2011, the AUC's complaint handling function was incorporated into PACT in the newly formed RPG.

PACT has three main functions in relation to handling passenger complaints. First, it provides advice to passengers on what their legal rights are under the relevant aviation specific and general consumer legislation. Second, where a passenger has what appears to be a legitimate and substantiated[1] claim against an airline, it will mediate with the airline concerned on behalf of the passenger to gain suitable redress. Third, where mediation has not resulted in a satisfactory outcome, PACT will refer the complaint to RPG's Consumer Enforcement and Policy Team (CEPT) for possible formal compliance action.

These three functions are explained in more detail below:

- *Advice* – PACT provides advice and assistance to passengers in many areas, including aviation specific legislation such as EU Regulation 261/2004[2], how to deal with lost or damaged baggage,[3] and general consumer protection law that applies across sectors. Passenger complaints are received by PACT via a telephone advice line, e-mail, fax or letter. In some circumstances, a matter may be resolved with a passenger via the advice line or e-mail immediately as the PACT team are able to advise the passenger that they do not have a claim where, for example, an airline acted lawfully. In circumstances where PACT is unable to mediate a satisfactory outcome for a passenger, it can

[1] Before PACT decides whether or not to pursue the passengers' complaint, they obtain all details and correspondence from the passenger, in order to assess whether – on the face of it – there may be a valid claim.
[2] EU Regulation 261/2004 providing rights to passengers during long delays and cancellations
[3] Passengers have individual rights under the Montreal Convention

advise passengers on how best to take up their case in the small claims court. In many instances, the outcome is successful for the passenger where, for example, the passenger has received a refund for his out of pocket expenses that he incurred during a delay where welfare and assistance was not provided by the airline.

- *Mediation* – Where PACT receives from a passenger what appears to be – on the face of it – a legitimate and substantiated claim against an airline it will first require the passenger to take up their complaint with the airline directly. If they are unable to resolve their complaint satisfactorily, PACT will intervene and contact the airline on behalf of the passenger in order to gain suitable redress. Participation in this mediation process is voluntary on the part of airports and airlines, although airlines, in particular, are strongly encouraged to participate in a constructive way. The voluntary nature of this process means that PACT does not have powers to impose a binding decision on the airline in the same way that an ombudsmen scheme does.

  The first step of the mediation process is to contact the airline, outlining the details of the dispute, and set out the argument of the issue/possible breach and the preferred resolution. As a result of this intervention, the airline may agree to resolve the issue. Where they disagree we expect them to set out their reasons/interpretation of the legislation which has led them to their position. Once a response from the airline has been received, PACT reviews this and decides whether it considers the airline has demonstrated that it has taken all necessary steps. Where it disagrees with an airline's position, PACT will challenge this once more. At that stage the issue may be escalated to senior staff within PACT and at the airline.

- *Link to enforcement* – If it is unable to resolve passenger complaints satisfactorily, the data is recorded and passed to CEPT for consideration to consider formal enforcement action. CEPT's limited resources mean it is not able to take up all complaints for formal enforcement action and prioritises its interventions according to a set of prioritisation principles[4]. In some cases, CEPT may refer a complaint to another body in the UK or to the National Enforcement Body in another Member State.

PACT staff undertake an induction and training process which can take between 12-18 months to complete, and this is followed by ongoing training as case law and legislation evolves. This process ensures that the individuals that provide advice to passengers are highly skilled and experienced for their role. PACT also has access to specialists across the CAA who can advise on aircraft and airport safety and provision of air traffic services.

**Consumer Enforcement and Policy Team**

CEPT is made up of a group of policy advisors who work with airlines on compliance issues. The overall approach of the CAA to compliance with consumer protection legislation can be found in our Strategic Plan[5]. The governance arrangements for how consumer enforcement is prioritised and taken forward can be found in our Prioritisation Principles and our Interim Consumer Enforcement Strategy[6].

In line with these publications, CEPT engages with airlines where there is a suspected breach of legislation which it believes is leading to material consumer

[4] http://www.caa.co.uk/docs/2107/Prioritisation%20Principles.pdf
[5] Civil Aviation Authority Strategic Plan 2011 to 2016, http://www.caa.co.uk/docs/1743/CAA%20Strategic%20Plan%202011-16%20v2.pdf
[6] http://www.caa.co.uk/docs/2107/Interim_Consumer_Enforcement_Strategy.pdf

detriment. If, following informal interventions, a resolution from the airline is not forthcoming, CEPT will seek to enforce the relevant consumer legislation using the powers provided to the CAA by Part 8 of the Enterprise Act 2002. This may be via an undertaking from the airline that they will comply, or if they refuse or breach this undertaking, via a court process to enforce the undertaking.

**CAA's Response to EU Proposals to ADR**

The CAA welcomes the initiative from the European Commission to implement a new platform for cross border resolution, especially where Member States do not currently have a process in place. However, it is not clear how the current proposal would work in practice and whether the voluntary nature would result in a sufficient number of businesses participating in the scheme.

Aviation is an international industry and UK consumers purchase flights from a wide range of airlines. Our experience is that consumers purchase their flights to fly in/out of the UK from airlines located or doing business in the UK. It is very rare for us to receive complaints from UK consumers about a flight which has been purchased to fly from and to another member state other than the UK. We do not therefore consider that there is a significant need for an ADR for cross border sales in the aviation sector.

Together with this, the aviation sector already has a number of ways in which a consumer can seek to resolve their complaint. These are via direct communication with the airline, Trading Standards, CAA's PACT, the European Union Consumer Centre and the Small Claims Court. There are also mechanisms in place which allow enforcement bodies to seek action from other Member States through the Regulations on Consumer Protection Co-operation (CPC).

Where a concern has been raised about an airline in another EU Member State, PACT or the Enforcement team may engage directly with the airline or via the National Enforcement Body in the Member State of the airline concerned via the CPC network, to request that they investigate and resolve the concern. The CPC network has been used by other Member States to request that the CAA investigate and resolve any concerns with a UK airline, and we have found this form of engagement very useful.

The European Union Consumer Centre (EUCC) provides advice and assistance to resolve cross border consumer disputes (though the centre does not have enforcement powers), guidance about ADR and possible action through the European Small Claims Procedure. The EUCC method is not expensive and we have no evidence that it is not a good mechanism for resolving cross border disputes.

The small claims court in the UK also provides advice and guidance to consumers, which includes a free mediation service. The court requires a consumer to consider this option prior to issuing court proceedings; as mediation may resolve the concern raised this saves court time and helps the consumer save money on legal costs. A mediation programme does not necessarily have to take place at the court and the actual mediation process may only take an hour. This is another cheap and effective tool UK consumers can use.

Since many sectors require specialist knowledge of the trade itself, we have some concerns on how the ADR process will work in practice for each trade sector. The concern here is that governing Regulation(s) are usually trade specific and articles may have been interpreted in court to have specific meanings which could be binding on all companies in that particular sector. The CAA has a wide range of expertise on

safety, airspace and airport regulation and is able to use this expertise in considering the reasons for flight cancellations, delays or on-board safety. A general ADR scheme would not have access to this information and may be unable to take decisions where the evidence airlines submit requires technical expertise to interpret.

We would also welcome greater clarity on how the impact assessment for the proposal was conducted. The cost and benefits referred to appear to be based on mystery shopping evaluations and 22 interviews with businesses. It is unclear whether the mystery shopping evaluation included all trade sectors, how many businesses took part in the interviews, and whether the businesses that did take part were reflective of all trade sectors.

As demonstrated above, UK consumers in the aviation sector currently have a range of consumer bodies to choose from when seeking to resolve their complaints, and we are not convinced currently that this sector requires an additional dispute resolution procedure.

# CBI (CONFEDERATION OF BRITISH INDUSTRY)

CBI
THE VOICE OF BUSINESS

# BIS CALL FOR EVIDENCE
# EU PROPOSALS ON ADR
# CBI response - 30 January 2012

The CBI appreciates the opportunity to respond to the BIS call for evidence. We do not have responses to the individual questions and instead would like to make the following comments:

## OVERALL VIEW

The CBI has been a long-standing supporter of ADR as a means of resolving disputes more quickly, effectively and at lower cost. So in principle we support the direction of promoting ADR for resolving business to consumer disputes.

The challenge however is how to implement these proposals in the UK without disrupting existing ADR schemes which are working effectively and without creating a complex superstructure. This could be costly to administer and add to business costs, which will ultimately be passed on to consumers.

## IMPACT ASSESSMENT – COSTS AND BENEFITS

We agree with BIS that quantifying the benefits of the draft Directive and Regulation is very difficult. The Commission estimate, down to two decimal places at 0.17% of EU GDP, coming to about £17 billion in consumer savings, strikes us as somewhat speculative. The estimated benefits to business of £1.5 – 2.5 billion have a wide range and are also difficult to endorse.

What is certain is that there will be increased costs to business and ultimately the consumer. The obvious cost to business will be in evaluating a suitable ADR scheme, informing consumers and managing the process. There may be further indirect costs which we comment on below.

There will be a cost in establishing and maintaining the Competent Authority which as BIS suggests may well be covered by fees rather than by central Government funding. The number of existing ADR schemes in the UK is believed to be in the hundreds so this could involve a considerable workload. The Government has been keen to reduce the number of public authorities and we suggest there is scope for the necessary monitoring to be done through self-regulation. The UK has a number of examples of successful self-regulation and we propose this option should be permitted under the Directive.



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## AVOIDING DISRUPTION TO EXISTING ADR SCHEMES

We believe it will be important that the Directive gives sufficient scope to allow existing schemes to evolve rather than having to be replaced. A great deal of effort has gone into setting up a large number of sectoral schemes and any new national ADR system should build on these and not displace them.

Existing schemes are usually based on the principle that a dissatisfied consumer should first make a complaint to the provider concerned. This is the first step in a process that can escalate through the provider's complaint procedure, then ADR and finally litigation if there is no resolution. This architecture needs to be preserved under the Directive so that providers are first given the opportunity of dealing with their dissatisfied customers.

## GETTING THE DETAILS RIGHT

Apart from the general architecture, we agree that the details of how the Directive and Regulation would work in practice need to be established. One obvious point is that a period of 90 days is proposed for the resolution of domestic disputes and 30 days for cross-border. This looks anomalous as cross-border claims would involve a lengthier process, including dealing with any language issues.

To avoid misuse of the scheme, safeguards should be considered such as requiring the consumer to pay a reasonable fee when using the ADR scheme and the fee could be refundable as part of the resolution of the dispute. As well as disputes being resolved on a fair and equitable basis they should also be based on the relevant consumer law. Claims may be time-barred for example.

## CONCLUSION

Although these measures are likely to receive considerable support within the EU they do carry costs for business and the quantifiable benefits are uncertain. They will need careful implementation to minimise cost and disruption to existing business schemes.

The CBI will be happy to participate in further working with BIS on these proposals.

**CBI 30 January 2012**

# CEDR (CENTRE FOR EFFECTIVE DISPUTE RESOLUTION)

**Response by The Centre for Effective Dispute Resolution to the call by BIS for evidence on EU proposals for ADR**

## I. Background

This response is on behalf of The Centre for Effective Dispute Resolution (CEDR) and in particular the CEDR Disputes Group , incorporating CEDR Solve and IDRS Ltd. CEDR Solve is Europe's leading commercial mediation service whilst IDRS Ltd, acquired by CEDR in October 2011, is one of the leading consumer redress, independent complaints review and ombudsman bodies in the UK.

Members of the CEDR Disputes Group have decades of experience in consumer ADR and include CEDR's Chief Executive and founder, Dr Karl Mackie CBE, the first person to be honoured by the Queen for services to ADR, and CEDR Group Director of Dispute Services Gregory Hunt - with 17 years-experience in consumer ADR, during which included appointment as the UK representative for ODR (appointed by the DTI) and during which time he has overseen the development and management of hundreds of dispute resolution schemes resolving tens of thousands of consumer disputes in the UK and overseas.

In the consumer markets in particular, the CEDR Disputes Group provide conciliation, mediation, adjudication and arbitration services for more than 25 stakeholders listed by BIS as potential respondents to the call for evidence. These include:

- Ofcom
- Trading Standards Institute
- ABTA, The Travel Association
- BIOA
- British Association of Removers
- Chartered Institute of Architectural Technologists
- Tenancy Deposit Solutions (my|deposits)
- Consumer Code for Home Builders
- Internet Services' Providers Association
- Motor Codes Ltd
- NHBC
- Renewable Energy Association

Other possible respondents listed include POSTRS (The Postal Redress Service) and CISAS (The Communications & Internet Services Adjudication Scheme). Both these schemes (and others) are trading brands of the CEDR Disputes Group and therefore this response covers CISAS, POSTRS and other relevant schemes operated by the CEDR Disputes Group.

For a full list of consumer schemes provided by The CEDR Disputes Group, see the relevant links below:

CEDR Solve Schemes http://www.cedr.com/solve/schemes/

IDRS Ltd Schemes http://www.idrs.ltd.uk/?p=33&lang=e

We have worked with a range of corporate and public sector bodies within our dispute services- a list of typical names is appended at Appendix A.

## II. Introduction

We welcome the opportunity provided by BIS to consult on the European Commission's Draft Directive and plans for an ODR service. ADR offers consumers and businesses alike the ability to resolve their disputes at a more affordable level and in a more timely fashion than pursing claims through litigation.

We would like to stress that there are many well-established ADR schemes already in existence and there are already some appropriate tailor-made schemes in place (including online and on-offline hybrids), therefore we feel it is important that such existing options are not excluded or duplicated, causing unnecessary cost and disruption.

For general consumer disputes where schemes are not provided by a sector specialist, we provide a recognised "catch all" scheme called the Independent Consumer Redress Service (ICRS). There are two parts to the ICRS – conciliation and arbitration – and further details can be found at The Independent Consumer Redress Service webpage. See Appendix B.

Furthermore, the use of existing "ad-hoc" ADR is always an option, for example our own Mediation 125 and Arbitration 125 (see Arbitration 125 and Mediation 125 for further details and note that Mediation 125 is available as Sterling and Euro schemes – attached as Appendix C).

Importantly, an official ADR Scheme should not be presented as the only mechanism for consumer ADR where others meet, and possibly exceed, all the relevant criteria.

**Definitions of Consumer ADR methods**

We are aware of the fact that across Europe different terms have different meanings. Indeed, even between the UK & Ireland, where CEDR is most active as an ADR provider, there are differences in meaning.

Therefore, for ease of reference, we have provided the following definitions as our definitions of the various types of ADR relating specifically to consumer disputes. We accept that the meaning of the different types of ADR listed will differ if applied to commercial ADR, and that arbitration is viewed by some as not being a form of ADR due to its quasi-judicial status. However, for the purposes of the consumer market, we feel that scheme arbitration is very much a form of ADR, being low cost and usually based on documents only submissions:

*Mediation*
Where an independent and impartial third party, the mediator, works with the parties, assisting negotiation leading to the settlement of the dispute on the parties own terms. The mediator is not a decision maker. Mediation can be undertaken in person, via videoconferencing or by telephone. Whilst

mediation can take place via written communications (such as email) much of its effect is lost and opportunity for miscommunication is heightened.

A mediation settlement is binding in accordance with normal rules of contract.

*Conciliation*
Where an independent and impartial third party, the conciliator, works with the parties, assisting negotiation leading to the settlement, where possible, of the dispute on the parties own terms. Where settlement by negotiation is not possible, the conciliator will provide the parties with a set of written recommendations for their consideration. (Note- not the definition used by ACAS but is used in civil engineering.)

If the parties accept the recommendations they become binding in contract.

*Adjudication*
A documents only procedure where parties present written evidence to an independent and impartial third party, the adjudicator, who makes a written decision based upon applicable laws, codes of practice and other relevant factors. In addition to written evidence the parties may also provide media files (pictures, video, sound etc). All documentation is shared and the adjudicator's decision includes full reasons for the decisions made, including, where relevant, clearly set out calculations. (This definition is separate from the statutory term used for construction disputes.)

In consumer schemes an adjudicator's decision is usually only binding in contract if accepted by the consumer. In some schemes the decision is statutorily binding, in others binding under codes, and in others, binding by agreement.

*Arbitration*
Similar to adjudication, arbitration is generally in consumer schemes a documents only procedure where parties present written evidence to an independent and impartial third party, the arbitrator, who makes a written decision based upon applicable laws, codes of practice and other relevant factors. In addition to written evidence the parties may also provide media files (pictures, video, sound etc). All documentation is shared and the arbitrator's decision includes a structured report with full reasons for the decisions made, including, where relevant, clearly set out calculations.

An arbitrator's decision is final and legally binding and subject to very strict (and costly) rights of appeal. An arbitrator's decision (known as an "award") is binding across Europe and many other jurisdictions under the terms of the New York Convention.

*Ombudsman*

An ombudsman service is a central officeholder charged with adjudicating between a consumer or user and an organisation, service or conduct in relation to that use. Ombudsmen are not bound by strict legal rules but by judgment of fair or reasonable conduct.

## III. Responses

1. **What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

Low cost ADR already exists through a number of schemes and freely available dispute resolution services. The fees for consumers (if any) and businesses should be, and in our experience generally are, proportionate to the amount in dispute.

The benefits of the proposed changes should outweigh the costs for all interested parties. Low-cost, accessible ADR should boost consumer confidence, leading to a higher volume of transactions within the Single Market and increased business growth.

However, the Commission's savings estimates are based only on problems reported by consumers. These estimates do not reflect the total number of actual problems that consumers experience, many of which are not reported. With more accessible ADR it is likely that the number of reported problems will increase once consumers are aware that they can obtain redress more easily than through the courts, and this will then mean a re-assessment of all relevant estimates.

While it is more cost-effective in several ways for companies to use ADR rather than litigation, if there was a significant increase in actual disputes following the implementation of the proposed changes, businesses may find that overall they are spending a higher proportion of resource on complaints handling and defending claims.

If companies are required to pay for the ADR scheme (i.e. with no contribution to the cost from consumers or state funding), this will also increase their costs.

2. **Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

***Costs and benefits of the draft Directive***

BENEFITS

In theory, the benefits of the proposed system can be divided into two parts:

- The benefits which will accrue to the UK economy as a consequence of increased consumer activity arising as a result of increased confidence that effective cross-border complaints resolution remedies are available.

- The additional benefits which might accrue as a result of that system offering an ADR rather than court-based solution.

We accept the proposition that the availability of more trusted and acceptable dispute resolution remedies should increase consumer confidence and, thereby, overall trade activity, although we have no direct evidence to offer on that topic. We would, however, offer a caution in that the credit card

"charge-back" facilities are already heavily used by knowledgeable consumers, and thus they may not perceive a need for an ADR system, or be motivated to undertake any more international activity as a result of its introduction.

In terms for benefits from ADR, we are not aware of any research in the consumer sector. Savings in this area are particularly difficult to calculate because much of the cost of the present system is hidden. Consumers bear the costs of their non-pursuit, or inaccessibility, of justice; and business bear the opportunity cost of lost trade.

However, we have published data based on our work with corporate disputes which shows that the use of mediation, in particular, saved the UK economy around £1.4 billion in 2010, primarily by reducing the amount of wasted management time, damaged relationships, lost productivity and legal fees relating to disputes.

Linked to this, there should also be a saving to the public purse in that there may be fewer cases going through the small claims courts if more alternative resolution methods are available, and widely promoted. This is an approach which the Ministry of Justice is currently developing through its focus on increasing the availability of mediation services at the small claims level. It is too early to tell whether this approach might lead to a reduction in the requirements for courts and judges, but as a minimum it should enable a redeployment of resource towards more complex cases, as well as speed up the process for those who do choose, or need, litigation.

Finally, there may be a further benefit to business who chose to participate in such ADR schemes in that their offering, linked as it is to notions of trading standards, customer care and effective complaint handling, may encourage more responsible trading, as well as benefit business through enhancing brand reputation and fostering greater goodwill customers.

COSTS

It is important to emphasise that the cost of providing an ADR scheme is not limited to the cost of directly administering and delivering specific complaints. In our experience the very existence of a scheme can attract a very high volume of consumer inquiries

By way of illustration, in our CISAS scheme, the standard procedure is supposed to be that a consumer tells the company they have a complaint; they then go through the company complaints procedure; finally, if the matter is unresolved after 8 weeks have passed, they may come to CISAS for adjudication. However, many come to the scheme to early - in 2011, CISAS received just under 5,000 enquiries, but of these only 2,025 resulted in valid applications, the primary reason for the difference being the large number of customers who applied to the service without first having given the company a chance to address their complaint. Due to the fact that CISAS contact details are shown on company bills, consumers often come to CISAS before event telling the company they have a complaint. In some cases consumer even send CISAS money for bill payments. Not only does this increase operating costs for the ADR scheme, but it also reduces the consumer's confidence in the ADR scheme if they feel they are being rejected by them, even if their complaint is valid.

This also illustrates the problem of determining where the costs of such a scheme should fall. At least for large organisations, the costs of setting up and running ADR schemes will be relatively modest when compared to the levels of underlying trading involved. However for smaller undertakings[1] , the set up and maintenance cost could be proportionality far higher. This would suggest that, whilst larger organisations might continue with the sector-specific schemes, such as CISAS and POSTRS, there may be a need for a generic "Small Claims ADR" facility for the SME sector.

However there are timing and "business modelling" issues which raise complications. The set up and "overhead" costs of handling abortive enquiries require initial funding, and there is clearly a variable cost attached to each complaint case. In our experience, most schemes work on the basis that funding is largely provided by the organisation, although some larger value schemes (such as the Travel Redress Service for ABTA) do involve consumer registration fees. It may be that, for a generic service that can also met the needs of SMEs, there will be a requirement for central funding.

Ultimately, of course, if businesses are required to bear these costs, they could be potentially passed onto consumers in terms of higher prices for goods and services.

***Costs and benefits of the draft Regulation***

We find it difficult to identify any benefits from the proposed ODR platform and system of national ODR facilitators. Provided that traders supply adequate information to customers about the availability of whatever scheme they subscribe to, there does not seem to be a need for the Commission to foster anything more than a central sign-posting, or directory, of ADR services to which consumers can then make a direct approach.

The imposition of a centralised ODR platform, to act as a gateway for complaints, adds an unnecessary layer of process. Specifically, as it is envisaged that complainants will enter their case details onto the platform, it introduces technology-related costs in terms of requiring standardised data arrangements so that case information can be transferred from the platform to a specific provider.

The concept of national online dispute resolution facilitators also seems to add a layer of staffing cost which would not be necessary were consumers simply sign-posted to approach ADR schemes directly.

3. **Do you think that the 'chargeback' process and/or processes used to resolve claims under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use 'chargeback' or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

[1] We are unsure whether or not the proposed Directive really is intended to cover all business that sell goods or services to consumers, (i.e. .all the way down to the small retailer or sole trader)

The chargeback process is not a form of ADR, as it does not provide a resolution to a dispute. It is merely a 'stopgap' measure while investigations are on-going. Further, credit card companies which perform chargebacks are not independent parties tasked with reaching and fair and impartial decision, which hampers their ability to provide a satisfactory resolution to a dispute.

Consumers can and do make claims under Section 75 of the Consumer Credit Act where this is available. However, the courts have not yet decided whether Section 75 applies to foreign transactions. ADR has the capacity to fill that gap.

4. **What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

The scope of the Directive is very wide. As the provision of ADR in UK-based transactions is currently limited to discreet areas, many gaps would need to be covered in order to comply with the Directive. This might make the potential public cost very high.

However, the fact that the Directive would create an ADR scheme that would not be mandatory for businesses to sign up to, limits its overall effectiveness.

The Directive should also recognise that consumers may wish to choose their own method of ADR or (after exploring options provided through ADR) proceed to court.

To repeat from our introduction we believe that some well-established ADR schemes are already in existence, therefore the Directive should not either miss these out or duplicate them with additional layers of ADR when directing consumers to an ADR process / solution. This includes our own "gap eliminator" – the ICRS.

5. **What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

We already meet the standards and requirements for ADR providers as outlined by the EU and have developed these by reason of significant experience with a range of schemes and by independent consumer feedback on all our services

Schemes which operate within the confines of their own rules (e.g. POSTRS) could be adopted for non-UK markets. Indeed, we are currently developing a number of our schemes for use in the Irish market with a long tern view of having them available elsewhere in Europe.

We do not feel that there would be significant cost barriers to providing Consumer ADR in other jurisdictions, other than the additional cost of acquiring specific language capabilities and possibly costs associated with marketing and employment.

6. **What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

ADR schemes may have their own regulators (e.g. Ofcom for CISAS and POSTRS) which carry out this function already. Information on the cost of being a Competent Authority may be sought from them direct.

Trade Associations, Chambers of Commerce and Professional Institutions can and do supervise ADR schemes for resolving disputes that their members may encounter with their customers. For example, Europe's longest running consumer arbitration scheme, the ABTA Arbitration Scheme for the UK Travel Industry has been managed via the input of the trade body, ABTA, for more than 40 years. Organisations like ABTA already carry out a quasi-Competent Authority role as part of their work. These could be a reasonable cost to setting up a new, sector-wide Competent Authority.

7. **Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

Our customer satisfaction surveys show that most consumers are made aware of their right to use ADR from the companies themselves. Therefore, if businesses were required to inform consumers about the proposed ADR scheme, it is anticipated that there would be an increase in the amount of enquiries / claims.

Existing Scheme Owners and ADR providers already offer information on how to use and access their services. On this basis no subsidy would be needed for existing schemes – however specific requirements may require investments of time or money and therefore it is impossible to say with 100% certainty that there will be no cost implications.

8. **What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

A link on a company's website directing consumers to the ADR scheme would be a minimal cost to the company. However, providing details of the ADR scheme on receipts, invoices, etc. may, deciding upon the size of the company, result in high costs and many premature enquiries.

Businesses could be required to display the information in-store or online. Indeed many users of CEDR Dispute Group ADR services display their membership of a scheme on shop windows and in brochures –

this is seen as a positive marketing tool to attract customers who know that if there is a problem it can be resolved independently.

There may be a difference in how an ADR scheme currently reports to scheme owners versus how they would report to a new authority. We can provide examples of the Key Performance Indicators that we report on annually to Scheme Owners. Examples of KPIs for CISAS can be seen here http://www.cisas.org.uk/KPIs-17_e.html.

A number of Trade Associations and Professional Institutions offer members access to low cost ADR at a subsidised or pre-negotiated low rate (as compared to the cost of arranging ADR on a one-off basis). These membership bodies (a) advertise to their members' clients what the scheme is and how to use it (normally online and in contract terms) and (b) give guidance for their members on how to conduct themselves in a dispute.

9. **Do you have any other comments on the proposed Directive?**

We are concerned that the Directive gives no recognition to the fact that low cost ADR already exists through a number of schemes and freely available dispute resolution services. It is important that whatever is introduced by the Directive should not sweep away or replace that which has already been created and has been working successfully in this area for years and in some instances, decades.

The fact that the Directive does not require businesses to be members of an ADR scheme may hamper its overall impact and effectiveness.

Businesses should be able to choose which schemes they are members of providing they meet key parameters.

With regards to reporting, currently for ADR Schemes making information available relating to a particular scheme we would argue is the prerogative of the Scheme Owner. Note that Scheme Owner client information can be confidential and / or commercially sensitive

10. **What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

The ODR Regulation is limited to cross-border transactions. It may be more consumer-friendly for the ODR to provide guidance on both domestic and cross-border disputes.

We question the need for a central information resource or 'Hub' on how to resolve a dispute. If companies are registered with an ADR scheme then this information will be available from the company, the company website or other sources, and a central ODR platform may just add expensive duplication of resources. It is also of no use to consumers who do not have reliable access to the internet.

The 30-day deadline for concluding disputes is very short, and ADR providers would be highly unlikely to meet it on a consistent basis. A 90-day period may be more achievable.

**Summary**

Consumer ADR can provide significant benefit for the effective workings of trade in giving a responsibility to companies to offer effective redress for failures in performance. Many such exist on a sectoral basis rather than a cross- industry model. There could therefore also be significant initial cost to business in adapting a standard ADR approach. Current experience suggests it is perfectly possible to design workable schemes but mechanisms need to be found to ensure a) awareness of the scheme and its rules, and b) buy-in from business to the ADR process and in particular to implementation of any outcome of the ADR process.

We believe further work needs to be done on designing and implementing a simple process to implement the generic consumer scheme envisaged by the EU, and are happy to be involved in this process as we have already worked up a similar scheme. (Appendix B)

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**Appendix A**

**The following represents a cross section of thousands of clients that CEDR Solve's services have helped with their disputes.**

| | |
|---|---|
| ABN AMRO | Inchcape |
| ACE Insurance | ING Bank |
| Aegis | Interserve Management |
| Air Tours | Intertech |
| Age Concern | Invensys |
| Alfred McAlpine | iSoft |
| Alliance UniChem | ITV |
| Allianz Cornhill | J P Morgan |
| AMEC | J Sainsbury |
| Aon | Johnson & Johnson |
| Argos | KPMG |
| Arts Council | Landesbank |
| Associated British Foods | Legal & General |
| AT&T | Lloyds TSB HBOS |
| AVIVA | Local Authorities (multiple) |
| Azko Nobel | Logica |
| BAA | Marks & Spencer |
| Babcock | Merrill Lynch |
| BAE Systems | Metropolitan Police, UK |
| Balfour Beatty | Michael Page |
| BDO Stoy Hayward | Microsoft |
| Banco Santander | Ministry of Defence, UK |
| Bank of America | National Farmers Union |
| Bankgesellschaft Berlin | National Grid |
| Barclays | National Westminster Bank |
| Barratt | Nestlé |
| BBC | News International |
| Beazley | NHS Primary Healthcare Trusts (multiple) |
| Bellway | Nomura International |
| Berkeley | Northern Rock |
| Birmingham City Council | Norwich Union |
| BMW | O2 |
| BNP Paribas | Orange |
| Bovis Homes | P&O Ferries |
| BP | Panasonic |
| British Airways | Pearson |
| British American Tobacco | Persimmon |

| | |
|---|---|
| BT | Pilkington |
| Cable & Wireless | Price WaterhouseCooper |
| Cadbury | Prudential |
| Cairn Energy | Qinetiq |
| Cancer Research UK | Railtrack |
| Cargill International | Reed Elsevier |
| Carillion | Regus |
| Catlin | Rentokil |
| Centrica | Rio Tinto |
| Channel 4 | Rolls Royce |
| Coca Cola | Royal and Sun Alliance |
| COLT | Royal Bank of Canada |
| Commerzbank | Royal Bank of Scotland |
| Compass Group | Royal Mail Group |
| Corporation of London | Samsung |
| Crédit Agricole | Savills |
| Credit Suisse First Boston | Serco |
| Dell | Severn Trent |
| Deloitte & Touche | Shell |
| Department for Business, Innovation & Skills, UK | Smiths Group |
| Department for Environment, Food and Rural Affairs, UK | Société Générale |
| Department for Work & Pensions, UK | Sony |
| Department of Health, UK | Sovereign States (multiple) |
| Department of State, USA | SSL |
| Department of Transport, UK | Stagecoach |
| Deutsche Bank | Standard Chartered Bank |
| Domino's Pizza | Standard Life |
| Easyjet | T Mobile |
| Enterprise Inns | Taylor Wimpey |
| Environment Agency, UK | Tesco |
| Esso | The Prince of Wales Trust |
| Experian | The Prudential |
| Financial Services Authority, UK | The Treasury, UK |
| Ford | Thomas Cook |
| Fortis Insurance | Toyota |
| GE | Travis Perkins |
| GlaxoSmithKline | Trinity Mirror |
| GM | UBS |
| Goldman Sachs | Unilever |
| Government Departments & Agencies (multiple) | UNISON |
| High Court of Justice | United Utilities |

| | |
|---|---|
| Hiscox | Virgin Media |
| HMV | Vodafone |
| Home Office, UK | Wolseley |
| House of Fraser | WPP |
| HSBC | Xansa |
| IBM | Yule Catto |

**Appendix B**

The Independent Consumer Redress Service - http://www.idrs.ltd.uk/?p=36&parent=33&lang=e

- A brief introduction to the service
- A copy of the rules
- A copy of the application for consumers

**Appendix B**

The Independent Consumer Redress Service - http://www.idrs.ltd.uk/?p=36&parent=33&lang=e

- A brief introduction to the service
- A copy of the rules
- A copy of the application for consumers

IDRS



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# Welcome to the Independent Consumer Redress Service

The ICRS was launched in 2007 to enable consumers and businesses access to low cost and speedy consumer redress.

Click on the relevant links to access the rules and application forms for the conciliation and arbitration services making up the ICRS.

ICAS Rules and Application Form

ICCS Rules

ICCS Application Form

Before making an application you should make sure that the business involved in the dispute is a registered member of the service. The list of members is shown below.

ICRS Members:
Albion Insurance
British Holiday & Home Parks Association
Chartered Institute of Architectural Technologists
Flights of Fancy
National Society of Allied and Independent Funeral Directors
NCC

If you are a business and would like to know more about the ICRS, please contact Michelle Ekpenyong on 020 7520 3825 for further information.

We offer cost-effective services for consumer or commercial disputes, covering all the main forms of private dispute resolution

**Useful links**

CISAS
POSTRS
CEDR Solve
Construction Adjudication

**Useful downloads**

IDRS Values
Complaints about IDRS

**IDRS Limited** 70 Fleet Street, London, EC4Y 1EU **Telephone:** 020 7520 3800 Fax: 020 7520 3829 **Email:** info@idrs.ltd.uk

IDRS
Dispute Resolution Services

# The Independent Consumer Conciliation Service

**2008 Edition**

## 1 Introduction

1.1 The Independent Consumer Conciliation Service (ICCS) is an independent conciliation service designed to minimise costs and to encourage agreement between the parties. The service is provided by IDRS Ltd (the administrator) for consumers or small businesses in dispute with companies registered with ICCS. A small business is defined as a business with ten or fewer employees. The service will normally take eight weeks from receipt of the application by the administrator to the closure of the case.

1.2 Conciliation is a private and structured form of negotiation between the parties who are assisted by a conciliator who can propose a solution for the parties to consider to reach agreement.

1.3 This procedure applies where disputing parties seek assistance from an independent conciliator appointed by the administrator on the matters in dispute. The administrator has the exclusive right to appoint a conciliator under these rules.

1.4 The conciliator, who will be a qualified and accredited mediator, will work with the parties to try to find an agreed solution to the dispute. If the parties do not voluntarily reach agreement in the first instance, then the conciliator will propose a solution to the parties in an attempt to help them resolve the dispute.

## 2 Making an application

2.1 Applications for conciliation under ICCS must be made on the designated application form, available from the company or the administrator.

## 3 Appointment of a conciliator

3.1 Upon receipt of a properly completed application form the administrator will appoint a conciliator and will inform the parties accordingly.

## 4 Procedure

4.1 The proceedings start when the administrator acknowledges receipt of the conciliation application form.

4.2 Upon receipt of the conciliation application form the administrator will invite each party to submit a case statement, of no more than the equivalent of two pages of A4 paper, plus supporting documentation, in duplicate, within 14 days. The statement should include any information thought to be of particular relevance to the dispute.

4.3 The conciliator will speak to the parties by telephone or communicate in writing (including email) with the parties, either together or individually, to request further information or to explore possible solutions.

4.4 If the parties do not reach a solution between themselves after discussions with the conciliator, then he or she may suggest to the parties some opportunities for settlement.

4.5 If a solution is found, then the conciliator will record that solution in writing and send it to the parties (via the administrator) in the form of a simple, Confirmation of Outcome Statement (the Statement), for signature. The parties must sign and return the Statement to the administrator within 14 days. Upon receipt of both signed copies of the Statement the administrator will advise the parties accordingly and they must then take action to comply with the agreed outcome.

4.6 If no solution is found, the conciliator will make a written recommendation and send it to the parties via the administrator as part of the Statement, for signature. If the parties wish to accept the recommendation they must sign and return the Statement to the administrator within 14 days. Upon receipt of both signed copies of the Statement the administrator will advise the parties accordingly and they must then take action to comply with the agreed outcome.

4.7 The administrator will provide a copy of the signed Statement to the parties. If the member company is a member of a trade body or professional institution then that body or institution will also be sent a copy (on a confidential basis) or to confirm to the trade body or professional institution that that a Statement was not returned.

4.8 If either party does not sign or return the Statement to the administrator within 14 days, then it has no effect. The parties may then choose to go to arbitration or to the court. If the parties choose arbitration under ICAS, then the application form must be submitted to the administrator within 21 days from the date the form is sent by the administrator to the customer.

**5 Administrator's powers**

5.1 If either party does not provide anything that the administrator needs under these rules, and still does not supply it within seven days of getting a reminder from the administrator, the following will apply.

(i) If neither party submits a case statement within the time allowed (21 days in total) then the application will be withdrawn and the customer can elect to proceed to ICAS but only with the agreement of the member company. If the parties choose arbitration under the ICAS, then the Arbitration Application Form must be submitted to the administrator within 28 days from the date the application was withdrawn.

(ii) If either party does not submit their case statement within the time allowed (21 days in total) then the application will proceed only with the case statement submitted by the other party, but the conciliator will still seek input from the other party in order to try and reach a settlement.

## 6 Costs

6.1 The administrator will invoice the member company for the sum of £400 plus VAT upon receipt of the application. The fee is due to the administrator regardless of the signing of the Statement, and cheques should be made payable to IDRS Ltd.

6.2 The parties shall bear their own costs of the conciliation regardless of the outcome.

## 7 Confidentiality

7.1 The proceedings will be kept confidential except as required or permitted by these rules and the law.

7.2 The administrator may gather and retain details, in summary form, of individual cases and while preserving the anonymity of the parties and may make the summaries available to other conciliators as a resource in order to encourage consistency of practice under these rules. The administrator may also publish statistical and outline information on such disputes whilst preserving the anonymity of parties.

## 8 General

8.1 The administrator may appoint a substitute conciliator in the event of the original conciliator becoming incapacitated, or for any reason being unable to attend competently and / or expeditiously to his duties.

8.2 These rules are subject to revision and amendment from time to time. The edition of the rules in force at the time the application is made shall govern any conciliation under the Service.

8.3 Neither the conciliator nor the administrator shall be liable to any party for any act or omission in connection with the conciliation conducted under the Procedure.

8.4 If any party has a complaint about the Procedure, or the conciliator, or a member of the administrator's staff then the complaint should be made by following the administrator's complaints procedure, copies of which are available from the administrator.

IDRS
Dispute Resolution Services

# Application to use the Independent Consumer Conciliation Service 2008 Edition

**The consumer initiating an application to the Independent Conciliation Service should complete this form.**

Please read the service rules carefully before you fill in and return this form. Please remember that you cannot use the service unless your dispute is with a member of the Independent Consumer Conciliation Service (ICCS).

Fill in this form in BLOCK CAPITALS.

## 1 Your details

Give your details below.

| | | |
|---|---|---|
| Your name: | | |
| Your address: | | |
| Daytime telephone number: | Mobile: | Fax: |
| E-mail address: | | |

If an email addresses is provided, we will normally send you information by email only.

## 2 ICCS Member details

Give the ICCS member details below.

| | | |
|---|---|---|
| Member name: | | |
| Member address: | | |
| Daytime telephone number: | Mobile: | Fax: |
| E-mail address: | | |

If an email addresses is provided, we will normally send you information by email only.

## 3 Dispute details

In the space below, tell us briefly what your dispute is about and what you want. You will have an opportunity to provide more detail later.

## 4 Declaration

Please read the statements below before signing this form.

- I have read and understood the Independent Consumer Conciliation Service Rules.
- I am applying for you to appoint a conciliator in line with the Independent Consumer Conciliation Service Rules
- I have tried to settle this matter through the ICCS member without success.
- I have not previously referred this dispute to the courts.

Your signature:

Date: / /

**Forward this form to the ICCS member**

ICCS member's signature:

Date: / /

- We confirm that we have attached the correct Code of Practice relating to this dispute

**Appendix C**

CEDR Solve's low cost dispute resolution schemes - http://www.cedr.com/solve/schemes/

- Arbitration 125 (also available as a Euro service)
- Mediation 125 (also available as a Euro service)

CEDR solve

CEDR's Dispute Resolution Service

www.cedr-solve.com

# Arbitration 125

*For cases where the value of the claim does not exceed £125,000*

## 1 Introduction

1.1 Arbitration 125 is for parties involved in disputes where they require a binding decision to be made by an independent third party and the claim made does not exceed £125,000.

1.2 We, CEDR Solve, have sole rights to appoint an arbitrator under these rules.

1.3 The arbitration cannot start until we receive a properly completed application signed by all parties and accompanied by payment of the relevant registration fees (see Rule 1.5 below).

1.4 The amount that can be claimed under these rules is £125,000 inclusive of VAT, interest and costs.

1.5 Where the claim and counterclaim (if any) totals £75,000 or less, a registration fee of £750 plus VAT must be paid by each party (or as agreed otherwise between the parties) when the application is submitted. For claims / counterclaims totalling between £75,001 and £125,000 a registration fee of £1,500 plus VAT must be paid by each party (or as agreed otherwise between the parties). Cheques should be made payable to *CEDR Solve* and registration fees are non-refundable in all circumstances.

1.6 If the claim / counterclaim exceeds £125,000 contact CEDR Solve on 020 7536 6060 or at adr@cedrsolve.com for further information on alternative dispute resolution services.

## 2 Commencement of arbitration proceedings

2.1 The arbitration commences when we write to the parties telling them that their application has been accepted. At this stage the party making the claim (the claimant) will be asked to submit a statement of claim as described at Rule 3.5 below.

2.2 We will appoint an arbitrator and will inform the parties of his / her appointment.

2.3 We will appoint a substitute arbitrator at no additional charge if, through no fault of the parties, the original arbitrator is unable to attend competently or expeditiously to his / her duties.

2.4 Once appointed the arbitrator will communicate with or issue directions directly with the parties. Correspondence to and from the arbitrator must be copied to all parties.

## 3 Arbitration procedure

3.1 The arbitration will proceed on the basis of written argument only.

3.2 The arbitrator has the jurisdiction and power to run the arbitration in terms of Section 34 of the Arbitration Act 1996 (the Act). The arbitrator also has the power to:

(a) Allow the parties to submit further evidence and / or amend the claim / counterclaim or defence;
(b) Order the parties to produce goods, documents or property for inspection;
(c) Conduct further enquiries and receive and consider any written evidence as he / she decides to be relevant;
(d) Award interest whether or not claimed;
(e) Proceed with the arbitration if any party fails to comply with these rules or with any directions of the arbitrator;
(f) End the arbitration if the arbitrator considers the case to be incapable of resolution under these rules (in accordance with rule 6.4 below).

3.3 If the parties settle their dispute prior to an award being issued, they must immediately inform the arbitrator in writing of the terms of the settlement and the arbitrator shall record them in an agreed award enforceable under the Act. If the parties fail to notify the arbitrator that a settlement has been reached, the arbitrator will publish an award which will be binding on the parties regardless of any earlier settlement made.

3.4 In addition to the powers set out in 3.2 above, the arbitrator shall have the widest discretion permitted by law to resolve the dispute in a final manner in accordance with natural justice.

3.5 Within 21 days of receipt of the request to submit their statement of claim, the claimant shall send to us their statement of claim with all supporting documents (such as, but not limited to, contracts, agreements, schedules, photographs and video recordings). The claimant may not raise issues or claim amounts not covered by the application form without the arbitrator's consent.

3.6 We will send a copy of the statement of claim and supporting documents to the other party (the respondent), who then has 21 days in which to submit a written statement of defence including a counterclaim, if any.

3.7 We will send a copy of the statement of defence and supporting documents and counterclaim, if any, to the claimant, who is entitled to submit written comments and a reply to any counterclaim within a further 21 days. Comments on the defence must be restricted to points arising from the defence. The claimant may not introduce any new matters or new points of claim, and if new evidence is produced the arbitrator will disregard it.

3.8 The arbitrator will make an award with reasons after considering all submissions and evidence. The award may be for an amount up to and including a maximum of £75,000 / £125,000 inclusive of VAT, interest and costs, depending upon the amount specified on the application form.

3.9 We will send a copy of the award to each party.

3.10 The arbitrator will specify any dates for any payments or other action to be completed. Any payments shall be made direct to the party entitled to receive it.

3.11 Any award made under these rules is final and binding under the Act, and therefore, once published, it will not be open to review. If either party wishes to appeal to the courts against the award, leave must be sought from the courts within 28 days from the date of publication of the award. It should be noted that parties cannot appeal on a point of fact. Neither the arbitrator nor CEDR Solve can advise the parties on how to seek leave to appeal.

3.12 The arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his / her functions as arbitrator unless the act or omission is shown to have been in bad faith.

3.13 Any party may request the return of its original documents but must do so within 42 days of the date of dispatch of the Award. We will destroy documents (including any photographs, videos etc) after 42 days.

## 4 Content of submissions for arbitration

4.1 All submissions must be submitted in duplicate.

4.2 The statement of claim (and counterclaim, if any) shall include:

(a) Nature and basis of the claim;
(b) The amount of compensation claimed or other remedy sought;
(c) All supporting documents relied on as evidence.

4.3 If the claimant is unable to submit any relevant document, the respondent shall use reasonable endeavours to provide a copy of that document with the defence.

4.4 The statement of defence shall include:

(a) What matters in the opposing documents are accepted or agreed;
(b) What matters are disputed, with reasons;
(c) Any supporting documents relied on as evidence.

4.5 The response by the claimant to any defence (including the reply to the counterclaim, if any) shall include:

(a) What matters in the opposing documents are accepted or agreed;
(b) What matters are disputed, with reasons;
(c) Any supporting documents relied on as evidence.

4.6 If any party fails to deliver anything required by these rules and does not supply it within 7 days of us issuing a reminder then:

(a) Where a claim is not delivered CEDR Solve shall consider it abandoned and the arbitration will not proceed;
(b) Where the failure concerns information requested by the arbitrator, the arbitrator shall proceed as he / she considers appropriate;
(c) Where the failure is non-delivery of the defence or a reply to the counterclaim (if any) the arbitrator may make the award on the basis of documents received. Alternatively the arbitrator may wish to allow the relevant party a further period in which to submit the defence.

## 5 Arbitration costs

5.1 The costs of the arbitration (that is, our fees and the arbitrator's fees) are covered by payment of the registration fees as set out at 1.5 above.

5.2 Subject to Rules 5.3 and 5.4 below, each party shall bear its own costs of preparing and submitting its case.

5.3 The arbitrator may also order one party to pay any part of or all of the other's registration fee where the former has, in the view of the arbitrator, acted unreasonably and caused the opposing party unnecessary expense.

5.4 These provisions for costs will not apply to any application or appeal to the High Court.

## 6 Miscellaneous

6.1 The law of England and Wales will apply.

6.2 Neither we nor the arbitrator shall be liable to any party for any act or omission in connection with the arbitration conducted under these rules (save for / subject to rule 3.12 above).

6.3 Nothing herein shall prevent the parties from appealing the award to the High Court in terms of the Act, or any statutory modification or re-enactment thereof for the time being in force. This provision applies equally to the law of Scotland.

6.4 If, after considering the documents or other representations submitted by the parties, the arbitrator believes that the dispute is not capable of resolution under these rules, the parties shall be so advised. In that event the arbitrator's appointment will be cancelled, and the parties' application for arbitration treated as withdrawn. The parties will then be able to return to the court.



CEDR Solve International Dispute Resolution Centre 70 Fleet Street London EC4Y 1EU

Tel +44 (0)20 7536 6000 Fax +44 (0)20 7536 6061 E-mail adr@cedr-solve.com www.cedr-solve.com

Registered in England as CEDR Services Limited Company number 3271988

# *Arbitration 125 Application Form*

**Please read the Arbitration 125 rules carefully before you fill in and return this form.**

**1 Claimant's details** (to be completed by the party making the claim)

Name _____

Address _____

_____

Phone_____Email_____

**2 Respondent's Details** (to be completed by the party responding to the claim)

Name _____

Address _____

_____

Phone_____Email_____



CEDR Solve International Dispute Resolution Centre 70 Fleet Street London EC4Y 1EU

Tel +44 (0)20 7536 6000 Fax +44 (0)20 7536 6061 E-mail adr@cedr-solve.com www.cedr-solve.com

Registered in England as CEDR Services Limited Company number 3271988

## 3 Claimant's Summary

Please give brief details of your claim and include the total figure for any amounts claimed from the respondent. You should note that if the arbitrator finds in your favour he / she can only award you an amount up to the amount you specify on this form. This amount cannot be altered at a later date. You are not required to set your case out here. You will receive an opportunity to do this once we have accepted the application.

_____

_____

_____

_____

_____

_____

_____

## 4 **Respondent's Summary** (to be completed only in the event of a counterclaim being made)

Please give brief details of your counterclaim (if any) and include any amounts claimed from the claimant. You should note that if the arbitrator finds in your favour he / she can only award you an amount up to the amount you specify on this form. This amount cannot be altered at a later date. You are not required to set your case out here or to defend any allegations made by the claimant in section 3 above. You will receive an opportunity to do this once we have accepted the application.

_____

_____

_____

_____

_____

_____

_____



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## 5 Declaration

Please read the statements below before signing this form.

- We have read and understood the Arbitration 125 rules and are applying to you to appoint an arbitrator under its rules.
- We understand that the arbitrator's decision is binding on us under the relevant sections of the Arbitration Act, 1996.
- We each* enclose **payment** for the sum of **£750 plus VAT / £1,500 plus VAT**** made payable to **"CEDR Solve "** in respect of our registration fee.

Claimant's signature_____

Date_____

Respondent's signature_____

Date_____

**Upon completion and signature and with payment attached, this form should be returned to:**

Arbitration 125
CEDR Solve
70 Fleet Street
London EC4Y 1EU

**The parties may agree to split the fees in whatever way they wish*
***Delete as appropriate*

CEDR solve

CEDR's Dispute Resolution Service

www.cedr-solve.com

# *Mediation 125* *Sterling Edition*

*low-cost quality controlled mediation from the market leader*

## ***Mediation 125*** **has been specially developed for disputes involving two parties where the value of the sums claimed do not exceed £125,000 – making *Mediation 125* ideal for cost sensitive cases.**

All mediators appointed under ***Mediation 125*** are CEDR Accredited and quality controlled by CEDR Solve*. Bookings cover a 10 hour period, which includes 3 hours for preparation and a 7 hour mediation day.

**What does *Mediation 125* cost?**

There are two price points for ***Mediation 125*** depending upon how much is in dispute.

- For claims of up to £75,000, the cost is £1,000 plus VAT
- For claims of between £75,001 and £125,000, the cost is £2,000 plus VAT

Parties are responsible for paying the mediation fee and for arranging and paying for room hire, refreshments and other disbursements.

To apply to use ***Mediation 125***, please return the following to us:

- ***Mediation 125*** Application Form & Mediation Agreement – completed and signed by **both** parties
- Full payment of the mediation fee, including VAT (cheques should be made payable to 'CEDR Services Limited')
- Supporting documentation**

**If your claim is for more than £125,000 and / or you would like to be given the opportunity to choose from a list of CEDR Solve recommended mediators, call us on 020 7536 6060 for further details about our mediator recommendations service.**

***Mediation 125***
CEDR Solve
IDRC, 70 Fleet Street
London EC4Y 1EU

**Quality control includes taking feedback and monitoring the performance of mediators on every mediation*

***a guide to the type and amount of documentation can be found at [http://www.cedr.com/solve/advice/?p=6](http://www.cedr.com/solve/advice/?p=6)*

***We will not appoint a mediator until we have received all the fees and documents.***



CEDR Solve International Dispute Resolution Centre 70 Fleet Street London EC4Y 1EU

Tel +44 (0)20 7536 6000 Fax +44 (0)20 7536 6061 E-mail info@cedr-solve.com www.cedr-solve.com

Registered in England as CEDR Services Limited Company number 3271988

# *Mediation 125 Application Form and Mediation Agreement*

***Party A / Claimant***

**Name**

**Address**

**Telephone**

**Email**

***Representative's details (if any)***

**Name and company name**

**Address**

**Telephone**

**Email**

AND

***Party B / Defendant***

**Name**

**Address**

**Telephone**

**Email**

***Representative's details (if any)***

**Name and company name**

**Address**

**Telephone**

**Email**



CEDR Solve International Dispute Resolution Centre 70 Fleet Street London EC4Y 1EU

Tel +44 (0)20 7536 6000 Fax +44 (0)20 7536 6061 E-mail info@cedr-solve.com www.cedr-solve.com

Registered in England as CEDR Services Limited Company number 3271988

Nature of dispute – please enter brief details in the box below. This will allow us to appoint the most appropriate mediator.

Amount in dispute £ _____

We agree to mediate at the following agreed venue:

We confirm we are available on the following dates (list up to three agreed dates):

**We agree to the following:**

**The Mediator**
Party A and Party B (jointly 'the Participants') agree that CEDR Solve will appoint a Mediator ('the Mediator'). The Participants understand that the Mediator is independent. The Parties understand that the Mediator does not give legal advice and agree that they will not make any claim against the Mediator or CEDR Solve in connection with this Mediation. The mediator will determine the mediation procedure.

**Private sessions**
During the Mediation, the Mediator may speak to the Parties separately in order to improve the Mediator's understanding of each Party's view. Private information given to the Mediator during such talks will be confidential unless the Party involved allows the Mediator to give the information to the other Participants.

**Confidentiality**
Any information we produce or receive - whether in a document prepared for the Mediation or written or spoken during the Mediation - can only be used for the purpose of Mediation and cannot be referred to in any formal investigation or court action or other proceedings. This does not apply to any information which would in any event have been admissible or disclosable in any such proceedings or which is necessary to implement and enforce any settlement agreement arising out of the Mediation.



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Registered in England as CEDR Services Limited Company number 3271988

The Parties agree that they will not call the Mediator or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) to give evidence in any disciplinary or court action or other proceedings, nor ask to see the Mediator's notes.

**Attendees**
All attendees agree to abide by the terms of this agreement, particularly the confidentiality of the process, and have signed below to confirm that.

**Mediation fee**
The person signing this agreement on behalf of the Party he/she represents is agreeing on behalf of that Party, to proceed on the basis of CEDR Solve's fees, terms and conditions.

**Agreement**
No agreement reached during mediation is legally binding unless written down and signed by all the parties.

**Ending the Mediation**
While it is hoped that all Parties will attend in good faith, and in a co-operative spirit to work towards finding a resolution, Mediation is a voluntary process, and the Mediator or any of the Participants may terminate the Mediation at any time.

**Signed**

**The Parties:**

Party A / Claimant

| | |
|---|---|
| Sign | Date |

Party B / Defendant

| | |
|---|---|
| Sign | Date |

Mediator

| | |
|---|---|
| Sign | Date |

CEDR Solve

| | |
|---|---|
| Sign | Date |



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Registered in England as CEDR Services Limited Company number 3271988

# CITIZENS ADVICE

Evidence

citizens advice bureau

# EU proposals on Alternative Dispute Resolution (ADR)

# Citizens Advice response to BIS's call for evidence

January 2012

Myddelton House | 115-123 Pentonville Road | London | N1 9LZ | Tel: 020 7833 2181 | Fax: 020 7833 4371 | www.citizensadvice.org.uk

# Introduction

Citizens Advice welcomes the opportunity to respond to BIS's call for evidence on the proposed EU Directive for ADR.

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,000 locations in England and Wales, including GPs' surgeries, courts and prisons.

In 2010/11 the Citizens Advice service in England and Wales advised 2.1 million people on 7.1 million problems. Of these seven million problems, over 49,000 related to complaints and redress:

- 13,976 concerned complaints and redress for consumer goods and services
- 12,312 related to complaints about creditors' practices in debt collection
- 11,045 related to complaints and redress about financial services
- 3,504 related to complaints and redress about travel, transport and holidays
- 8,205 related to complaints and redress about utilities.

# General comments

Citizens Advice welcomes the intention of the Directive to provide an easy means for consumers and traders to resolve disputes without having to go to court. It is particularly welcome that the Directive intends that ADR should be available for all contractual disputes between consumers and traders arising from any type of goods or service, as we have been calling for a comprehensive consumer ombudsman service for a number of years.

Citizens Advice believes that ADR complements consumer protection legislation because it provides:

- straightforward access to redress without the costs in money, time and anxiety associated with taking a dispute through the courts;
- education for consumers and for traders as to their legal rights and responsibilities by publishing case decisions;
- information to enforcers about priority sectors or businesses; and
- a stronger role for self-regulation in improving trader behaviour by using ADR decisions to inform business adherence to the law. This both reduces the need for future enforcement action and promotes the development of high standards of customer service.

We agree that consumers considering cross-border purchases may be put off by concerns about resolving any disputes with traders based abroad.

## Important omissions in the proposed Directive

We are extremely concerned about two important omissions from the proposals:

- First, we understand that the current draft of the Directive will require all Member States to provide for access to ADR of a defined quality but that there is, as yet, no specific requirement for all businesses to offer ADR. The draft Directive is extremely confusing on this matter in that it strongly implies that the objective is for all businesses to offer ADR but fails to actually make the requirement. This renders the proposals in danger of appearing to offer a real boon for consumers but failing to secure it. **The proposals must be amended to require ADR for all business to consumer transactions.**

  Secondly, the Directive appears to exclude from ADR disputes where the business to consumer relationship is an obligation, rather than a contract. This would mean that disputes about civil recovery claims for damages for alleged shoplifting and employee theft; alleged illegal downloading of copyrighted materials or claims for contravention of parking rules on private land would not be covered by ADR. We believe that the provision of ADR to resolve these cases are vital as the businesses concerned appear to use aggressive unfair commercial practices within the scope of the Consumer Protection from Unfair Commercial Practices Regulations (CPRs). Consumers are finding that their best defence against claims they dispute is to ignore them. But consumers receiving a claim are uncomfortable with ignoring that claim and want to challenge it. Provision of ADR would provide for this. **The proposed Directive must be developed to fit with the wider provisions of the Unfair Commercial Practices Directive (UCPD) that include obligations.**

## Specific requirements for ADR

We support the quality principles of impartiality, transparency, effectiveness and fairness proposed by the Commission.

In our response to the EU consultation paper in the first quarter of 2011 we set out pre-requisites for the processes for successful ADR and urge the UK Government to ensure that they are included in the requirements under the proposed Directive. These are:

- An accessible explanation of how the ADR works and when it should be used, including any pre-ADR steps such as time limits for the initial complaint to the trader and any need for a letter from the other party confirming the parties cannot reach agreement.
- An explanation of elements that will be considered. This must include what is fair as well as what is legal.
- Investigatory powers. The ADR provider needs to be in a position to investigate the root cause of the problem. To do this they must be able to require information to explore the problem and come to a fair decision. For example, the Financial Ombudsman Service (FOS) in the UK can take a financial services business to court to obtain evidence that the firm has refused to supply on request.
- A requirement for business to tell consumers about any ADR provision they belong to and how to access it.
- A requirement for business to agree to the ADR process so that consumers know they cannot be refused access to the service.
- The burden of proof should be on the business. Consumers will not be able to access business records to prove their case.

- Provision for non-financial as well as financial awards. This might include an apology or requiring the business to replace the goods or services in question.
- Completion of the ADR process within a reasonable time, appropriate to the purchase, so that where a decision is made in favour of the consumer they receive redress quickly.
- Legally enforceable decisions. The ADR decision should be binding on the business and enforceable in court where the business refuses to abide by the ADR decision. If this does not happen, consumers are unlikely to feel confident to use the ADR process.
- Publication of case outcomes. Information about ADR decisions can inform business, consumers and regulators, particularly where bad practice has become common or may be copied throughout the sector.
- The power to direct all businesses in a sector to behave in a certain way or to refer the matter to the relevant regulator for action to be taken to stop that practice.

## Response to specific issues raised in the consultation

### **Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

We agree that lack of access to redress is expensive for consumers. We would also point out that ADR has benefits other than just financial ones to consumers – it will be less stressful and time-consuming than going to court.

Citizens Advice believes that the full benefits to consumers from the proposed Directive and Regulation will only emerge once all business to consumer transactions have available a quality ADR provision. We believe that investment by business in the delivery of good customer service that eliminates the need to pay for ADR cases will help ensure compliance with EU consumer protection legislation. This will represent savings for consumers, business and enforcement.

### **Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?

We do not have evidence to quantify the costs and benefits of the draft Directive and Regulation described in Annex B and Annex C but agree that wider coverage and awareness of ADR should lead to:

- greater use of this mechanism for resolving disputes;
- fewer court cases;
- greater levels of redress; and
- increased consumer confidence, including in cross-border shopping.

### **Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be

## more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

We agree that the equal liability provisions of section 75 of the Consumer Credit Act 1974 provide an alternative for claiming redress for breach of contract, by allowing the consumer to choose whether to claim against the trader who supplied the product or the creditor who lent the money to pay for it. But this process is not a form of ADR within the scope of the proposed Directive, at Article 2, because the creditor is a party to the transaction. Consumers can either take the creditor to court or obtain ADR through the Financial Ombudsman Service (FOS) where section 75 disputes are unresolved. We consider access to FOS to resolve these disputes is be an important consumer protection measure which should not be lost.

“Chargeback” is not ADR either. We are not aware that the process for “chargeback” includes a judgment about liability that is binding on the supplying trader. It appears to be used only where the payment transaction has not been completed. Further, the provisions at Article 9 of the proposed Directive for parties to hear arguments from the other party and any experts and for the outcome and grounds for that decision to be made available are not met and the process is conducted exclusively between the creditor and the supplier, as in the following cases:

> A CAB in Wales was concerned that bank staff were failing to offer clients help through the chargeback process for breaches of contract by suppliers where debit cards had been used to pay for the product. The adviser contacted a major bank to clarify the process. After a number of staff at the bank had passed his call on to a supervisor he was eventually given a new number to call. He was told that every case was judged on its merits and decisions about whether to grant a refund were made at the bank’s discretion.
>
> A man sought advice from a CAB in south east England when a major bank refused to administer their chargeback process. The client’s account had been debited for £66.95 by a loan company he had not contracted with causing his account to be overdrawn. He told the bank he had not authorised the payment but had no response. He submitted a second declaration to reclaim the money and was informed his application for chargeback had been refused. When he found a further £66.95 had been debited, he reported this to his branch whose card services dispute resolution centre refused to reverse the payment. They told him they were satisfied that the transaction was authorised and that a further cancellation request would take up to 30 days. An internet search revealed that other consumers had had the same experiance with unauthorised debits by the same loan company.

We believe that consumers would use whichever recourse was easiest and most likely to be effective. Bureaux often refer to the difference in redress available between those cases where section 75 is applicable and those where it is not available because the consumer paid using a debit card or cash, particularly where a trader refuses to communicate or has disappeared and where the trader is based abroad. These are backstops for failures in the customer service provisions of the supplying trader that acknowledge that a financial service has been purchased as well as the goods or service. They are administered by the financial institution involved, rather than independently. We do not consider that these they are an alternative to independent ADR.

## **Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you

## provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

### Scope

We are concerned that the Directive fails to include transactions that are obligations. It is vitally important that the Directive covers unfair commercial practices under the UCPD so that there is comprehensive provision of enhanced redress. It would be very difficult to justify why it is necessary to have ADR for disputes where something is purchased, and where redress is already provided through consumer protection law, but not for money claims by a trader where the consumer has no details about how the value of that claim has been reached and where no redress is currently available for these aggressive practices.

## Gaps

As there is no current provision for ADR for all business to consumer transactions, there are gaps, unless ADR is required by statute, e.g. for financial services, fuel, telecoms and estate agency markets. Other markets have optional or self-regulatory provisions so that businesses choose whether to provide ADR. Examples include TrustMark, OFT approved codes and many Local Authority Assured Trader Schemes run by Trading Standards Services. For the majority of transactions, including those where there are high levels of complaint, such as vehicle purchases and repairs, no ADR is guaranteed.

Further gaps in provision can occur because there is no compulsion on the business to agree to ADR, even where there is statutory provision, for example in the lettings agency sector. Under UK law, private landlords are required to protect the often substantial deposits that their tenants are required to pay at the start of their tenancy against damage to the property[1]. The schemes set up to protect tenants' deposits include an ADR provision, but in order to use it, both tenant and landlord must agree to its use. If this happens, both parties are bound by the decision. However, not all landlords agree to use this service.

> A woman sought advice from a CAB in South-East Engalnd when her ex-landlord would not refund the deposit she had paid at the start of the tenancy. He claimed the property was damaged and retained the full sum. He refused to go to the ADR available under the tenancy deposit scheme and claimed he would go to court. The client was expecting a baby and had to borrow money to pay the deposit on her next rented accommodation. The bureau commented on the need for this ADR to be compulsory.
>
> A couple who sought advice from another CAB in the South-East found their landlord refused to use the ADR service available under the tenancy deposit scheme. They disputed the landlord's claim that the property they had rented had been damaged during their tenancy. The clients told the bureau they felt let down by the scheme that had been set up to protect their money because it lacked the power needed to ensure the ADR service could be accessed. The only alternative was for them to take the landlord to court.

We believe that ADR processes which are not binding on traders mean that the imbalance in power between the parties is exacerbated.

[1] Section 213 of the Housing Act 2004 has protected tenancy deposits since 6 April 2007

### Public subsidy

We are not able to estimate the level of public subsidy, if any, to ensure ADR of the standard required in the proposals for all consumer disputes, but suggest that this may be far less than savings for both business and consumers. The provision of ADR for all consumer disputes would have the effect of encouraging traders to offer better customer service. If business and consumers could take disputes to ADR, both parties could avoid costly court action.

We would expect business to pay the cost of setting up the ADR as part of on-going overheads and in direct relation to the annual value of transactions. Payment per case could then be used to incentivise in-house resolution of disputes. This mechanism is common in UK statutory ADR provision, such as the Financial Ombudsman Service. Many UK regulators are funded through the sector they regulate and are also responsible for setting criteria for ADR that could meet the proposals in that sector. The costs of the proposed 'competent authority' should be met through general business taxation and exemptions provided where a levy is already in place in that sector.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

Citizens Advice is not an ADR provider but please note the section within our general comments above on the specific requirements we have set out for ADR.

We support the following standards and requirements for ADR providers proposed in the Directive:

- the basic principles of impartiality, transparency, effectiveness and fairness.
- the requirement in Articles 6 for expertise and impartiality.
- The transparency requirements at Article 7 which could alert consumers and traders to relevant standards for fair behaviour.
- the fairness requirements at Article 9 for awareness of arguments posed by the other party; written information on ADR decisions and clear understanding of the implications of accepting suggested solutions.

We would however, like to see the effectiveness requirements in Article 8 amended to ensure that the ADR process is accessible to all consumers,

We believe that ADR should be free to consumers and that cases need to be resolved within a reasonable time. We have no objection to the 90 day rule for cases to be completed. It would also be useful for potential ADR users to know how successful that ADR has been in terms of the decisions being complied with. Poor compliance might influence a decision on whether ADR was a valuable alternative to court.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the

## UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

### Competent Authority role

We largely support the proposed role for the Competent Authority, but note that there is no specific role for ensuring that ADR schemes meet the requirements of the Directive. Instead, this is a self-assessment role in Article 16. We think that the Competent Authority should approve ADR schemes against the EU criteria. This would mirror the role of regulators such as OFCOM in the communications sector, OFGEM in the fuel sector and OFT in the estate agency sector, where ADR is a statutory requirement. We do not suggest this function is carried out twice, but that these regulators should inform the Competent Authority who in turn could learn from the regulators in order to perform this function in other sectors.

### Possible UK Competent Authority

The decision as to the most suitable Competent Authority for the UK will depend largely on the outcome of the Government's consumer landscape review. Historically this role would have fallen to the OFT, which may not continue to exist. In our response to the consumer landscape review consultation we suggested that the proposed Trading Standards Policy Board (TSPB) could take on the current OFT roles under EU legislation for co-ordination and this may be a possibility. However, we have long campaigned for a consumer ombudsman to:

- provide the single portal for all business to consumer ADR;
- fill gaps in ADR provision; and
- provide a co-ordinating role for collective redress where the same problem is experienced by a group of consumers.

**We believe that the EU proposals for a Competent Authority should be established in the UK as the Consumer Ombudsman.**

## **Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We support Article 10 of the framework Directive which requires business to inform consumers about the ADR schemes they are covered by but would like this provision to be extended so that all businesses had to inform consumers whether or not they are covered by ADR. We also believe that this should be mandatory, so that consumers do not experience the problem of access to ADR being denied.

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We believe that if businesses were required to inform consumers as to whether ADR was available, consumers would be more likely to take this information into account when deciding which trader to buy from. It would also make it easy for consumers to find out whether ADR was available. Currently, this is only possible where businesses are required by law to alert consumers to that ADR provision, as in the fuel and telecoms markets.

## **Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

As a consumer organization we have no information on costs to business. However, we believe that a standard format could be established nationally or by the EU to help reduce the costs.

## **Question 9**: Do you have any other comments on the proposed Directive?

We would be very concerned if the final Directive did not require ADR for all business to consumer transactions. If business can choose whether to provide ADR as well as whether to use it, the objective for improving consumer redress provision seems very unlikely to materialize. The Directive and Regulation would then fail to provide effective and enhanced consumer protection. It is also possible that those businesses that voluntarily provide ADR might be disadvantaged because the Directive and Regulation will make requirements on them that they do not have now and which competitors without ADR provision would not face.

## **Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

We agree with the Commission's assessment that consumers will be likely to be less worried about e-commerce cross-border purchases if there is access to quality ADR. However, unless all business are required to provide ADR, consumers may not be able to find a trader in another Member State that provides ADR. This would mean that the objectives for consumer confidence and a higher level of consumer protection in cross-border purchasing would fail.

The Regulation would only apply to e-commerce cross border purchases. We agree that consumers would value the proposal for a free interactive website for e-commerce cross-border ADR in all official languages.

Provision for on-line dispute resolution for e-commerce should be expended to e-commerce within Member States.

## Supplementary question: the effect of businesses seeking ADR for disputes with consumers.

Traditionally requests for ADR have been made by consumers. We believe that ADR is beneficial for business because cases can be dealt with more quickly and with less cost than a court case. We have no inherent objection to businesses being able to instigate ADR, but believe that there may be some consequences arising from this change:

- ADR might be seen as a threat by consumers, in the same way as court action is now. Whether this happens would depend on whether ADR is offered or threatened;

- ADR might no longer be seen to address the balance of power between business and consumers by guaranteeing protection from costs;
- consumers might lose confidence in ADR because it appears to be a tool for business;
- ADR processes fail to help consumers access their services, in order to provide an equal service to business. Some ADR provisions, such as the Financial Ombudsman Service and OTELO help consumers who find it difficult to express their claim in writing by listening to the complaint and sending the consumer a summary for them to sign.

# CMC (CIVIL MEDIATION COUNCIL)

**Response of the Civil Mediation Council**

To the proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2007/2004 and Directive 2009/22EC (Directive on Consumer ADR)

31st January 2012.

## THE CIVIL MEDIATION COUNCIL

### 70 Fleet Street, London EC4

1. This is the response of the Civil Mediation Council (the CMC) to the proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2007/2004 and Directive 2009/22EC (Directive on Consumer ADR).

2. The CMC was founded in April 2003 to represent the common interests of mediators and mediation providers in promoting mediation and similar forms of dispute resolution in England and Wales.

3. The CMC is now recognised as the organisation which represents the interests of civil, commercial and workplace mediation in England and Wales, with links throughout the United Kingdom and Europe. It has more than 80 provider members and over 300 individual members. It provides an accreditation scheme for mediation providers, and acts as the first point of contact for the Government, the judiciary, the legal profession and industry on civil mediation issues. The CMC's board includes government, the legal profession and the elected representatives of the provider and individual members.

## THE RESPONSE

4. This response has been prepared by a working group of members of the Board of the CMC.

5. The CMC supports the ambition of extending the reach of ADR procedures into consumer disputes by making widely available a well-publicised, high quality ADR procedure.

6. Equally there is no doubt that the delivery of these services (outside high–value civil disputes where the expense of money and effort of mediation is readily justified) is enormously challenging.

7. In England and Wales the most effective approach to dealing with low-value claims has proved to be the telephone-based technique now used in a growing proportion of small claims. This enjoys great success in settlement terms and very high levels of approval from its users. Many if not most of these claims would be classified as consumer claims under the terms of the draft directive.

8. Within a few days of this consultation closing the Ministry of Justice is expected to publish its proposals for (it is thought) expanding the use of this approach possibly by making greater use of private sector mediators. Nobody who has been engaged in developing those proposals will under-estimate the financial and logistical challenges involved.

9. The proposed directive envisages a high quality ADR service being available at no or low cost to the consumer "up-front", well ahead of any thought of litigation. There can be no doubt that even a properly–operated telephone service offered in this way will place a serious burden on businesses.

10. Similarly the monitoring effort required of government or of those acting on its behalf is considerable, at least as described in this draft. The CMC will offer its help in developing a response to these requirements if they are imposed but has not conceivably got the resources to take on this role itself as presently funded and constituted.

11. All of these challenges are to be faced at a time of increasing financial stringency for governments and the private sector alike.

12. So far as corporate pledges to offer ADR to the public are concerned it is noteworthy that, the CMC, the CBI , the ICAEW and others are working with industry (under the aegis of the Ministry of Justice) to develop just such a pledge albeit not one limited to the consumer sphere.

# CONSUMER COUNCIL FOR NORTHERN IRELAND

**The Consumer Council for Northern Ireland**

# Response to EU Proposals on Alternative Dispute Resolution

## 1 Introduction

1.1 The Consumer Council is an independent consumer organisation, working to bring about change to benefit Northern Ireland (NI) consumers. Our aim is to make the consumer voice heard and make it count.

1.2 We have a statutory remit to promote and safeguard the interests of consumers in Northern Ireland and we have specific functions in relation to energy, water, transport and food. These include considering consumer complaints and enquiries, carrying out research and educating and informing consumers. In taking forward our broad statutory remit we are informed by and representative of consumers in NI.

1.3 The Consumer Council is a designated body for the purposes of supercomplaints, which means that we can refer any consumer affairs goods and services issue to the OFT, where we feel that the market may be harming consumers' best interests.

1.4 The Consumer Council appreciates the opportunity to participate in this consultation on. EU Proposals on Alternative Dispute Resolution schemes. We hope that you will find our comments useful and that our views will be reflected in the final decision making process.

## 2 Consumer Council views

2.1 The Consumer Council's views on EU proposals on Alternative Dispute Resolution (ADR) for consumer disputes are set out in this paper. We agree with the Commission's general proposal to help all EU consumers to be able to solve their problems without going to court, regardless of the kind of product or service that the dispute is about and regardless of where they bought it in the European Single Market.

2.2 Our comments are focussed on the following issues:

- Consumer awareness of ADR
- Information and training
- Cross-border and online shopping issues
- Costs of ADR
- Going to court
- Quality assurance and monitoring
- Business information to consumers

## 3 Consumer awareness of ADR

3.1 The Consumer Council considers that much work is needed to build consumers' awareness and understanding of the role and value of ADR. Currently consumer access to ADR in Northern Ireland is more limited than in GB. Apart from legal issues such as family law and divorce, ADR schemes are not often used here.

3.2 Consumers will be less likely to pursue a resolution of a dispute if they perceive it to be costly, inconvenient, time-consuming or difficult to access. Therefore the Consumer Council wishes to contribute towards a robust discussion on raising consumer awareness of ADR and ensuring that it can be effective, efficient and responsive to consumers needs.

## 4. Information and training

4.1 The Consumer Council believes that a coordinated and cost-effective information initiative will be required across the UK and particularly in Northern Ireland, to ensure that consumers have awareness and knowledge of how ADR works and to help them gain confidence to use it as a redress mechanism.

4.2 We also recommend that there needs to be a concerted and

co-ordinated effort to raise awareness of ADR and increase training on the schemes among businesses and frontline advice workers.

## 5 Cross-border and online shopping issues

5.1 The Consumer Council believes that the development of a robust cross-border ADR and ODR is timely and needed. Northern Ireland and ROI consumers regularly engage in cross-border shopping particularly those who live in border areas and ADR may improve access to redress for this group.

5.2 The Consumer Council also supports the proposal to create an EU wide single European ODR that can be accessed electronically and free of charge in all EU official languages and will allow disputes to be solved entirely online and within 30 days. However it is essential that those consumers without internet access are helped to access this free service through advice organisations and appropriate consumer bodies.

5.3 The Consumer Council is of the opinion that for these ADR and ODR mechanisms to be effective, efficient, and responsive and offer improved consumer protection the EC needs to engage genuinely with consumer organisations on an ongoing basis.

## 6 Costs of ADR

6.1 The Consumer Council takes the view that it is essential that ADR schemes are free or low cost.

6.2 We recognise that ADR has the potential to offer a different way to solve disputes and may appeal to consumers because it can be cheaper, quicker and less stressful than going to court. It can also offer a range of flexible remedies unavailable in a court to consumers.

6.3 However we have concerns about the assumption in the consultation

that ADR is always cheaper, quicker or less expensive than going to court. Potentially ADR, where it fails, can still be costly.

6.4 Whether or not the mediation process is cheaper than going to court therefore depends very much on the outcome of the mediation, not just in terms of whether or not a settlement is reached, but on whether the agreement is honoured.

6.5 So although we acknowledge the benefits of ADR, we recognise its limitations and call for a balanced promotion of it to consumers so that they can make an informed decision about whether to opt for it. It is important that they are provided with balanced information to enable them to make a real choice suitable to their personal circumstances.

## 7 Going to court

7.1 The Consumer Council agrees that when a dispute arises in most cases it is important to encourage and promote ADR as early as possible. However there may be some cases when the best course of action will continue to be a court hearing. Therefore we believe that ADR schemes should not limit consumers' right to access justice.

7.2 Consumers should continue to be encouraged to use the Small Claims Court where it is the most appropriate redress mechanism for their personal circumstances.

7.3 We also consider that the advantages ADR enjoys over a court process are only sustainable if a concerted effort and commitment is made towards continuous improvements and its responsiveness to consumers needs

## 8 Quality assurance and monitoring

8.1 The Consumer Council believes that quality assurance and monitoring of ADR is essential to help build consumer trust in the proposed new ADR mechanism.

8.2 We support the proposals to introduce an independent and transparent system for monitoring key features and principles of good ADR schemes to help build consumer trust in the process.

8.3 We believe it is vital that the Competent Authority provides transparent and effective regulation of the training and accreditation process for the independent mediators and arbitrators in ADR schemes.

## 9 Business Information to Consumers

9.1 The Consumer Council agrees with the proposal that businesses should inform consumers of the ADR schemes they are a part of and that this information should be provided to consumers before they enter into any online or offline contract

9.2 With regard to the proposal that businesses can approach ADR bodies with a dispute against a consumer the Consumer Council believes that alternative dispute mechanisms should not be used as a means for debt recovery against consumers.

## 10 Concluding Remarks

Please do not hesitate to contact the Consumer Council if you require any additional information. Our contact is Carol Edwards, Head of Consumer Education on 028 9067 4802 or by e-mail cedwards@consumercouncil.org.uk

# CONSUMER FOCUS

Consumer Focus
Campaigning for a fair deal

# Consumer Focus response to BIS Call for Evidence on EU Proposals on Alternative Dispute Resolution

**January 2011**

# About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

# Contents

# Executive summary

Consumer Focus welcomes the Commission's initiative aimed at providing consumers with a general Alternative Dispute Resolution (ADR) mechanism that they can use to resolve any disputes they may have with traders. However, we have concerns that the current proposals are too broad and, as such, will not provide the certainty of redress that is so keenly needed.

The greatest need is to have a system that tackles the unlawful trader and provides consumers with a quick, cheap, fair and reliable way of getting redress.

Accordingly, we believe any ADR scheme should:

- be compulsory for traders wherever this is practicable
- require decisions made by an adjudicator/ombudsman to be binding on the trader but not the consumer
- be limited to complaints from consumers about traders
- be free for consumers
- be funded by industry
- provide a decision within a reasonably short time period ie within a maximum of 90 days
- include effective enforcement processes as part of the scheme
- provide for a minimum level of training, clear suitability criteria for ADR providers and clear accreditation criteria for ADR scheme

# Introduction

ADR can be a useful and attractive option for consumers to obtain redress from traders and, as proposed, we would agree that an ADR system for use by consumers should be 'impartial, transparent, effective and fair'.

However, we do not agree that what the Commission is proposing or deems acceptable will lead to an ADR scheme that has all of these characteristics. In particular, we question whether some of the schemes that the Commission is proposing will be effective from the consumers' perspective.

ADR, as described in the Commission's proposal, includes a very broad range of possible schemes. We understand that the very nature of ADR, as well as the breadth of tradition and practices throughout Europe, encourages a broad definition. However, we see this approach as having serious limitations that will reduce, and possibly even negate, the intended benefit to consumers.

If this proposal is to be the instrument for the introduction of an effective redress system that will ensure redress for consumers whatever their Member State – and underpin the proposed Online Dispute Resolution (ODR) scheme – each and every ADR scheme introduced in Europe must have material common features rather than general common characteristics. If this is not the case there will be a wide variety of systems introduced throughout Europe which will do little to promote the 'level playing field' advocated by the Commission.

For example, currently under the proposal, acceptable ADR schemes could range from an ombudsman service that has mandatory application to a business sector and applies quasi-judicial decisions, to schemes that facilitate an exchange of information between the parties and that may or may not offer non-binding solutions. These two forms of ADR could provide very different outcomes and levels of engagement by traders.

To achieve the intended aim of providing consumers with redress across all business sectors and increasing consumer confidence in cross-border shopping, ADR systems that guarantee results and are properly consumer focused are required.

Not all systems of ADR will satisfy these aims – schemes that are discretionary and/or act to facilitate a consensual resolution are entirely dependent on the willing participation of all parties.

We would therefore propose the implementation of schemes that:

- wherever possible, are compulsory on traders: for example in regulated industries, or
- where compulsory application on traders is not possible or is very difficult to achieve, which may be the case with unregulated industries, where a trader signs up to the scheme, that trader must abide by any decisions or agreements reached under that scheme

We therefore strongly disagree with the view of the Commission that an ADR system that suggests rather than imposes a solution on the trader will be 'effective'. It may be effective if both sides agree to use the scheme and abide by any proposals: but from a consumer perspective, it will not be effective if a trader that promotes its engagement with the scheme can ignore any recommended or agreed solution.

Furthermore, we would not support the assertion that facilitated mediation can be relied on to lead to a fair outcome. By definition, mediation involves negotiation, which in turn can lead to rights being conceded. Research previously reported has found that mediation can, and often does, result in consumers agreeing a lower level of redress than that to which they are entitled. This may be either because they simply want to get the matter resolved as quickly as possible or they cannot face the prospect of court proceedings. (Consumer Focus, *Small Claims, Big Claims*, 2010).

# Responses to questions

## Question 1

### What are your views on the key estimates the European Commission make in their Impact Assessment (IA)? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

#### The wide definition of ADR

In its IA, the Commission refers to ADR schemes as including conciliation, mediation, arbitration, complaints boards and ombudsman services. While these can all come under the broad heading of ADR they do not guarantee the same outcome. For example, an ombudsman service that acts as an adjudicator, independently reviews the issues and makes a decision on what would be a fair outcome that is binding on the trader but not the consumer is very different to a conciliation service that acts solely to encourage and facilitate a discussion between the parties that may or may not lead to an agreed resolution.

Choosing such a broad definition of ADR may have allowed the Commission to accommodate the many dispute resolution styles/preferences within the EU but it cannot then lead to the stated aim of a range of EU-wide ADR schemes that are effective. The Commission's apparent view of what is effective should, in our view, focus more on outcome than process.

#### The effect of a wide definition of ADR scheme

The IA Executive Summary states: 'Particular attention needs to be paid to generating consumer confidence in the internal market and to ensuring a level playing field for business across Member States'. However, if a discretionary mediation scheme is the accepted ADR scheme in one Member State whereas an obligatory ombudsman scheme is the accepted ADR scheme in another Member State (and each of these underpins the cross-border ADR/ODR scheme) this will not create a level playing field or consistency across the EU.

#### The rights of consumers and traders to bring a claim

Consumer Focus has concerns about the ADR system being available for both consumers and businesses to bring complaints. If the thrust of the initiative is for consumers to be given redress and for an effective and attractive consumer redress system to engender the confidence necessary to increase the levels of cross-border shopping, it should be promulgated as a consumer-focused initiative. In reality, non-payment for goods or services is the principal issue a trader will have against a consumer. Traders can deal with this issue either practically (by requiring payment before goods or services are supplied) or through the courts. We recommend that the proposed ADR systems be available solely to consumers.

### Funding

The IA rightly notes that funding of ADR schemes by businesses is already a common practice in many sectors and Member States. But this statement does not, in our view, give due weight to the fact that this is generally the case in regulated sectors. This is significant as with regulated sectors it is far easier to:

- adjudicate issues in a narrow sphere of activity
- identify traders in that area of industry in order to enforce a requirement to fund the scheme

We would suggest that the potential methods of obtaining funding from non-regulated business areas is properly evaluated.

### Enforcement

Much is made of designing an ADR system that is effective, but nothing is mentioned about enforcement of any decisions or compromise agreements.

We would advocate that the issue of enforcement should be a central part of the proposals. A decision or compromise is simply one part of the redress process. Successful redress comprises a determination of what redress is due and the fulfillment of that redress.

The issue of enforcement of any decision is of paramount importance – a decision or determination is of little value if the practical outcome is that the consumer does not receive his/her dues. Not to include enforcement as an integral part of the ADR process runs the risk of undermining the efficacy and usefulness of the initiative to consumers.

## Question 2

**Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

**Comments on Annex B**

### Consistent standards

Without doubt consistent standards used by ADR providers are needed: Consumer Focus has been calling for credible self regulation of the mediation industry for some time (Reference: Consumer Focus, *Small Claims, Big Claims*, 2010).

For the reasons outlined above, a narrow definition of ADR should be applied otherwise the range of offerings will be so wide as to largely make the issue of standards irrelevant: one Member State or industry sector will offer ‘apples’ while another will be offering ‘pears’.

### Exporting ADR services

In relation to UK ADR providers offering services in other Member States, we see this as having potential as the UK has a wide experience of ADR and is a recognised leader in the field of mediation etc. Nevertheless, it is for those organisations with practical experience of such activities to comment on the financial viability of exporting these services.

### Non-compliance correction as a business cost

We find it strange that the potential change from businesses avoiding consumer redress to being challenged through ADR is presented as a potential cost. We would expect this to be seen as a benefit in that lawful businesses do not suffer an unfair disadvantage and consumers are provided with proper redress.

### Communication of adherence to an ADR scheme

In relation to traders telling consumers that they are signatories to an ADR scheme, such a communication could be managed by the use of a 'trust mark' logo which could act as a 'visual shorthand'. Website links to either the relevant ADR entities or the competent authority may be offered by those bodies to ease the burden on small traders and provide consistency of information.

### Costs of establishment and running costs

It is inevitable that some costs will be incurred as there are many areas of commerce that do not have ADR schemes attached to them. As suggested, a review of the 'gaps' in coverage is required, as is a review of the ways in which effective ADR can pragmatically be offered and funded.

One possible consequence of a successful ADR scheme in the UK might be a reduction in the number of complaints to Trading Standards Authorities. If this was the case, it may help offset costs imposed on the Competent Authority for the monitoring of the schemes. In any event, we would advocate an industry-funded approach to the setting up and maintenance of any EU-wide ADR initiative.

The cost of the ADR scheme may largely be in line with need. Already there are ombudsman schemes for the majority of regulated industries. From analysis of court actions and other sources of information, we can identify those business sectors in which the number of consumer complaints are high. The establishment of a general ADR system that either suggests or imposes decisions on the parties will be quite a task given the wide range of goods and services that it will potentially have to cover.

However this is achieved, we would advocate a 'polluter pays' system whereby those areas of business that give rise to the most complaints contribute the most. We believe this would be fair as well as encourage compliance and good business practice. Alternatively, a charge could payable by a business each time a consumer lodges a complaint about that business, as is the case with the Financial Ombudsman Service (FOS), to go some way to ensuring that reliable traders do not bear a disproportionate cost.

We advocate ADR systems that are fully funded by business. Such systems should be seen as beneficial to businesses as much as consumers in that they provide a level playing field and support the honest trader as well as acting as an independent arbiter/referee to the benefit of the trader as much as the consumer. After all, if there is an issue, it must be dealt with by the trader so an efficient and familiar ADR system may easily reduce business costs and avoid court costs in the long run.

## Comments on Annex C

### ODR

We assume that the significance of an ODR scheme would be to provide a translation service in respect of the use of non-domestic ADR systems. If this is the case it would provide a useful and much needed service to consumers.

## Question 3

**Do you think that the 'chargeback'process and/or processes used to resolve claims under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would or should be more likely to use 'chargeback' or make claims under Section 75 of the CCA where this is available, rather than using ADR to resolve a dispute? Why?**

Section 75 CCA should not be viewed as a form of ADR. This provision simply provides consumers with an additional party against whom they can seek a remedy (this right being founded on the premise that the credit/debit card issuer is an essential party to the transaction and benefits from it). Credit and debit card issuers are required, by financial services regulatory requirements, to have developed complaints handling processes. This means in practice that, in addition to any complaints handling service offered by the trader, a consumer can use the complaints handling service of their bank/card issuer. Neither the card issuer's nor the trader's complaints handling scheme is an ADR scheme – neither are independent nor impartial.

In the case of chargeback schemes, these are not dispute resolution schemes they are simply a way of suspending the consumer's payment obligation while a dispute is examined and a possible resolution is discussed. The 'suspension' period is usually fairly short, eg 120 days.

It is worth noting that invoking s75 or the chargeback scheme is not suitable for all disputes. For example, neither would be appropriate where the consumer requires a partial refund or replacement of goods. Such issues could however be dealt with through an ADR scheme.

## Question 4

**What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

The Directive's stated intention is to ensure that disputes between consumers and traders can be referred to entities offering an ADR system that is impartial, transparent, effective and fair.

These characteristics are all highly desirable for an ADR scheme. However we do not believe that the proposals tabled by the Commission will lead to these characteristics being satisfied.

To ensure that such a system is effective we believe that:

- The ADR scheme must act as an independent adjudicator/ referee – most consumers want an independent party to act as a referee and impose a decision that is fair. In some instances consumers may have a falsely inflated view of the quantum of redress that they are entitled to and, in such circumstances, having a referee helps the consumer to understand his/her entitlement. Similarly, an independent referee can help a consumer to properly assess whether or not an offer tabled by a trader is a fair one in all the circumstances.

- The ADR decision should bind the trader – in using an ADR scheme a consumer must be confident that any decision will bind the trader: an ADR scheme under which the trader can simply ignore any decision will not engender consumer confidence.
- Enforcement should be as important as a fair and independent decision – there is a greater rate of compliance with decisions reached as a result of voluntary mediation than in court cases where judgments are imposed (see Consumer Focus *Small claims, big claims,*2010), as is to be expected where both sides are genuinely seeking a settlement. But it should not be taken as given that redress automatically follows an agreed or imposed decision. Again, to ensure confidence and widespread uptake, appropriate enforcement measures must be seen as an integral part of any ADR system.

## 'Gaps' in the ADR landscape

There are known industry sectors where there is a high incidence of consumer complaints, for example second-hand car and IT hardware purchases, and mobile phone contracts, but we are not aware of any empiric study on issues across the consumer retail landscape. There are also key areas where there is a notable absence of an ADR scheme, for example in the private parking sector. A detailed review of the consumer retail areas and, where an ADR scheme is available, the corresponding satisfaction levels with any applicable ADR schemes, is advisable.

A comprehensive review of the available ADR schemes has already been undertaken by the Centre for Socio-Legal Studies based at Oxford University. But we are not aware of any information on consumer knowledge of, or satisfaction with, all of these services.

## Changes to existing ADR schemes – Extension of ADR to trader complaints about consumers

Article 3 of the Directive appears to ensure that no existing UK ADR scheme shall be altered to the detriment of consumers, which we endorse.

But we do not agree that existing or future ADR schemes should be adapted or expanded to permit complaints by traders against consumers. Such a proposal is not necessary; traders already have satisfactory practical and legal routes of redress and protection. Furthermore, we do not think it is advisable as the proposal should be viewed purely and simply as providing consumer redress. By presenting it as a general ADR scheme open to all comers its aim and intention will be confusing and may result in consumers not purchasing from traders covered by the scheme due to concern and suspicion that it would impose an additional liability on the consumer.

## Representation

We are concerned about the proposal at Article 8 that parties may be represented or assisted by a third party. While we understand that no restriction should be placed on consumers should they wish to avail themselves of assistance, any perceived or real imbalance between the trader and the consumer resulting from the trader being able to afford representation, legal or otherwise, should be avoided. The aim of ADR is to provide a 'low-key' and inexpensive alternative to legal action. We recommend that, as a minimum, traders should not be allowed representation if the consumer is not represented. This should go some way to making the process seem less like a court hearing and also less adversarial.

### Costs and recoverability of costs

We advocate a system of ADR that is free to consumers. Where this is not possible costs should be low and, at the very least, recoverable and payable by the trader in the event that the consumer is successful, in line with general equitable principles.

### Publication of outcome

Article 9 of the Directive states that any outcome of an ADR process must be made available in writing to the parties stating the grounds on which any outcome is based. We would expect a sophisticated system of reporting the outcome to be developed so that in addition to details on any agreed compromise, consumer satisfaction with the process and outcome is recorded.

### Information on ADR schemes

As proposed, there should be obligations on traders to inform consumers of any ADR scheme to which they subscribe. This information **must** be made clear and visible well **before** the contracting process so that consumers have all the information available to them in advance of selecting traders and making their purchasing decision.

But it is also necessary to consider how traders advise consumers where there is the option of more than one ADR scheme. Consider the scenario where a consumer has a dispute with a trader about electrical goods purchased using a credit card and s75 CCA applies. If the current proposals are introduced, the consumer will be able to choose between the 'general' ADR scheme applicable to the sale of electrical goods and the FOS scheme applicable to financial services disputes. Which ADR scheme the consumer will choose will depend a variety of factors: speed, cost and whether the scheme will determine the dispute, etc. In such a scenario, neither the trader nor the credit/debit card issuer should be able to advocate the scheme which benefits them the most. Advice should be provided about all potential ADR schemes so that the consumer can select the best scheme for him/her. This may best be accomplished by ADR entities being obliged to check that consumers have been given details of alternative schemes and an explanation of their respective advantages and drawbacks.

## Question 5

**What do you think of the standards/requirements of ADR providers that are proposed by the EU? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

It is critical that there is complete transparency as to the eligibility, selection and length of tenure of the Board of an ADR entity and the referees/adjudicators that they appoint. In addition there should be credible sanctions for the failure to operate an ADR entity in line with the applicable standards, including the withdrawal of that entity's licence/authority to operate/be included in the ADR network. This will ensure internal rigour and support consumer confidence in that entity.

There should be an obligation on ADR entities to publish details of traders who are repeated or egregious offenders (Article 16). If, aside from providing due redress, one of the aims of the proposals is to give consumers greater confidence in shopping cross border, then supplying information to consumers about such offenders should be part of the duty of the ADR operators.

We endorse the proposals relating to expertise and impartiality, however we would go further and suggest that the ADR scheme, even if funded by a relevant industry sector, be completely independent.

In the area of telecoms, we agree with the following proposals put forward by Ofcom in 2011:

1. the establishment of minimum standards for complaints handling procedures, which apply to all communications providers (the 'Ofcom Code'). The Ofcom Code establishes a regulatory requirement for providers to resolve complaints in a 'fair and timely manner' and also outlines minimum expectations about the accessibility, transparency and effectiveness of providers' complaints handling procedures
2. a requirement that communications providers provide additional information to consumers about their right to take unresolved complaints to ADR. Providers must now include relevant information about ADR on consumers' bills and write to consumers whose complaints have not been resolved within eight weeks to inform them of their right to go to ADR
3. the publication of data on individual communication provider's complaints record

## Question 6

### What do you think about the proposed role of the Competent Authority? What kind of organization do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organization that you think would be well placed to take on this role? How much do you think it would cost to fulfill this role?

Monitoring the performance of ADR entities is undoubtedly necessary. The Competent Authority should be a regulator/law enforcement body and we consider the OFT to be best placed to act in this capacity and to authorise, monitor and assess the performance of ADR entities. The OFT has internal expertise on redress schemes and the evaluation of eligibility, performance and/or compliance, as well as the necessary contacts with the Commission for reporting purposes.

## Question 7

### Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in an ADR? What evidence do you have to support this view?

Research and survey evidence invariably show that consumers prefer ombudsman-style redress to legal proceedings. This preference is borne out by the year on year popularity of FOS and the increasing number of complaints submitted to FOS. This phenomenon is no doubt a consequence of a number of factors:

- the obligation imposed on retail financial institutions to tell customers about FOS
- the concomitant increased awareness of FOS
- the publication of FOS 'success stories' and word of mouth

It must be appreciated that FOS is a shining example of how to operate an ombudsman scheme that consumers find easy to use and effective.

Not all ombudsman schemes are so revered. FOS shows that good ADR schemes produce results and can encourage consumers to change their behaviour.

Greater awareness of the effectiveness of ADR will undoubtedly lead to an increase in the use of ADR schemes. For example, Ofcom's review of complaints procedures (Ofcom *A review of consumer complaints procedures consultation,* 2009) shows poor consumer experience of pursuing telecoms-related complaints through company complaints procedures:

- 30 per cent of complaints (around 3 million per year) were still unresolved after 12 weeks
- the majority of consumers who could not resolve their complaint promptly had considerable difficulty getting their provider to recognise that they were trying to make a complaint and in finding out information about the complaints process
- those consumers who were unable to resolve their complaint within 12 weeks were much more likely to suffer financially or through stress

And yet only 8 per cent of consumers were aware that they could take unresolved complaints to an ADR operator. For those that did use an ADR scheme, the prospect of a resolution improved significantly: 91 per cent of mobile complaints that went to ADR were completely or partially resolved, compared with 51 per cent of mobile complaints that were not resolved within 12 weeks through the company's own complaints handling process.

## Question 8

### What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Clearly the impact on business of providing information can be managed by the use of standard information provided by the ADR body for use by all its trader members and the use of the internet.

It is worth pointing out that the Consumer Rights Directive contains information requirements for distance and off premises contracts relating to codes of practice and out-of-court complaint and redress mechanisms which business will have to adhere to when the directive is implemented in the UK.

## Question 9

### Do you have any other comments on the proposed Directive?

#### Fees

The Directive states that ADR should be provided 'free of charge or at moderate costs for consumers'. We would advocate that such a service should be free to ensure the maximum use of the scheme by consumers. A free service would also help the ADR scheme differentiate itself from the small claims court where charges are imposed. It may also mean that, if the ADR was unsuccessful for any reason, the consumer would still consider claiming in the small claims court as s/he had not already paid for a redress service.

If a charge is made for the ADR service and satisfactory redress is not forthcoming for whatever reason, a consumer is less likely to go on to use the small claims court, even with a good claim, as they may view proceeding as a waste of money having had one unsuccessful 'paid-for' attempt at resolution.

While our strongly preferred option is for there to be no charge, to maximise the attractiveness of redress schemes, where modest charges are viewed as necessary, we would advocate the recoverability of these charges in the event that a complaint is successful. Such recoverability is routine in the court system and we see no reason for this not to be the case with ADR.

## Question 10

**What do you think about the proposals in the ODR Regulation? What would be the cost/benefits of the ODR platform and facilitators to consumers, business and ADR providers? Would ADR providers be able to meet the 30 day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

### The inter-relation between ADR and ODR

There can be no doubt that the lack of a reliable and fair dispute resolution system puts some consumers off cross-border online shopping**.** So a proposal to provide such a facility is to be encouraged.

It is understandable that an ODR system is underpinned by the relevant national ADR system, and there is a clear statement in the IA that an ODR should be concluded entirely online, however, beyond this statement, there is little in the Directive/Regulation that anticipates how this will be done. Clearly there needs to be a fuller explanation as to how a Commission-managed portal will connect with ADR schemes in different Member States to deal with consumer disputes relating to all types of cross-border purchases and provide a dispute resolution process that is entirely online. As the IA Executive Summary states: ‘improving cross-border ADR relies on improving national ADR’. However, the link between ADR and online ADR is somewhat glossed over. The IA goes on to state that: ‘Very few existing ADR schemes offer the possibility to have the entire process online. Handling the entire process online would allow savings in terms of time and ease of communication between parties.’ We agree with this statement but would wish to see more detailed proposals for how this would be achieved uniformly across the EU. We would also counsel a proper understanding of the limitations and drawbacks of an ‘online only’ redress system.

### Time frame for resolution

It seems odd that a significantly shorter period is expected for cross-border online issues than the 90 day period suggested for ADR procedures. An automated system may reduce the time taken to disseminate information but sufficient time will still be necessary to conduct investigations etc. The added issue of language translations must also be accommodated. Therefore, while laudable, a 30-day resolution period is probably not practical. We would recommend the same resolution timeline for both ADR and ODR, namely 90 days.

## A disincentive to traders?

A consistent EU-wide ADR/ODR system should benefit traders as much as consumers. However, it is feasible that differing ADR systems among Member States may make traders reluctant to trade online or cross-border: doubts about which systems apply where or in what circumstances or advantages conferred by some ADR systems not being obligatory etc may well discourage traders and consumers alike. A diverse and confusing ADR landscape will not provide the improvements sought by the Commission.

## Current developments in the UK

In relation to ODR, the Government has already published proposals for working with online retailers to establish an ADR scheme for e-commerce disputes (BIS and Cabinet Office, *Better Choices; Better Deals,*2011). We would agree with its stated key principles for success, namely, universality, consumer awareness, policing and sanctions, and reinforcing mechanisms.

Consumer Focus
Campaigning for a fair deal

**Consumer Focus response to BIS Call for Evidence on EU Proposals on Alternative Dispute Resolution**

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# FINANCIAL SERVICES CONSUMER PANEL

Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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Dr Heidi Munn
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31 January 2012

Dear Dr Munn,

**CALL FOR EVIDENCE: EU PROPOSALS ON ALTERNATIVE DISPUTE RESOLUTION**

This is the Financial Services Consumer Panel's response to the call for evidence on Alternative Dispute Resolution.

The Panel has for some time been concerned about the fragmentation of cross-border ADR and has previously responded to the European Commission's consultations[1] on ADR in financial services. In that response we stated that this should be a priority area for action by the Commission so that rights to provide financial services cross border are accompanied by obligations and mechanisms to deal with complaints from consumers when problems arise.

We are broadly supportive of the recent proposals, although we do have some comments to make on specific aspects of the Regulation and Directive. Generally, we would be concerned if any of the proposals were to erode the protections already available to consumers in the UK, particularly through the operation of the Financial Ombudsman Service, which is more rigorous in its operation than would be required in some of the proposals.

**Principle of Transparency**

The Panel believes that there should be a presumption of transparency, unless there are robust and convincing reasons otherwise, in publishing information about complaints and dispute resolution processes. The FOS has already made important progress in this direction in its publication of firm-specific complaints data, and wishes to move further by publishing all ombudsman decisions. Article 7.2 of the draft Directive outlines the information which should be published in the form of annual activity reports, which is much less detailed than that which the FOS already supplies and wishes to supply in future. We would welcome confirmation that the

[1] '*Response to the Consultation Paper on use of Alternative Dispute resolution as a means to resolve dispute related to commercial transactions and practices in the European Union*', Financial Services Consumer Panel, March 2011
'*Response to DG Markt consultation document: Alternative Dispute Resolution in the area of financial services'*, Financial Services Consumer Panel, February 2009

provisions of the Directive, and also the confidentiality requirements of the proposed Online Dispute Resolution (ODR) services would not prevent such publication.

**Participation**

The Panel supports the compulsory jurisdiction rules within which FOS operates, and notes that the Directive does not require that traders must participate in an ADR scheme. The Directive needs to be amended to make clear that Member States may retain compulsory jurisdiction rules in sectors such as financial services.

However, provisions elsewhere, such as in the revised MiFID Directive[2] require Member States to ensure that bodies are established with a view to settling disputes out of court, to cooperate in resolving cross-border disputes, and we see this as an important step forward. We would therefore welcome a broader EU obligation on ADR in financial services.

**90 day resolution period**

Article 8(d) requires that disputes should be resolved within a 90 day period, from the date when the entity has received the complaint, with the possibility of exception for complex cases. Although we would support the timely resolution of cases, we do support the exception for complex cases, as we believe that 90 days may be insufficient time to investigate and collect evidence in some situations. This should be subject to some guidance in the Directive on the definition of 'complex cases' to prevent abuse. It is also necessary to specify exactly when the 90 day period begins, as cases may be referred inappropriately to the ADR body in the first instance, recorded, unresolved by the parties involved, and returned to the ADR body for final resolution. In such a case it would be inappropriate to start the 90 day time limit at the point of first contact.

**Governance**

We note the proposal that the 'collegial body' of an ADR must have an equal number of traders and consumers (Article 6). If 'collegial body' in this case could be interpreted as the governing body then we would prefer a less prescriptive requirement that at least half of the governing body must be independent, including representatives of consumers.

If, however, 'collegial body' means the body that adjudicates on consumer complaints, we would like to see a similar requirement. While we understand that what is proposed may not affect rulings by FOS, since they are not taken by a collegial body, this may not be the case for ADR bodies in other member states. In any event, some clarification of the definition of 'collegial body' in the Directive may be helpful.

**Complaints by traders against consumers**

We see no practical purpose in the provisions in the draft Directive which would apply it to complaints submitted by traders against consumers. In cases where, for

[2] COM(2011) 656 final: *Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments*, Article 80.

example, consumers have failed to pay for goods or services, there are other mechanisms in place to address this, and such a provision would serve only to open the possibility of a 'spoiling' counter claim against the consumer, discouraging them from taking part in the ADR process.

We would be happy to discuss any of these points in further detail.

Yours sincerely

Adam Phillips
*Chair, Financial Services Consumer Panel*

# FLA (FINANCE AND LEASING ASSOCIATION)

Finance and Leasing Association

# FLA RESPONSE TO THE DEPARTMENT FOR BUSINESS' CALL FOR EVIDENCE ON EC PROPOSALS ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE EU

1. The Finance & Leasing Association (FLA) welcomes the opportunity of responding to the Department for Business, Innovation and Skills' (BIS) call for evidence on the European Commission's (EC) proposals on the use of alternative dispute resolution (ADR).

## GENERAL COMMENTS

### Background

2. The FLA is the leading trade association for the asset, consumer and motor finance sectors in the UK. During the twelve months to November 2010, FLA members provided £73 billion of new finance to UK businesses and households. Of this, £21 billion went to support business equipment investment in the private and public sectors, representing over a quarter of all UK fixed capital investment. £52 billion was in the form of consumer credit, representing almost 30% of UK consumer lending. £19.7 billion financed the purchase of motor vehicles, including over 60% of all new private car sales.

3. Our members include banks, subsidiaries of banks and building societies, the finance arms of leading retailers and manufacturing companies, and a range of specialist lenders. They provide a wide range of credit products, including finance leasing, operating leasing, hire purchase, conditional sale, personal contract purchase plans, personal lease plans, secured and unsecured personal loans, credit cards and store cards.

4. The FLA operates a code of practice, known as the Lending Code, which is binding on FLA members. It sets out standards of good practice for the finance industry and provides consumers with the reassurance that they are dealing with reputable organisations. It gives consumers rights which go beyond those provided by law. It requires companies to ensure that all loans (including credit and store cards) go through a "sound and proper credit assessment" and that companies "act fairly reasonably and responsibly in all dealings".

5. On 1 February 2012 the FLA will publish a revised version of the Lending Code to reflect changes to the regulatory and economic environment. This can be

downloaded at www.lendingcode.org.uk. New consumer rights relate mainly to store cards and the payday lending markets, as well as additional help for all customers in financial difficulties. These include:

- New protections for customers taking out payday loans, including limiting the number of times such a loan can be 'rolled-over' to a maximum of three.
- New rights for store card customers agreed with the Government in Autumn 2011, including a ban on sales commission and immediate customer discounts – so people can make an impartial decision when taking out a card.
- Additional help for customers with debt problems, especially those with mental health difficulties.

6. We also operate the Business Finance Code which sets out the standards that FLA members will meet when providing asset finance to businesses and the public sector.

7. Both the Lending Code and the Business Finance Code are backed by free complaints and conciliation schemes. In most cases, if consumers remain dissatisfied, their complaints can ultimately be referred to the UK Financial Ombudsman Service (FOS), which is a statutory authorised independent service for setting disputes between financial businesses and consumers. The Lending Code has been supported by both the Office of Fair Trading and the FOS. On occasions, the latter has applied the requirements of the Code to a non-FLA member, as it considered that the Code represented best practice for the whole consumer credit market.

8. Members' compliance with both Codes is monitored by two separate independent groups established by the FLA.

**FLA Position**

9. The FLA is a keen supporter of self-regulation which provides a flexible adjunct to the statutory system, and can adapt quickly to changing market conditions. The vast majority of complaints brought to the FLA are successfully resolved. This avoids the need for costly and lengthy legal disputes.

10. The Lending Code largely conforms to the provisions set out in the draft Directive. There are number of points on which we would like BIS and/or the EC to provide clarification.

## RESPONSE TO SPECIFIC QUESTIONS

***Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?***
We are unable to verify the EC's figures, but we can confirm that there are savings to be made by avoiding costly court procedures. It is worth reiterating that ADR is, in our experience, usually free to consumers.

***Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?***
As you will see in our response below, we believe that the FLA's Lending Code largely conforms to the proposals set out in the draft Directive. Therefore we do not envisage much additional cost. The benefits of ADR are already well recognised by the FLA and its members.

***Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act (CCA) should be considered as a form of ADR?***
No, because "chargeback" is a form of legal redress, which does not match the criteria for ADR. If it was introduced, it would leave little scope for negotiation.
***If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?***
Yes because Section 75 of the CCA is more straightforward. People use it because it is well-known and, for example, often publicised in the media.

***Question 4: What do you think of the proposed scope of the Directive?***
The scope is fine. Our view is that schemes, such as the FLA's Lending Code, would be included within the Directive. Although our Code is exclusive to our members, we do not regard it as falling within the exclusion set out in art. 2(2a) which is targeted at ADR schemes operated by traders.
***Where do you think there are gaps, if any, in the provision of ADR currently in the UK?***
None that we are aware of. The FOS's coverage is extensive. There are schemes which pre-date the FOS taking over consumer credit in 2007, including the FLA Code.
***Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?***
Not applicable.

***Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU?***

They are generally sound. It is worth emphasising that art. 5(2c) requires ADR entities to accept both domestic and cross-border disputes. The FLA's Lending Code is open only to FLA members. Complaints against non-members would continue to be dealt with by the FOS. The FLA refers any cross-border disputes to the European Consumer Centre Network (ECC-Net) although we have not received any complaint under this scheme in the several years that we have been a member.

***If you are an ADR provider can you currently demonstrate that you meet them? If not, why not?***

Yes, we generally can subject to a number of clarifications:

- Art. 6(1a) refers to expertise requirements but how far would this be expected to drill down: for example, is the person responsible for the scheme supposed to have an in-depth understanding of the arbitration scheme?
- Art. 6(2) provides for an equal number of consumer and trader representatives on the oversight body. However, there are a majority of independent representatives on the FLA's Code Group, which oversees our code of practice. We would suggest an amendment to the effect that "at least half should be consumer or independent representatives."
- It is unclear why the requirements in art. 7(1a &1b) regarding the mandate of the persons in charge of the ADR scheme and the financing of the scheme are needed.
- Under the FLA Code, complaints can occasionally take longer than the 90 days specified in art. 8d due to delays in obtaining information. This requirement must therefore be qualified.
- The FLA's Code allows both parties to put across their point of view and hear the opposing arguments but only in writing. We assume that this would conform with the Directive.

***Would you be willing to develop your scheme so it could meet these standards?***

We do not believe this will be necessary. Our scheme is appropriate for one which is exclusive (members-only).

***If so, what might this cost you?***

Not applicable.

***Are there any standards that you think are not appropriate or not required? Are any missing?***

See our points for clarification above.

***Can you see any potential for UK ADR providers to provide their services to non-UK businesses?***

No, because legal and ADR systems differ between Member States. Under the FLA's Code we can refer cross-border disputes to ECC-Net.

***Question 6: What do you think about the proposed role of the Competent Authority?***
It is fine.

***What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role?***
It should be a regulator which can act impartially and get easy access to information.

***How much do you think it would cost to fulfil this role?***
We have no idea. Presumably the main outlays would be staff costs and to establish and administer a database.

***Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?***
Under the Lending Code, members must confirm in writing to customers that they are a member of the FLA. They also pledge to publicise the Lending Code, for example on their website. When a loan is taken out, consumers must be advised of complaints-handling procedures, including details of the schemes operated by the FLA and the Financial Ombudsman Service (FOS). Under the Financial Services and Markets Act (FSMA) and the CCA there is a statutory duty for lenders to inform borrowers about recourse to the FOS in the event of a complaint.

***Question 8: What would be the costs to business of providing these additional information requirements to consumers?***
There would be no additional cost. We already provide such information under the Code.
***How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?***
Not applicable.

***Question 9: Do you have any other comments on the proposed Directive?***
We are greatly concerned by the suggestion in recital 15 that national collective ADR schemes should be a precursor to a collective EU ADR model. The FLA does not support pan-European (or indeed at all) collective consumer redress procedures. The EC has not demonstrated that current redress mechanisms in Member States are inadequate nor the need for pan-European intervention. We would urge the EC take into account its better regulation principles which require a convincing business case to be made before legislation may be introduced.

***Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?***
Our members do not lend directly cross-border. Therefore we do not have any comments on the draft ODR regulation, which applies only to cross-border contracts.

**Edward Simpson**
**Head of Government Affairs**
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**Tel: +44 20 7420 9654**

**31 January 2012**

# FOS (FINANCIAL OMBUDSMAN SERVICE)

**Commission proposals on Alternative Dispute Resolution**
**Financial Ombudsman Service response to BIS call for evidence**

## Overview

The Financial Ombudsman Service, which traces its roots back to 1981, covers more than 100,000 'traders' (to use the language of the Commission proposals). We provide around 25% of all the ADR (across all consumer sectors) in the EU. We are familiar with the arrangements for (and significant gaps in) financial ADR elsewhere in the EU.

We think that there is a well-established structure of ADR schemes in the UK and that it would be unlikely to be necessary or helpful to create new schemes in order to extend the coverage they offer. The current ADR landscape in the UK reflects the differing needs of consumers and businesses for access to effective and independent dispute resolution as an alternative to the courts. This helps reduce costs for businesses (and consumers) and gives consumers confidence that if things do go wrong they can access redress without the need for court action.

We think that transposition of the proposed directive should recognise these differing needs by ensuring an overarching structure that meets the directive's aims while continuing to reflect the particular needs of different sectors. In broad terms we think three different groups of sectors can be identified.

- Those sectors, like financial and legal services, where there are well established information asymmetries and other market features that systemically disadvantage consumers in their relationship with service providers. Here we think the appropriate response would normally be a compulsory ombudsman service – preferably with statutory support.

- Those sectors where there are, or have been, widespread concerns about the fair conduct of traders and where it is recognised that large numbers of disputes can arise. These might, for example, include areas like estate agency where OFT has identified particular detriments that warrant regulatory action to secure fair and free access to redress. It seems to us that voluntary ombudsman schemes have proved valuable in providing specialist ADR here.

- Those other sectors where ADR may be less structured but provides a valuable alternative to the courts should disputes arise – as has been considered by the Ministry of Justice as part of its thinking around reform of the civil courts. Here the norm is individual or small groups of mediators providing paid for services by agreement.

Gaps in coverage do presently exist in this model. And we share the concerns about the quality and accessibility of some of the existing arrangements, especially in the third group. But we think that much of the existing landscape is well established and effective. It could serve as a base from which wider transposition of the directive could be developed.

We therefore think it is important that reforms should build on existing success to provide impartial, clear and accessible ADR for consumers and businesses that is efficient and effective and meets necessary quality standards. There is a risk that creating ad hoc new schemes may lead to unnecessary complexity for businesses and consumers and may undermine the clarity of existing arrangements. While it is important that ADR schemes have relevant sectoral expertise, they also need the organisational resilience to retain independence and impartiality and the ability to respond to a demand led environment.

While the Financial Ombudsman Service complies with the requirements for ADR bodies set out in the proposed ADR Directive, we have concerns about a few aspects of the proposal – including territorial scope, independence and claims by traders against consumers. Our detailed comments on the proposed ADR Directive are at *Annex A*.

We also have concerns about aspects of the practical operation of the proposed ODR Regulation by the Commission, and seek reassurance that its confidentiality provisions will not affect our transparency programme. We would welcome an opportunity of providing input on the implementation measures. Our detailed comments on the proposed ODR Regulation are at *Annex B*.

Our replies to the specific questions from BIS are at *Annex C*. These are supplementary to our main comments on the proposed ADR Directive and ODR Regulation in *Annex A* and *Annex B*.

Transposition of the ADR Directive will require some complex UK issues to be addressed. We suggest that this would benefit from input from those representing consumers and traders and also those with technical knowledge of ADR and the current ombudsman landscape. These technical issues are outlined at *Annex D*.

By way of background, we set out at *Annex E* the current landscape for financial ADR across the ADR. This illustrates the issues that the Commission's proposals are intended to address.

**Tony Boorman**
**Principal Ombudsman and Decisions Director**
**Financial Ombudsman Service**
**January 2012**

***ANNEX A***

**Proposed ADR Directive**

Save as mentioned below, we do not consider that the terms of the proposed directive would cause difficulties for the Financial Ombudsman Service nor in the sectors that we cover. We comply with its requirements for ADR bodies.

*Territoriality*

As mentioned above, EU policy has hitherto proceeded on the basis that, in cross-border cases where the consumer and the trader are in different member states, the ADR in the member state where the business is based should deal with the case – as it is more likely to secure the business's compliance with its decision.

It is unclear from the proposal whether the obligation on member states in article 5(1) – to ensure that disputes can be submitted to an ADR – is limited to goods/services supplied in/from that member state (consistent with existing policy), or whether it includes goods/services supplied from elsewhere in the EU to consumers in that member state.

For example, if member state A established an ADR to cover disputes between consumers in member state A and traders in other member states: there could be clashes of jurisdiction/decisions with ADRs established by the other member states; and it is unclear how the ADR in member state A could ensure that traders elsewhere in the EU comply with its decisions.

This issue relates to the obligation on member state A. It is different from the position contemplated by recital 14, which would allow member state B to authorise an ADR in member state A to handle complaints about goods/services supplied in/from member state B.

*Independence*

Article 6 (expertise and impartiality) falls short of the existing Principle I (independence) in European Recommendation 1998/257/EC and significantly short of the independence criteria in the British and Irish Ombudsman Association principles of good governance.[1]

At the very least, article 6 should be extended to provide that the natural persons in charge of the alternative dispute resolution should be appointed, for a term sufficient to ensure independence, by someone who is (or a body with a majority which is) independent of those subject to investigation.

*Claims by traders against consumers*

Recital 7 makes it clear that the proposal covers not only disputes initiated by the consumer against the trader but also disputes initiated by the trader against the consumer.

This would represent a major change for ombudsman schemes, which typically consider only disputes initiated by consumers against traders. It is unclear how the ADR would be able to ensure that the consumer complied with its decision – even if the consumer is in the same member state as the ADR, but more so if the consumer is abroad.

It also raises the prospect of a trader threatening/making a 'spoiling' counterclaim against a consumer who complains – so, in effect, obstructing the consumer's access to ADR that the proposal is otherwise intended to encourage.

[1] www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf

*Complaint-handling by traders*

Ombudsman schemes are usually established on the basis that the consumer must first complain to the trader, which has a specified time within which to respond to the complaint, before the consumer can refer the complaint to the ADR.

This maximises efficiency, because a majority of complaints are resolved by the trader, and only a minority – where the consumer remains dissatisfied – have to be referred to the ombudsman scheme.

To assist consumers, if they send their complaint to the ombudsman scheme first in error, many ombudsman schemes (including the Financial Ombudsman Service) do not just send the consumer away but assist them by recording the complaint and referring it to the trader.

These principles are reflected in the complaint handling rules and time limits which are set for financial complaints by the FSA, and which are set out in the DISP chapter of the FSA Handbook[2]. It would be useful to obtain confirmation that the Directive would not prevent these rules and time limits from continuing to apply.

It would also be useful to obtain confirmation that the clock for the 90-day resolution limit under article 8(d) would not start ticking until the trader has responded to the complaint, or the time limit for it to do so has expired.

It would be useful too if the occasions when the trader is required to identify the relevant ADR under article 10 were extended to include a trader's response to a consumer complaint – as in the last sentence of article 13(1) of the proposed ODR Regulation.

*90 day resolution period*

It is proposed under article 8(d) that disputes be resolved within 90 days, except in the case of complex disputes. We think this is does not adequately reflect the wide range of products and services the directive will cover, and could lead to perverse incentives and unintended consequences.

While it is true that ADR cases are highly variable – from the simple to the complex and from the relatively trivial to the life-changing – we think that it would be better if the proposal were recast to define the outcome that is actually being sought from ADR in every case, which is that each dispute should be resolved more quickly and informally than it would have been in the courts.

There is an example of this in s225(1) of the Financial Services and Markets Act 2000 (under which the Financial Ombudsman Service was created), where it states that the ombudsman is to resolve disputes "quickly and with minimum formality".

*Monitoring by competent body*

We think that the British and Irish Ombudsman Association (BIOA)[3] should be considered for designation as the competent authority under article 15(1). Alternatively, if BIOA does not meet the technical definition of a 'competent body' for the purposes of EU legislation, it might be possible for the designated competent authority to delegate certain functions to BIOA.

[2] http://fsahandbook.info/FSA/html/handbook/DISP
[3] www.bioa.org.uk

***ANNEX B***

**Proposed ODR Regulation**

Save as mentioned below, we do not consider that the terms of the proposed regulation would cause difficulties for the Financial Ombudsman Service or in the sectors that we cover.

Some of the issues raised below are issues of practicality. Unless DG SANCO's knowledge and thinking has moved on significantly since we discussed these issues with them in July 2011, we are not yet convinced that DG SANCO fully understands the practicalities and the extent of the task it has set the Commission.

*Scope*

The regulation would cover goods and services that are ordered online and which are not supplied or which are defective. It would be helpful, however, to have clarification of how far the scope is taken by the words 'arising from' in article 2.

Motor insurance – commonly bought online – is an example where this issue might arise. There are likely to be scenarios where the online cross-border purchase of the insurance takes place without problem, but later the insured car is written-off in an accident and there is a dispute between the consumer and the insurer about its value. We would assume, under article 2, that this would be a dispute "arising from the cross-border online sale" of the insurance – and so covered by the Regulation.

*Consent of trader*

Article 8(2)(a) envisages that the parties must be told that both the consumer and the trader have to agree on the ADR. This should be qualified by reference to article 8(2)(f) where the trader is legally obliged to submit to the jurisdiction of the ADR.

*Recognition of mandatory ADRs*

The processes set out in article 8(2) do not recognise the position of those ADRs established by members states on a mandatory basis – and indeed could allow their mandatory jurisdictions to be evaded where alternative ADRs are established with powers that are weaker than the mandatory ADR.

In order to mitigate the consequent risk of a reduction in consumer protection, we suggest that the ODR platform should automatically refer disputes to mandatory ADRs where member states have established these.

*Complaint-handling by traders*

As with the proposed ADR Directive, the proposed ODR Regulation makes no explicit allowance for the important pre-ADR stage in the complaint-handling process (see *Annex A* above). As above, therefore, we suggest that it would be useful to obtain confirmation that the Regulation would not prevent national complaint-handling rules and time limits from continuing to apply, nor that the clock for the 30 day resolution period under article 9(b) should start ticking until the trader has responded to the complaint, or the time limit for it to do so has expired.

*30 day resolution period*

As with the 90 day resolution period (see *Annex A* above), we believe that the proposal for a 30 day resolution period is simplistic, and would suggest that this be replaced by a more general outcome-based objective.

*Data confidentiality and security*

The Financial Ombudsman Service provides a high degree of transparency, including by publishing complaints data about named financial businesses – and is moving towards publishing all ombudsman decisions. We suggest that it would useful to obtain confirmation that these policies would not be prevented by the provisions of article 12(1).

*Practicality: complaint form and routing of complaints*

Article 5 provides for the Commission to provide the platform. Article 6(1) provides for national contact points. When we last spoke to DG SANCO it envisaged that most of the routing would be worked out electronically by the ODR platform, based on the standard complaint form.

Based on our own experience, even within one member state, we doubt that electronic routing will prove practicable – and we expect that much of the work will rely on human intervention by the national contact points. And in more complex situations the ADR will require more initial information than that envisaged by the standard complaint form.

*Implementing acts*

Articles 6(5) and 7(5) provide for implementing acts under article 15. We would welcome an opportunity of providing standing input to the UK representative on the committee established under article 15.

***ANNEX C***

**Replies to specific BIS questions**

Our main comments on the proposed ADR Directive and ODR Regulation are in *Annex A* and *Annex B* above. The following are replies to the specific questions from BIS, and are supplementary to those earlier comments.

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***Q1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?*

It will assist businesses, consumers and the Single Market if there were competent financial ADRs in all other member states.

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***Q2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?*

We have no comments.

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***Q3**: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?*

We do not think that these are forms of ADR.

We do not consider that chargeback should itself be considered as form of ADR for the purpose of the proposed ADR Directive for the following reasons:

- The chargeback procedures are in the contractual terms of the card networks, and card-issuers do not usually incorporate them in the terms of their contract with card-holders.
- The decision-making process for chargeback does not comply with the requirements of impartiality, transparency, effectiveness and fairness specified in the proposed ADR Directive.

We do not consider that connected-lender liability under section 75 of the Consumer Credit Act should itself be considered as a form of ADR for the purpose of the proposed ADR Directive for the following reasons:

- Section 75 applies only to credit cards, and not to debit cards, charge-cards nor stored-value cards – but most consumers are unable to distinguish one from another, and some cards are multi-function.
- At the Financial Ombudsman Service we have to handle cases where card-issuers have failed to honour their obligations under connected-lender liability. But there is seldom an ADR through which the consumer can pursue the original trader.

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***Q4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?*

There are clearly large gaps in ADR coverage across the retail economy. But, even in the financial sector, there are still some gaps that remain, such as:

- accountancy services;
- gambling;
- foreign currency exchange;
- activities benefitting from derogations from sector-specific single market directives (such as the Payment Services, Electronic Money and Consumer Credit Directives);
- advice to transfer between, or exit from, occupational pension schemes;
- administration of death-benefit-only pension schemes;
- activities carried out by (unlawfully) unauthorised financial businesses or unlicensed consumer credit businesses;
- activities carried out by holders of group consumer credit licenses, and
- activities carried out before they were regulated (e.g. pre-2004 insurance intermediation).

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***Q5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?*

We are content with the proposed standards, and we do comply with them.

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***Q6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?*

We believe that the British and Irish Ombudsman Association should be considered for designation as the competent authority – see our comments in *Annex A*.

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***Q7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?*

It is evident to us that consumers value ADR when they have a problem – and some consumers have told us that knowledge that ADR is available has made them more inclined to purchase a product or service.

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***Q8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?*

Financial businesses covered by our jurisdiction are already subject to similar requirements.

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***Q9**: Do you have any other comments on the proposed Directive?*

Please see the section on the proposed ADR Directive in *Annex A*.

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***Q10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?*

Please see the section on the proposed ODR Regulation in *Annex B*.

***ANNEX D***

**Transposition of the ADR Directive in the UK – technical issues**

UK transposition will need to address the issue of unclear boundaries and differing powers of ADR schemes.

The jurisdiction given to some ombudsman schemes (such as the Financial Ombudsman Service) is largely based on specified activities, irrespective of which entity carries them out. But the jurisdiction given to some other ombudsman schemes (such as the Legal Ombudsman) is largely based on specified entities, irrespective of the activities involved.

This means that there are significant gaps and overlaps, even in regulated sectors where ombudsmen already exist. The problems created will increase as sectoral boundaries become blurred, with – for example:

- the provision of packaged services, such as a remortgage service combining finance, property and legal services;
- the ability for financial businesses to acquire/create legal businesses, as 'alternative business structures' under the Legal Services Act 2007, and
- the ability for telecommunications companies to provide electronic money under the EU Electronic Money Directive.

Existing ombudsman schemes have also been given differing scope and powers on, for example: territorial scope; complainant eligibility; time limits; and compensation limits. So allocation of a dispute where there is an overlap between or amongst ombudsmen may have significant consequences for the outcome of the complaint.

In a few sectors, the position is complicated by the existence of so-called 'competitive' ADR schemes – although in reality this is not true competition, as only the trader and not the consumer is given any choice of ADR entity. We believe that this presents risks to the independence and impartiality of ADR schemes – as traders may favour the ADR entity they consider likely to give them the best outcome.

Transposition of the ADR Directive will therefore require some complex UK issues to be addressed. We suggest that this would benefit from input from those representing consumers and traders and also those with technical knowledge of ADR and the current ombudsman landscape. We therefore hope that BIS will consider the establishment of a stakeholder group to assist its consideration of these issues.

***ANNEX E***

**Financial ADR across the EU**

EU policy has hitherto proceeded on the basis that, in cross-border cases where the consumer and the trader are in different member states, the ADR in the member state where the trader is based should deal with the case – as it is more likely to secure the trader's compliance with its decision.

This policy is reflected in paragraphs 2 and 6 of the FIN-NET memorandum of understanding.[4] It is consistent with the statutory jurisdiction of the Financial Ombudsman Service, which covers services provided in or from the UK – irrespective where the consumer lives.

Consumers in the UK, and elsewhere in the EU, benefit from access to effective ADR – through the statutory Financial Ombudsman Service – for financial services and credit which are provided in or from the UK. But there are significant gaps, and shortfalls in standards, in relation to financial ADR across the rest of the EU.

These gaps, and shortfalls in standards, are relevant to UK consumers when they buy financial services or credit cross-border, which they sometimes do unwittingly by buying services online – in the belief that the services are being provided from the UK, when in fact they are provided from elsewhere in the EU (and hence outside our jurisdiction).

The table below shows our understanding of the availability – in the main sectors of banking, insurance and investments – of ADRs that comply with the current minimum standards in Recommendation 1998/257/EC.

| Country | Banking | Insurance | Investment |
|---|---|---|---|
| Austria | Yes | No | No |
| Belgium | Yes | Yes | Yes |
| Bulgaria | No | No | No |
| Cyprus | No | No | No |
| Czech Republic | Yes | No | Limited range |
| Denmark | Yes | Yes | Yes |
| Estonia | Yes | Yes | No |
| Finland | Yes | Yes | Yes |
| France | Yes | No | Yes |
| Germany | Yes | Yes | Limited range |
| Greece | Yes | Yes | Yes |
| Hungary | Yes | Yes | Yes |
| Ireland | Yes | Yes | Yes |
| Italy | Yes | Yes | Only if sold by bank |
| Latvia | No | No | No |
| Lithuania | Yes | No | Yes |
| Luxembourg | Yes | Yes | Yes |
| Malta | Yes | Yes | Yes |
| Netherlands | Yes | Yes | Yes |
| Poland | Yes | Yes | Yes |
| Portugal | Only for Lisbon area | Only for Lisbon area | Yes |
| Romania | No | No | No |

[4] http://ec.europa.eu/internal_market/fin-net/docs/mou/en.pdf

| | | | |
|---|---|---|---|
| Slovakia | No | No | No |
| Slovenia | No | No | No |
| Spain | Yes | Yes | Yes |
| Sweden | Yes | Yes | Yes |
| United Kingdom | Yes | Yes | Yes |
| Gibraltar[5] | No | No | No |

For banking, there are major gaps in six member states and only partial coverage in one more. For insurance, there are major gaps in ten member states and only partial coverage in one more. For investments, there are major gaps in eight member states and only partial coverage in three more.

Additionally, there is no financial ADR in Gibraltar – part of the EU, although not a member state – which is a significant source of financial services (such as motor insurance) directed at consumers in the UK.

In view of these gaps, and shortfalls in standards, in the availability of ADR even in such a highly-regulated sector as financial services, it is perhaps understandable why the Commission considers that binding action is required at an EU level.

[5] Territorially part of the EU, although not an EU member state.

# FSA (FINANCIAL SERVICES AUTHORITY)

30 January 2012

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd floor, Victoria 1
1 Victoria Street
London
SW1H 0ET

Dear Dr Munn

**Call for evidence – On EU proposals on Alternative Dispute Resolution (ADR)**

The Financial Services Authority (FSA) welcomes the opportunity to provide a response to the Department for Business Innovation and Skills (BIS) call for evidence on Alternative Dispute Resolution.

Overall we regard ADR as an important aspect of the regulation of financial services in the UK and as an effective means for resolving consumer complaints. So we welcome proposals in this area, provided they are proportionate, necessary and broad enough to take account of the different types of complaints that arise in different sectors.

The current ADR arrangements for financial services in the UK are well-developed and we note that these arrangements are broadly in line with the European Commission's proposals ('the proposals'). Given the very broad and cross-sector nature of the proposals, however, a number of outstanding issues require clarification, either in the text of the proposals or as part of the UK's future implementation. In particular:

- There are certain financial services activities in the UK that do not fall within the jurisdiction of the Financial Ombudsman Service (FOS) and so are not subject to an ADR scheme (or at least not the FOS). This means that there are potential gaps in the future provision of ADR in financial services when the proposals come to be implemented.

- Any time limits for the resolution of complaints by ADR entities should recognise the issues inherent in complex complaints, notably the need for sufficient time for parties to provide information to the ADR entity (noting that some consumers may be less able to communicate with the ADR entity).

- The proposals should enable ADR entities to have rules or procedures that are fit for purpose and tailored to their circumstances. So while procedures should ensure that it remains possible for consumers to bring eligible complaints to an ADR entity, some flexibility should be retained – for example the FOS has time limits in which a consumer must refer their complaint.

- The ability to exchange information is a key part of facilitating co-operation between national authorities and ADR entities. However the focus should be on enabling the

exchange of information when this is necessary to achieve a statutory function - not an obligation to provide information in a vacuum.

- Given the fragmented nature of ADR provision in the UK, we think it would be more practical to appoint different competent authorities to monitor the ADR entities which exist in different sectors (as is the case now with the FSA carrying out these responsibilities in relation to the FOS), with a single lead authority responsible for coordination and liaison.

- It is right that consumers receive appropriate information about ADR, but the most appropriate and cost-effective method of providing the consumer with this information will vary from sector to sector. So we are in favour of a generic requirement that traders should be required to inform consumers as to the availability of an ADR entity in a clear and comprehensible way, on specified occasions. But requirements should not set out the details of this and should recognise the information requirements in various existing EU directives.

- We strongly oppose the proposal that ADR entities should be used by firms to resolve complaints against consumers. We believe complaints arrangements should be designed primarily to assist those who are least able to sustain financial loss and who do not have the resources to pursue their claims before courts.

A more detailed response to the questions posed in the call for evidence is set out in the Annex to this letter. We are happy to discuss any of the points detailed in this response further.

Kind regards

Nadege Genetay

Head of Department, Conduct and Redress Policy

The Financial Services Authority

## Overview of the UK regime

*Background*

The FSA was established under the Financial Services and Markets Act, 2000 (FSMA) as the independent body that regulates most financial services in the UK. The FSA has four statutory objectives:

- maintaining confidence in the UK's financial system;
- contributing to the protection and enhancement of financial stability in the UK;
- securing the appropriate degree of protection for consumers; and
- reducing the extent to which financial services business can be used for financial crime.

The Financial Ombudsman Service (FOS) was also established under FSMA and has a single objective: to provide a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.

Consistent with this objective, the FOS' basis for dealing with complaints does not follow what is strictly required by law. Instead a complaint is determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case. In deciding what is 'fair and reasonable' the FOS takes into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what the ombudsman considers to have been good industry practice at the relevant time.

*Governance*

FSMA requires that the FSA take such steps as are necessary to ensure that the scheme operator is at all times capable of exercising its functions. The FSA has some governance and oversight responsibilities, including:

- appointing the FOS Board and approving the FOS budget;
- setting the scope of FOS' compulsory jurisdiction; and
- approving FOS rules (such as its procedural rules).

However to ensure that FOS is a viable, unbiased and trusted alternative to the courts, FOS is operationally independent. FSMA requires the FOS ombudsmen to be appointed on terms consistent with independence.

*Coverage and jurisdiction*

There are four criteria, all of which must be met, for FOS to be able to consider a complaint. These are as follows:

- The activity to which the complaint relates must fall within the Compulsory, Consumer Credit or Voluntary Jurisdiction;

- The activity complained about must be carried on from an establishment in the UK (although there are exceptions to this for example the Voluntary Jurisdiction also covers complaints about activities carried on from elsewhere in the EEA);

- The consumer must be eligible (that is they must be a consumer or micro-enterprise, charity or trustee of a trust fulfilling certain other criteria); and

- The complaint must be referred to the FOS within certain time limits.

*Complaints handling*

The FOS cannot consider a complaint unless a firm has already had a reasonable opportunity to resolve it Firms have eight weeks to resolve a complaint to the satisfaction of the consumer, after which the consumer can refer their complaint to FOS for consideration.

Upon receipt of a complaint, the FOS will immediately consider whether it should be dismissed (e.g. because the complaint is not eligible or because it is frivolous or vexatious).

*Operation*

FOS seeks to resolve cases by mediation where that is practicable. Where mediation is not practicable, FOS makes a formal decision. Formal decisions involve at least two stages. A determination (a final decision by an ombudsman) cannot be issued until the parties have been given an opportunity of commenting on a provisional assessment (usually by a case-handler).

A final decision is legally binding on the firm, but leaves the consumer free to pursue their claim before the courts if they wish.

The FOS can award up to £150,000 in compensation. It can recommend firms pay more when appropriate, but the firm is not obliged to follow this advice.

If a firm does not pay the compensation agreed by the FOS, the consumer can go to the county court. Independently of this, the FSA will take supervisory action against any firm it regulates for not paying a FOS award.

*Funding*

The FOS is free to consumers. It is funded through a combination of a general levy on all firms and a case fee. The general levy is divided across the activities that the FSA permits firms to undertake and increases with the amount of relevant business done by the firm.

The case fee is paid on a ‘pay as you go’ basis in respect of each chargeable case relating to that firm, which is closed by the FOS. The standard case fee charged is £500 for the fourth chargeable case and any subsequent case.

# Annex

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumer, business and the Single Market?**

Overall, we expect that the impact of the ADR proposals will be net beneficial. However, given our experience of ADR for UK financial services we believe that the stated benefits might be overestimated. The Commission state that if their preferred policy option 3 is adopted, all consumer disputes will potentially be solved. We note that for the proposals to lead to the benefits set out in the Commission's IA, both traders and consumers must choose to participate in the ADR entities established. We do not think this will necessary be the case for the following reasons:

- Consumers do not always choose to pursue all complaints through to resolution. In some cases this is because the opportunity cost of the time taken to pursue their complaint will outweigh the redress they are contesting.

- The main reason set out by the Commission as to why traders will choose to participate in an ADR is that it will be more cost-effective than pursuing a case through the courts. We are unable to comment on how many traders currently pursue complaints against consumers through the courts. However we know the majority of consumers choose not to pursue their disputes against traders through the courts because of the significant costs involved in doing this. Engaging in an ADR scheme therefore may end up being more costly for the trader if it means consumers bring more complaints against the firm than would have been the case if the consumer's only option was court.

Regarding the benefits and costs as set out in the Commission's IA, we have noted below how these estimations compare to those in relation to the existing financial services ADR scheme in the UK. In particular we note that:

1. The Commission estimates the savings to EU consumers if quality ADR is available to be around €20 billion. This is based on 60 million disputes being resolved by the ADR, each resulting in redress of €300. The 60 million disputes figure is calculated based on 425 million European citizens each having 1.75 disputes per year of which 8% can be resolved by an ADR.

   We note that in 2010 a total of 3.5 million disputes were reported by the financial services firms authorised by the FSA. In 2010/11, 206,121 financial services disputes were referred to the ADR entity FOS. This works out that around 5.8% of all financial services disputes reported were referred to the ADR entity. This figure is less than the 8% of disputes the Commission estimate can be resolved by an ADR.

   FOS is a mandatory scheme therefore the percentage of complaints it resolves is likely to be higher than that of a voluntary ADR scheme. As set out in the IA, for the large majority of the schemes already in existence, participation of the industry in the ADR procedure is voluntary.

   However, contrary to this, the percentage of complaints resolved by FOS may be lower than the percentage resolved by alternative schemes because of the incentives our rules place on firms to resolve complaints themselves (for example our rules on complaints handling and the way FOS is funded on a 'pay as you go basis').

We understand that the Commission also estimate that all 60 million disputes will result in €300 of redress each for consumers, in effect all disputes referred to an ADR will be upheld in the consumer's favour. In 2010/11 the involvement of FOS resulted in compensation for consumers in 51% of closed cases. We have previously stated that average redress awarded by FOS is £1000.

2. The Commission also estimates that the benefits to businesses from using an ADR scheme instead of going to court are between €1.7 – 3 billion. We understand that this calculation assumes that the cost of using an ADR entity is €854 (£731 using the exchange rate used in the call for evidence) per case compared with the costs of using court estimated at €7,000 (£5,991). It also assumes that businesses involved in ADR cases process two cases per year on average.

   As set out in the overview above, the FOS is funded by firms. All firms pay the general levy. In addition firms about which cases are referred to FOS are charged a £500 case fee for the fourth and each consecutive case. We understand that this funding structure is specific to FOS.

   The table below, taken from that published in a recent FOS consultation[*], shows that for the majority of firms, who have three or fewer cases referred to FOS in a year (and so never pay the £500 case fee), the average cost per case is £2.41 and these firms have an average of 0.08 cases referred to FOS per year.

   However for those firms which have more than four cases referred to FOS in a year, the average cost per case is £500 and these firms have an average of 200 cases referred to the ADR per year.

   Taken together the average cost per case of using FOS works out at around £490(€575) and each firm has roughly 5 cases referred to FOS in a year.

| | Total number of 'permissions'[†] | Total number of cases[‡] | Total levy income paid | Total case fee paid |
|---|---|---|---|---|
| Firms with 3 cases or less | 30,265 | 2511 | £6,061 | £0 |
| Firms with 4 or more cases | 743 | 148,724 | £11,586 | £74,362,000 |

   We note that the cost for business, per case, of using ADR entities will vary depending on the type of ADR scheme established. We also note that the number of cases dealt with per business by ADR entities will likely be higher if an ADR scheme is mandatory (as is FOS).

   The Commission also estimate the cost of pursuing a dispute through the courts to be €7,000. In a recent consultation paper[§] we estimated the cost to consumers of pursuing a dispute with compensation of over £150,000 through court might be between £125,000 to

[*] http://www.financial-ombudsman.org.uk/publications/pdf/charging-for-our-work-Jan12.pdf

[†] Firms pay levy income based on their permissions. There are 31,008 permissions spread over around 26,000 firms.

[‡] This is the total number of cases referred to FOS that fall within the Compulsory Jurisdiction. It therefore does not cover all cases referred to FOS in 2010/11.

[§] http://www.fsa.gov.uk/pubs/cp/cp10_21.pdf

£175,000 depending on the complexity of the case and the number of legal professionals and expert witnesses needed.

As we have set out above and given the costs involved, we think it is unlikely that for every consumer who currently refers their complaint to FOS, they would instead choose to pursue their dispute through the courts if FOS were not available.

3. Lastly the Commission estimates that the information requirements placed on businesses will lead to costs of €254 (£217) per business in total.

   We do not have any recent data on the costs of providing consumers with such information however we have provided costs from past data which was used to estimate the costs some firms would incur when we introduced additional disclosure requirements[*] as part of implementing the Distance Marketing Directive (DMD). As part of implementing this Directive we introduced new rules for deposit takers that prescribed, often for the first time, or changed the detail of: the content of product documentation; the delivery mechanisms for key features or other product documentation; cancellation rights that must be offered; and cancellation mechanisms.

   We estimated the one-off costs to 445 banks and building societies of these additional disclosure requirements (resulting from DMD) would be £8.9 million. This works out at an average of £20,000 (€23,370) per firm. We note that these additional disclosure requirements were likely to be more significant than those in the proposed ADR Directive; however this is still a significantly higher cost to businesses than the Commission has estimated in their IA. We therefore wonder if the Commission's estimate might be an underestimate rather than an overestimate as has been suggested.

   The Commission note that the cost of the information requirements placed on businesses is low as documents such as terms and conditions are updated regularly. We would also note that this is not always the case and depends on the nature of the product. Some terms and conditions are standardised and will change very infrequently, for example only when there are changes to the law.

4. The IA states that there are 15,251 businesses in the financial services sector in the EU, while acknowledging that this only includes businesses which belong to the categories 'credit institutions', 'insurance' and 'pension funding'. The FSA alone regulates approximately 27,000 firms.

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

As set out in response to Question 1, we think it is unlikely the proposals will lead to the intended benefits unless both firms and traders choose to participate in the ADR entities established.

We also note that the Commission has not taken into account potential transfer costs. The costs of setting up and administering ADR schemes, whether borne by traders or the government will ultimately be passed on to the consumer. This means that all consumers will effectively pay for the benefit of having an ADR scheme available to consider their complaints, but not all consumers will necessarily benefit from the ADR scheme.

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[*] http://www.fsa.gov.uk/pubs/cp/cp196.pdf

Given the existing regime for financial services that already exists in the UK, the FSA is keen to ensure that any costs incurred do lead to a consumer (or other) benefit, and do not simply bring about a change to existing provisions, which are already broadly equivalent in terms of consumer outcome, that has no or limited benefit. In particular the following proposals may have significant cost implications:

- Proposals for time limits in which ADR entities should have resolved disputes. For FOS to deal with all disputes within 90 days could come at considerable cost (see response to question 5). Although having disputes resolved more quickly is of benefit to consumers, this must be carefully considered against the time necessary for an ADR entity to fairly consider complex complaints, notably the time needed for parties to provide information to the ADR.

- Proposals for firms to disclose information about ADR entities to consumers at a stage or in a form that is different (or additional) to what is required currently in UK or EU rules. There might be no net benefit to the consumer as a result of these changes, given the substance of the information communicated has not changed. We would therefore query whether the costs associated with such a change can be justified.

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

Both Section 75 of the Consumer Credit Act and the Payment Services Regulations 2009 create rights for consumers to claim against payment service providers. Chargeback is the mechanism through which providers can claim recompense from traders for such claims. We do not consider that these processes fall to be considered as ADR under the terms of the proposals. They reflect consumer rights not a method of dispute resolution.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

The FOS is the only financial services ombudsman in the UK. However for a complaint to be considered by the FOS it must relate to an activity which falls within one of FOS' three jurisdictions; the Compulsory Jurisdiction, the Consumer Credit Jurisdiction, and the Voluntary Jurisdiction (see technical note in box).

Currently there are certain financial services activities in the UK that do not fall within FOS jurisdiction and so are not subject to an ADR scheme (or at least not the FOS). Examples of such activities are:

- certain complaints about foreign currency exchange

- certain pensions related activities that are not regulated by either the FSA or the pensions regulator

- certain activities that are exempt from the scope of regulation under other European Directives, for example Payment Services Directive.

This means that there is currently a gap in the provision of ADR in financial services.

Our understanding of the proposals is that consumers should be able to refer complaints arising from any type of financial services activity to an ADR and so there would have to be an ADR entity available to consider complaints about such activities.

To the extent that these complaints relate to financial services activities we think, where possible, these complaints should be covered by the FOS rather than a residual ADR entity.

Note that it is also essential to distinguish issues around 'scope' from those that relate to rules on the admissibility of individual complaints (that are indeed covered by an ADR). Please see our response to question 5 in that respect.

**FOS jurisdiction**

The FOS can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by an FSA regulated firm in carrying out one or more of the following activities:

- activities regulated by the FSA;
- payment services;
- consumer credit activities;
- lending money secured by a charge on land;
- lending money (excluding restricted credit where that is not a consumer credit activity);
- paying money by a plastic card (excluding a store card where that is not a consumer credit activity);
- providing ancillary banking services;

or any ancillary activities, including advice, carried on by the firm in connection with them.

The FOS can consider a complaint under the Consumer Credit Jurisdiction if it is not covered by the Compulsory Jurisdiction and it relates to an act or omission by a consumer credit licensee (regulated by the Office of Fair Trading) in carrying on consumer credit activities.

The FOS can consider a complaint under the Voluntary Jurisdiction if it is not covered by the Compulsory Jurisdiction or the Consumer Credit Jurisdiction and it relates to an act or omission by a Voluntary Jurisdiction participant ('VJ participant') in carrying out certain activities. These activities include:

- activities that were not regulated by the FSA at the time the act or omission occurred but were regulated activities when the VJ participant joined the Voluntary Jurisdiction.
- activities which would be regulated activities or consumer credit activities or payment service activities if they were carried on from an establishment in the UK.

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet those standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

The FSA is supportive of the proposals requiring ADR entities to be impartial, transparent, effective and fair.

Time limits for the ADR to resolve disputes

As a starting point, complaints should be dealt with as promptly as possible. However what is considered an appropriate timeframe for resolving a dispute will differ depending on a number of factors including the subject matter of the complaint, the information required from both parties, the circumstances of the complainant and the processes of the ADR.

Therefore any time limit for the resolution of complaints by ADR entities should recognise the issues inherent in complex complaints, notably the need for sufficient time for parties to provide information to the ADR entity (noting that some consumers are less able to communicate with the ADR entity.

Most notably time limits should not lead to the creation of simpler but less effective ADR entities (bearing in mind that this is a minimum harmonisation directive). An effective and fair ADR process (such as that operated at FOS, see technical note) may involve the consideration of a case at a number of stages before the case can be resolved. In some circumstances the outcome of the case can change from one stage to another (for example, when new information comes to light). We would not want the existence of time limits to drive ADR entities towards a simple resolution process which although quicker for the consumer may not achieve the level of fairness achieved by a more considered process (especially in more complex sectors such as financial services).

As an aside FOS currently deal with around a third of disputes within three months. In the 2011/12 year they have an operational budget of £102.9 million. So for FOS to deal with all disputes within 90 days could come at considerable cost, and the impact would need to be very carefully considered.

**Outline of FOS process**

At the FOS, a complaint is resolved via a number of possible stages:

- On accepting the complaint as a formal case, FOS notifies the firm and asks it to provide relevant papers. FOS received 206,121 new cases in 2010/11.

- After an initial assessment a FOS case-handler may decide that mediation, conciliation or mere explanation can bring the matter to a conclusion. This may be done over the telephone.

- Alternatively, after any further investigation the case-handler considers appropriate, the case-handler will issue a provisional assessment of the case. This may take the form of a 'view letter' sent initially to the losing party or an adjudication sent simultaneously to both sides. The parties may accept this. FOS had resolved 147,434 cases by this stage in 2010/11.

- Either party is free to reject the view/adjudication, ask for the case to be reviewed by an ombudsman and say why the result should be different. The ombudsman reviews the case from the outset. 17,465 cases were resolved by ombudsmen at FOS in 2010/11.

- After reviewing the case, including the losing party's reasons for rejecting the case-handler's view/adjudication, the ombudsman may decide to issue a provisional decision. Typically, the ombudsman will do this where there is likely to be a significant difference in outcome – so that the parties have a further opportunity to comment. In 2010/11 the ombudsman reached the same conclusion as the adjudicator in over 8 out of 10 decisions.

- The ombudsman will issue a final decision and set a time (typically, 28 days) within which the consumer can accept it. If the consumer accepts it within that time, it becomes legally binding on the consumer and the firm, and can be enforced in court. Otherwise, neither side is bound and both sides retain the right to pursue any legal remedies against the other in court.

Procedural rules

ADR entities should be in a position to have rules or procedures that are fit for purpose and tailored to their circumstances. So while procedures should ensure that it remains possible for consumers to bring eligible complaints to an ADR entity, some flexibility should be retained. For example, current FOS procedures:

- require the complainant to first complain to the trader before the case can be considered;

- provide for certain time limits in which the complainant must refer their complaint to the FOS; and

- give the FOS the discretion to dismiss certain types of complaints, such as those which are frivolous or vexatious.

Such procedural rules are intended to maximise the efficient use of the ADR entity's resources, as it should not be used to resolve disputes which could be resolved to the consumer's satisfaction without involving the ADR entity. ADR entities are intended to be free (or of moderate cost to consumers). So it is important that they are not overwhelmed by cases which could be handled outside the ADR scheme.

**Complaint handling by firms**

Before a complaint can be considered by FOS, the consumer must first submit the complaint to the firm concerned. The firm must consider the complaint and issue a 'final response letter'. Only when the firm has issued a 'final response letter', or if the firm fails to do so within eight weeks, can the consumer refer their complaint to FOS.

**Time limits for referring a complaint to FOS**

There is no absolute time limit on complaints that firms or the FOS can deal with. However in general, the FOS cannot consider a complaint if the complainant refers it to FOS:

- more than 6 months after the date on which the firm sent the complainant its 'final response letter'; or

- more than 6 years after the event complained of. However, if later, the complainant has 3 years from when they ought reasonably to have become aware that they had cause for complaint.

**Dismissal of complaints without consideration of their merits**

FOS can dismiss a complaint without considering its merits in a number of circumstances. A small minority of complainants may attempt to pursue complaints which are clearly without any merit. A few may attempt to resubmit a complaint which has already been considered by an ADR. Therefore FOS can dismiss a complaint without considering its merits where:

- the complainant has not suffered (or is unlikely to suffer) financial loss, material distress or material inconvenience;
- the complaint is frivolous or vexatious;
- the complaint has previously been considered or excluded under the FOS; or
- the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable independent complaints scheme or dispute-resolution process.

In addition, the FOS cannot overrule a court decision; that is a matter for the court appeal process. It would not be appropriate for a complaint which is also being considered by the court to be considered under the FOS, unless the court proceedings are stayed (by agreement of all parties or by order of the court) so that it could be handled under the FOS Scheme. There will be a few cases which can only be dealt with appropriately in court or some other forum – for example, because they involve the rights of a third party in addition to the complainant and firm. So FOS can also dismiss a complaint without considering its merits where:

- the matter has been the subject of court proceedings where there has been a decision on the merits;
- the matter is the subject of current court proceedings, unless the proceedings are stayed (by agreement of all parties or order of the court) in order that the matter may be considered under the FOS Scheme; or
- it would be more suitable for the matter to be dealt with by a court, arbitration or another complaints scheme.

Lastly there are a number of matters about which it would not be appropriate for complaints to be dealt with under an ADR scheme. These include:

- complaints about the legitimate exercise of a firm's commercial judgement, for example, the refusal of credit or to accept an underwriting risk;
- complaints about investment performance; and
- complaints from employees of firms relating to employment matters.

Co-operation between ADR entities and national authorities

We believe that co-operation and communication between ADR entities and national authorities benefits both consumers of financial services and the financial services industry by contributing to the efficient functioning of systems for both regulation and dispute resolution.

The ability to exchange information is a key part of this co-operation. However we believe that any duty to cooperate on exchange of information should not amount to an obligation to provide information, but should allow for the exchange of information only when this is necessary to achieve a statutory function.

Requirements obliging the FSA to provide unlimited information to the FOS may impact on our ability to obtain the information we need to be able to carry out our statutory functions, as well as conflict with existing legal duties or other arrangements.

In addition we see a need to clarify the 'provision of technical assessment' in Article 14(2). We are keen to ensure the ongoing independence of FOS. When considering cases FOS takes into account the regulators' rules and guidance among other factors. However it would not be appropriate to require a regulator, such as the FSA, to be called upon to give its view of individual complaints that are being considered by FOS.

**Information sharing between the FSA and FOS**

Our Memorandum of Understanding (MoU) with the FOS sets out a framework for the FSA and FOS to co-operate and communicate constructively in order to be able to carry out our independent and separate roles.

The rules which set out what information may be shared by the FSA and FOS are set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 and the Financial Services and Markets Act 2000 (Disclosure of Information by Prescribed Persons) Regulations 2001. They are also reflected in the MoU, and state that information sharing between the FSA and FOS is subject to relevant restrictions on disclosure of confidential information:

- So long as it has regard to any rights of privacy, the FOS may disclose information to the FSA for the purposes of assisting the FSA or the FOS to discharge its functions.

- The FSA may disclose confidential information to the FOS for the purposes of facilitating the carrying out of a public function of the FSA or a function of the FOS if permitted by FSMA 2000 (Disclosure of Confidential Information) Regulations 2001. The FSA is not permitted to disclose information which it has received in fulfilling its role under the financial services Single Market Directives or MiFID information received from an overseas authority.

These regulations do not impose an obligation on the FSA to disclose particular information to other bodies, however the FSA has a duty to co-operate with such bodies.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

The FSA is broadly content with the responsibilities of the competent authority in relation to the monitoring of ADR entities. However we note that the ADR proposals as they currently stand require each member state to appoint a single competent authority. Certain functions, ascribed to the competent authority in the proposals, are already carried out by existing bodies in the UK, such as regulators including the FSA.

Some of the responsibilities of the competent authority overlap with the FSA's statutory responsibilities for FOS. For example, FSMA provides that the FSA must appoint the chairman and Board of FOS and that FOS must report to the FSA annually on the discharge of its functions. Given this, we appear best placed to be able to carry out the responsibilities of the competent authority in relation to FOS.

The FSA does not consider it desirable to have a duplication of functions, nor are we convinced a single competent authority will necessarily be better placed to carry out certain functions, such as assessing the fairness and effectiveness of an ADR in highly-complex sectors, such as financial services (as is required by Article 17(1)).

Given the fragmented structure of ADR provision in the UK the FSA thinks it would be more practical to appoint several competent authorities to monitor the ADR entities which exist in different sectors, with a single lead authority responsible for coordination and liaison.

There are a number of variations in other EU consumer protection measures as to the designation of one or more competent authorities, and their co-ordination through a single contact point or lead authority.

**Question 7: Do you think that consumers would change their behaviour if business were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

**Question 8: What would be the costs to businesses of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

The FSA believes it is right that consumers receive appropriate information about the products and services they are choosing.

However the most appropriate and cost-effective method of providing the consumer with this information will vary from sector to sector. We would therefore like the requirements set out in Article 10 to be more in line with those set out in other Directives and reflected in our current domestic rules (see note below), which provide that traders must inform consumers as to the availability of an ADR entity in a clear and comprehensible way, on specified occasions, but do not specify exactly how this information must be disclosed.

The most appropriate method of providing this information to the consumer will vary depending on a number of factors, including the type of good or service, the nature of the consumer's relationship with the trader and the occasion on which they are requesting this information. What may be useful to a consumer in one set of circumstances may be useless in another.

In addition, as set out above, the costs of requiring traders to provide this information specifically in the general terms and conditions of contract, in invoices and receipts could be significant to firms and may be disproportionate to the benefits (which as set out above will likely vary considerably depending on circumstance).

The FSA would also take this opportunity to highlight that existing EU financial services directives provide that firms inform consumers about the availability of an ADR scheme, and that this is sometimes done through standardised information documentation. In addition the three European Supervisory Authorities for financial services are also conducting work on complaints handling. The European Insurance and Occupational Pensions Authority (EIOPA), for instance, is consulting on draft guidelines that require insurers to inform the consumer of their options to pursue their complaint (see note below).

**FSA rules on providing information to consumers about FOS**

The FSA already has requirements on the firms it regulates to provide summary details of their complaints handling arrangements. These summary details should cover that, if a complaint is not resolved, the complainant may be entitled to refer it to the FOS. Firms are required to:

- publish this information;
- refer consumers to the availability of this information in writing at, or immediately after, the point of sale; and
- provide such information in writing and free of charge to consumers on request and when acknowledging a complaint.

There are also other requirements on firms to inform consumers about the availability of FOS in our various conduct of business sourcebooks. (These requirements generally reflect the provisions in other Directives such as those set out below).

**Consumer information requirements in other Directives**

**Article 12(1)(e) of The Insurance Mediation Directive (Directive 2002/92/EC)** requires that:

*"Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information:*

*(e) the procedures referred to in Article 10 allowing customers and other interested parties to register complaints about insurance and reinsurance intermediaries and, if appropriate, about the out-of-court complaint and redress procedures referred to in Article 11."*

**Article 10(2)(t) of The Consumer Credit Directive (Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC)** requires that:

*"The credit agreement shall specify in a clear and concise manner:*

*(t) whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it."*

**Article 3(1)(4a) of The Distance Marketing Directive (Directive 2002/65/EC on distance marketing of consumer financial services and amending Council Directive 90/619EEC and Directives 97/7/EC and 98/27/EC)** requires that:

*"In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning:*

*(4a) whether or not there is an out-of-court complaint and redress mechanism for the consumer that is party to the distance contract and, if so, the methods for having access to it."*

**Guideline 7 of the proposed EIOPA guidelines on complaints-handling by insurance undertakings** requires that:

*"When providing a final decision, include a thorough explanation of the insurance undertaking's position on the complaint and set out the consumer's option to maintain the complaint e.g. the availability of an ombudsman, alternative dispute mechanism, national competent authorities, etc."*

**Question 9: Do you have any other comments on the proposed Directive?**

Use of ADR entities to resolve complaints filed by traders against consumers

The FSA does not believe that ADR entities should be used by firms to resolve complaints against consumers. Our current redress framework for financial services in the UK is not set up to be able to deal with such disputes and it was never our intention that it would. We believe complaints arrangements should be designed primarily to assist those who are least able to sustain financial loss and who do not have the resources to pursue their claims before courts.

The FSA also believes that enabling ADR entities to be able to deal with such disputes would undermine consumer confidence in their engagement with financial services firms, as well as firms more widely, and may make them less likely to complain when they have cause to do so, or to pursue their complaint through an ADR entity.

The temporal application of the Directive

We would like clarification as to the temporal application of the Directive, i.e. whether the Directive would require an ADR entity to be able to deal with all complaints including those relating to acts or omissions which occurred prior to the coming into force of the Directive as well as all complaints relating to acts or omissions which occur in the future.

We believe the Directive should apply to complaints arising from acts or omissions that occur from the date the Directive has to be implemented, and that member states should be able to decide the extent to which ADR entities could accept older complaints.

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, business and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

Many of the FSA's concerns with regards to the proposals for a Regulation on Online Dispute Resolution (ODR) reflect those that we have already set out above in relation to ADR. In particular we wish to re-iterate our concerns regarding the time limits for ADR entities to resolve disputes and the requirements on traders to provide information to consumers.

Time limits for the ADR to resolve disputes referred to it by the ODR platform

As set out above, the FSA supports the timely resolution of complaints by ADR entities. However we see no reason why complaints referred to an ADR entity via the ODR platform should be dealt with any quicker than complaints referred to the ADR entity directly. We do not think that consumers making online cross-border purchases should be positively discriminated against consumers purchasing goods and services domestically. As such, we think the obligations of ADR entities with respect to timeliness set out in Article 9 (b) of the ODR Regulation should be in line with those set out in Article 8 (d) of the ADR Directive.

Any time limit for the resolution of complaints by ADR entities should recognise the issues inherent in complex complaints, notably the need for sufficient time for parties to provide information to the ADR entity (noting that some consumer are less able to communicate with the ADR entity.

We note that rather than informing a consumer that their dispute will be dealt with in 30 days, it might be more useful for the ODR platform to provide consumers with a prompt acknowledgement of their complaint and keep them updated as to the ADR entity's progress in resolving it.

Providing information about the ODR platform to consumers

We note that Article 10 of the proposed ADR Directive already requires traders to inform consumers about the ADR entities which cover them and are competent to deal with potential disputes between themselves and consumers.

Provided traders comply with these requirements in the proposed ADR Directive as implemented by member states, then consumers should already know to which ADR entity they should direct their complaint.

As set out above, the costs to traders of providing this information can be significant. We therefore question whether the costs of also requiring traders to inform consumers of the ODR platform are necessary, when the ODR platform will essentially inform consumers of the ADR entities available to them. This is information which the consumer will already have been provided with by the trader in complying with the ADR proposals.

As with the consumer information requirements in relation to ADR, if traders are to be required to inform consumers of the ODR platform we think they should be required to do so in a clear and comprehensible way, on specified occasions, but that the proposals' requirements should not set out exactly how this information must be disclosed.

# FSB (FEDERATION OF SMALL BUSINESSES)

Federation of Small Businesses
The UK's Leading Business Organisation

31 January 2012

Dear

**CALL FOR EVIDENCE: EU PROPOSALS ON ALTERNATIVE DISPUTE RESOLUTION**

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with 200,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58 per cent of the private sector workforce.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours sincerely,

Tina Sommer

Chairman for EU and International Affairs

Federation of Small Businesses

Federation of Small Businesses
The UK's Leading Business Organisation

# FSB response to BIS call for evidence on EU proposals on Alternative Dispute Resolution

**January 2012**

Federation of Small Businesses
The UK's Leading Business Organisation

# CALL FOR EVIDENCE: EU PROPOSALS ON ALTERNATIVE DISPUTE RESOLUTION

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above consultation document on behalf of its 200,000 members across the UK.

Nearly half of our members trade online, and of those trading online 43 per cent do so within the European Economic Area.[1] Whether the internet is used as an advertising tool or as a second shop floor, online presence increases sales and allows businesses to find new customers. However, resolving contractual disputes can be costly and time consuming. Therefore we welcome the Commission proposals for Alternative Dispute Resolution and Online Dispute Resolution.

However, the FSB is keen to ensure that a balanced approach is taken to the impact assessment and all potential costs and benefits to small businesses are fully gauged. Clearly, there are benefits to be had for businesses in having cross border disputes dealt with more quickly and efficiently via the alternative dispute resolution (ADR) and mediation process in many cases. That said, those benefits are counteracted by costs to businesses at some point in the process paying for that ADR intervention and costs to businesses in communicating to consumers that the ADR option is available.

The issue too is that many small businesses are simply not aware or convinced about the benefits of ADR or mediation and have doubts about whether this truly offers a more cost and time effective way of resolving disputes. It will be important that the UK competent authority in partnership with the business community takes the lead on explaining the benefits to businesses. We would also prefer that these communications are honest and open and point out that ADR is not a panacea and recognize that there are simply circumstances in which a business may be better off, in terms of time and money in going to court. There will need to a push on the part of the competent authority and the business community to ensure that the ADR option is presented as a clear option to businesses. However, the scheme has to remain voluntary for the business and consumer. We cannot risk that businesses *must* subscribe to an ADR scheme.

Furthermore, the charges should reflect the amount under dispute. Therefore, a flat fee should be avoided because it would hit micros hard as the sales value of their transactions is often low.

In conclusion, we don't contest that businesses will pay, but the scheme has to be voluntary, proportionate and the timelines known in advance.

In response to the questions, broadly as laid out in the call for evidence:

<u>European Commission Impact Assessment</u>

We do not have any additional figures or estimates that may confirm or contest the statistics set out in the impact assessment. We don't contest that there will be benefits for businesses in reducing the costs and time spent on litigation. That said, ADR won't be appropriate in all cases

[1] *Small Businesses and Online Trading* FSB, December 2011



and may costs businesses, as we have already outlined, in terms of communicating to consumers and either direct or indirect costs in paying for the ADR process.

'Chargeback' process

From a business point of view, the FSB believes that we should approach extension of the chargeback system with caution. Businesses are already on the receiving end of chargebacks from consumers as a result of card not present fraud; often being a victim on multiple occasions losing £1000s in the process. Each small business in the UK loses on average up to £2900 per year to fraud which is a concerning figure in the current climate. Businesses are not protected by the banks or payment companies because card authorisation does not necessarily guarantee payment at the end of the day if the card details turn out to be lost or stolen. Given this wider context for businesses, the FSB would be wary of any drives to open up businesses to vexatious or spurious chargeback claims.

ADR Directive

The issue for us is around raising awareness of the benefits to business. We understand from discussions that there is currently spare capacity in the ADR/mediation market in the UK that could meet increased demand. Our concern would be that with additional funding or subsidy at a Government level being unlikely that even though the call is for the ADR to be free to consumers that it will be businesses that will end up paying either directly or indirectly for any services offered or available. It's important that businesses can expect a certain level of service attached to the ADR process. That said, the FSB would be wary of making process of meeting a standard to onerous for smaller providers to meet.

Lastly, if mediation is agreed, can the customer still go to court or is it binding? Once agreement is reached and fulfilled, is that the end of the matter or is there the chance that this can still go to court from either side?

Competent Authority

The important role for the competent authority will be to champion the role of ADR and mediation and in partnership with the business community sell the benefits to small businesses and explain how the process works and what the different options are.

Notification

With regard to the requirement to inform consumers, with think that thought should be given to costing the administrative burden for businesses in doing this and making information available on their websites. This cost should be quantified with further analysis on small businesses in the impact assessment.

ODR Regulation

Again, the FSB would like to ensure that in the cost benefit analysis that businesses do not end up paying more for this platform than they may receive through any benefits from cross border trade.


The effectivessness of the webplatform may rely upon straightforward and accessible design for businesses and through its availability be well communicated to businesses.

**For further information**

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# GRAHAM, COSMO – PROFESSOR

I am a Professor of Law with over twenty years' experience of researching and writing on consumer ADR schemes in the United Kingdom and have studied a number of sectors, such as financial services, energy, telecommunications, water and legal services. I unfortunately do not have any quantitative information that would enable me to estimate the costs of these proposals, so I have restricted myself to aspects of Questions 4-6.

**Scope of the Directive**

The scope of the Directive is "any contractual dispute arising from the sale of goods or the provision of services". This is a very wide scope which would cover all of high street retailing, supermarkets, tradespeople generally and motor traders, to give just a few examples. It would also cover public bodies where their relationship with the consumer is a contractual one, for example, local authority gym membership.

This seems to be far too wide. ADR schemes, in my experience, usually arise when an industry or part of an industry recognises that there is a problem for consumer redress. Usually this is in industries where, for a variety of reasons, market mechanisms are not functioning effectively. Government might encourage or require the creation of such schemes, or step in later to regulate them in order to ensure that they meet certain standards. In other words, ADR schemes are normally created in response to what might be called market failure. Although I think that there are gaps in the provision of ADR in the UK, I see no case for such a widespread extension of ADR schemes to all sectors where transactions are based on contract. For example, I do not see what benefit there would be in creating an ADR scheme for supermarkets. For me, the important gaps in provision of ADR in the UK relate to passenger transport (rail and bus) and water supply (which would not be covered by the draft Directive).

I am also concerned by the proposal that such ADR schemes should also cover complaints by traders against consumers. The danger here is that ADR schemes will be turned into debt collectors for traders, which is what I believe has largely happened with the small claims procedure in the country courts.

Implementation of the draft Directive would be very difficult. It is unlikely that all sectors could agree on a single solution, as is the case in relation to estate agents, and thus competing ADR schemes could be created, which the draft Directive does not seem to prohibit. Even with the best will in the world, there will be problems about defining the jurisdiction of ADR schemes in a way that is not confusing to the consumers and this will lead to pressure for a large sectoral ADR scheme, such as the Financial Ombudsman Service. As regards a residual ADR scheme, I simply do not see how this could work.

**Standards and requirements for ADR providers**

The basic principles which are set out are perfectly good ones. I think two provisions of the draft Article 5 are unnecessary: enabling parties to exchange information by electronic means and accepting both domestic and cross-border disputes. The former might be desirable, but it is not essential and the latter does not seem necessary in a general sense, although I can see that it might be relevant in some industries. Much of the rest of the provisions seem to be information that most

ADR schemes give in some form or another on their web-sites, although monitoring whether or not these provisions are complied with would seem to be a very onerous task.

**The competent authority**

The competent authority would have to be a newly created public body or a new agency or a division of an existing government department. The Office of Fair Trading would have been a candidate, but its consumer role is due to be abolished. I am not aware of any private sector or voluntary organisation that could fulfil this role. Given that the competent authority has a monitoring role, it would probably have to be a public authority. The alternative would be to require some agreement amongst ADR schemes to set up a central body. This would be difficult.

If the competent authority undertakes its role seriously, this could be quite a difficult task. It is also likely to have to deal with complaints from consumers that ADR schemes are not meeting the criteria set out in the draft Directive.

# HODGES, CHRIS – PROFESSOR

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UNIVERSITY OF OXFORD

28 January 2012

# Response to BIS Call for Evidence on Consumer ADR

Professor Christopher Hodges[1]

In this Response, I will not deal with every question raised by BIS, but concentrate on some major issues that might be otherwise overlooked.

## The Strategic Choice: CADR or Litigation?

In my view, the consumer ADR proposals need to be evaluated in a broad context. One needs to begin by asking what the ultimate policy objectives are. In my view, high level policy in relation to markets can be described simply as three things:

1. Set rules for business conduct;
2. Make sure that business practice conforms to those rules;
3. Restore balance as soon as possible after anything goes wrong.

Against that background, the techniques that are available for goals 2 and 3 can broadly be divided into enforcement by either public or private means. Classic private enforcement means individuals asserting their rights in court actions. Classic public enforcement means action initiated by a regulator. There are, of course, advantages and disadvantages with both those approaches, and variants of both have been developed. Court actions, for example, can be expensive, slow and not user friendly for consumers, so a small claims track and mediation can offer some advantages. Where individual issues occur for many people at once, on a wide scale, we wrestle with whether some form of collective private action can be devised, although there are perceived to be multiple disadvantages with such an approach. As an alternative, dealing with collective issues with the assistance of regulatory powers is being taken up in various contexts, and appears to offer a number of advantages in terms of speed and low cost.

The underlying question here is whether resolving individual and collective B2C issues is best done by an ADR technique or through the courts. I have little hesitation in thinking that an ADR approach is better than a litigation approach for resolving B2C disputes. However, if it is to be effective, the ADR approach must be incentivised and controlled. Accordingly, as a matter of high level policy, I strongly support the adoption of a policy of encouraging the development of a system of consumer ADR (CADR)[2] for such disputes. Indeed, I think that a

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[2] I think it is helpful to refer to CADR rather than consumer ADR, since CADR systems are different from the ADR techniques and systems with which many people are familiar, and this gives rise to confusion. ADR is usually understood as mediation in the context of court proceedings. The whole point about CADR is that court

decision of major strategic importance is now being faced at EU and national levels. We are at a very important cross-roads in terms of how we choose to develop not only dispute resolution but also regulation of business and consumer markets, and we must make the right choice now, and not defer it. The choice is between developing a system of CADR or a system of court-based enforcement and collective actions. We will miss the bus if we just kick the can down the road without picking it up. If a clear policy preference is not made between those two alternatives and things are allowed just to drift, both collective actions and CADR will be allowed to develop in parallel, and that will be a major mistake that will prove to be very costly. I believe that the evidence clearly favours prioritising CADR (and regulatory techniques) for delivering both redress and behaviour control, and keeping litigation as a long-stop. Issues of collective redress are being discussed now, and it is important to make consistent decisions between CADR and collective redress.

Accordingly I urge government, consumers and business to embrace the clear choice for development of an effective CADR system.

The rationale for this choice is based on the fact that CADR systems have a number of clear advantages:

- They can be quick and cheap to resolve disputes.
- They are cheaper and quicker than courts, both for consumers, businesses, the public purse supporting courts, and for the economy overall.[3]
- They can capture more individual disputes than would be attracted by courts or small claims procedures, on an individual basis.
- They are more speedy, cheap and effective for mass issues than a court-based collective action.
- Hence, they address gaps in access to justice that courts are not good at filling.
- They can do more than just resolve disputes, because they can also feed back market and regulatory information that can be used to affect market behaviour and regulatory action.
- That means that cost savings can be made on other regulatory and self-regulatory systems and enforcement.
- In many sectors, many of the contacts made by consumers to CADR systems are requests for information rather than disputes. That information function assists consumers and markets, and prevents disputes or dissatisfaction growing.
- In short well-designed CADR systems are good value for money and provide valuable benefits and savings.

**The Vision of ADR**

It is not widely known just how much CADR we have already. CADR has occurred within individual sectors, and gradually spread, rather than being centrally planned or organised. In UK, many sectors now have CADR systems, as a result either of statutory requirements where ADR has been imposed as an integral part of a regulatory structure (such as financial

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proceedings are not the overarching structure within which the dispute resolution takes place, and the structure is provided by different architecture, namely consumer ombudsmen or code-based systems.

[3] We are looking at such micro and macro data: it is difficult to assemble but I am confident about these assertions.

services,[4] pensions,[5] telecoms,[6] legal services,[7] new houses,[8] energy,[9] gas, electricity, postal services and estate agents,[10] now to be extended to the water, rail, coach, bus and tram sectors[11]), or of development of ADR by business sectors for their own commercial advantage, such as travel agents,[12] encouraged by schemes such as the OFT's Consumer Code Approval Scheme, which covers traders such as motor vehicles (new, repair and servicing), debt managers, medical products, carpets, direct selling, removers, and will writers. A 2010 study by the OFT identified 95 discrete schemes across 35 sectors.[13]

Given that effective CADR schemes now exist for such a wide range of disputes, the United Kingdom is getting close to a stage at which there are few gaps left, and it would make sense to ensure that all gaps are filled. Belgium is currently taking imaginative steps to do exactly this, by constructing at some speed a national internal portal supported by CADR schemes for all major sectors, and a residual capability.

ADR systems have also spread widely in other areas, not related to B2C disputes. Use of ombudsmen or code systems is widely used and spreading for disputes as diverse as between citizens and state entities, and within higher education. Mediation or other ADR techniques such as early neutral evaluation are, of course, now an integral part of litigation procedure.

ADR and ombudsmen are extremely widely used, and their use is being extended and encouraged. But these facts are not generally known to citizens or business, since existing schemes are sectoral and not joined up. Against that background, government should be aiming at establishing a simple idea in people's minds: if I have a dispute, I should first raise it with the other party, and then raise it with an ombudsman. In short, we should substitute the current idea of 'court' in people's minds with 'ombudsman'. If there were a national system, formal or informal, with horizontal coverage of ombudsmen, we would capture more issues, widen access to justice, resolve more problems, enable greater feedback to businesses, consumers and regulators about their markets, raise consumer confidence in markets, improve competitiveness—all far more quickly, cheaply and effectively than courts.

Hence, I advocate taking a logical next step in the development of CADR, by adoption of a national policy on establishment of ombudsmen/ADR for *all* disputes. Such an attitude is emerging *de facto*, but could be so much more effective if it were stated, and if the disparate component parts were to be joined up.

## The Central Problem

[4] The Financial Ombudsman Service under the Financial Services and Markets Act 2000, and the Lending Code scheme of the Finance and Leasing Association. Note also the Financial Services Compensation Scheme.
[5] The Pensions Ombudsman, under the Pension Schemes Act 1993.
[6] Ombudsman Services: Communications and CISCO under the Communications Act 2003.
[7] The Office for Legal Complaints and legal Ombudsman under the Legal Services Act 2007.
[8] Consumer Code for Home Builders' Adjudication Scheme.
[9] The Energy Ombudsman under the Consumers, Estate Agents and Redress Act 2007.
[10] ADR schemes for gas, electricity, postal services and estate agents all under the Consumers, Estate Agents and Redress Act 2007.
[11] *Empowering and Protecting Consumers. Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement* (Department for Business Enterprise and Skills, 2011).
[12] ABTA's Code of Conduct dispute resolution scheme.
[13] Mapping UK consumer redress. A summary guide to dispute resolution systems, (Office of Fair Trading, 2010), OFT, available at: http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf

In the consumer trading sector, there is a hurdle to be overcome. Many EU Member States currently have existing national CADR systems that provide full horizontal coverage for all types of B2C disputes in all consumer trading sectors. This is so across the Nordic States and central and European States. However, CADR systems in other Member States, importantly UK, Germany and France, CADR systems have been growing organically and cover quite a few systems, but there is as yet no full horizontal (residual) coverage. As noted above, wide comprehensive coverage has in fact been achieved by organic means in the UK. The problem is that, in the current economic climate, governments will be reluctant to fund the creation of extra CADR systems, or impose such extra cost unnecessarily on businesses, especially if the sectors that are not covered by CADR systems currently have in place good systems for dealing in-house with customer issues.

Accordingly, support and funding for CADR systems must come from business, since it is they who must pay for the system. In fact, our research shows that the vast majority of existing CADR systems across Europe are funded by business. This means:

- CADR systems must enable all existing customer care systems to continue and to be encouraged. This should not be a problem. All existing good CADR systems require consumers to raise disputes with the trader before it is able to be considered by the CADR. This should be made mandatory. That would encourage better and more widespread customer service.

- Pricing of CADR systems must be such that overhead costs and case costs that are imposed excessively on businesses that do not attract high volumes of complaints. Such pricing structures already exist in some schemes, so this should be soluble.

- There must be an obligation imposed by law that all traders must belong to a CADR scheme. Such an obligation has in fact increasingly been imposed by (EU and UK) statutes on various sectors.[14]

- The definition of CADR and the essential requirements must be wide enough to encompass all existing effective methods of dispute resolution, and others that might become introduced.

In relation to the last point, the Call for Evidence rightly mentions Chargeback. Pathways such as chargeback are widely used, effective techniques for resolving disputes between consumers and traders. With chargeback, the card company acts as intermediary, somewhat similar to an ombudsman, in being a channel for resolving a dispute, whilst also reversing/freezing the payment until the issue is resolved. This is a technique that should be encouraged. However, it is a voluntary technique adopted by payment companies, not a dispute resolution system as such. Its essential mode of operation is to freeze payments, and that acts as an incentive for consumer and trader to solve their dispute bilaterally. But this mechanism does not apply to all types of dispute. It works for issues such as non-delivery, but not for unfair terms.

## Competitive Advantages

[14] eg financial services, telecoms, energy, insurance, and others.

CADR in UK is in fact more developed than in most Member States, in terms of technique, sectoral coverage, numbers of disputes per head of population, efficiency, effective outputs, and low cost. Accordingly, compliance by UK ADR schemes with many of the requirements proposed by the Commission should overall not present a challenge. This would apply to the matters listed at para 27 of the Call for Evidence.

The UK possesses considerable knowledge and experience about 'how to do CADR' that could be spread across other States, quite possibly also to the commercial advantage of the UK CADR providers. Some Member States, particularly smaller ones, might wish to outsource handling of CADR disputes in particular sectors to larger CADR providers located elsewhere, which can offer advantages of sectoral expertise and economies of scale and hence value for money. Private sector CADR suppliers such as Ombudsman Services and CEDR/IDRS may be well placed to expand their businesses internationally.

**Qs 5 and 6. Quality Issues**

Almost all of the matters proposed by the Commission raise no particular problems and represent development of pre-existing trends. I would, however, comment on one issue, which is how to ensure the quality of CADR systems for cross-border disputes.

A pan-EU CADR system that will be used by consumers depends crucially on establishing trust, which in turn depends entirely on the quality of every national CADR scheme in complying with the essential requirements. Quality compliance is hardly an issue for UK CADR schemes at present. But it would clearly be an issue with some other Member States—but by no means all, such as the Nordics, where the residual CADR body either forms part of, or is closely linked to, the national consumer enforcement agency: hence those States have little problem in constructing a proposed CADR competent authority, and possibly little problem, over the extent of its funding. This highlights the point that where a Member State has CADR providers that are private sector bodies, the proposals around quality, essential requirements, and a competent authority, inherently involve greater concern. The UK's architecture involves both public and private CADR bodies. Although the UK might well not want to change this architecture, some thought should be given to whether converting to fully-public CADR bodies might save money overall.

If a number of public sector CADR bodies are to remain, some thought needs to be given to whether a separate or new competent authority is necessary for them. Would the FSA's successor be sufficient for the FOS?[15] Would there be a sufficient level of confidence in all foreign CADR systems that are located in or close to regulatory authorities?

If a significant number of private sector CADR bodies remain, in this country or any Member State, the issue is how to guarantee the necessary level of confidence in their quality. This is a classic regulatory question. The main options are *ex ante* approvals and/or *ex post* inspections and powers. Would it be enough to act only after quality complaints arise? I do not think so. So one is forced to contemplate an *ex ante* approval system plus some *ex post* monitoring. That technique inevitably brings a cost, but it is unavoidable.

[15] I in fact favour separating the FOS and other CADR bodies from regulatory authorities, since I do not believe that they build sufficient business confidence in the required level of independence. There needs to be transparency of the CADR bodies' data, but it is not satisfactory for a CADR body to be too close to a regulator.

In the UK, we have the models of the OFT's CCAS scheme (which it is proposed to cease, and replace by some form of standards-based self-certification or audited system), and a system in which a CADR provider is approved by a sectoral regulator (like telecoms and energy). The Commission's proposal is for national competent authorities (CAs), and that CADR providers notify the CA (self-certification). This is a light-touch requirement, not necessarily involving major cost. However, it may well not be strong enough. It might be, however, that a pragmatic and developmental approach is appropriate: the major objective is to establish CADR as a general proposition.

A further and related issue should be noted, and that is whether there should be any limitation on the number of CADR bodies. In general, private sector entities should be subject to the forces of competition. However, dispute resolution is not necessarily a market. The state's courts are monopolistic providers. All public sector ombudsmen are monopolistic. In the energy sector, a single CADR provider was appointed. Important considerations are that consumers should know of the existence of CADR, and trust the provider(s). Those objectives might be threatened if too many providers are permitted in individual sectors, or as a whole.

I believe, however, that the 'essential requirements' need to be reviewed and updated. The drafting of the Commission's 1998 and 2001 Recommendations was done a long time ago in terms of the development of CADR, and should be reviewed.[16]

**Q 7. Requirement for traders to inform consumers of CADR**

Quite a number of traders now inform consumers of the CADR option. My clear impression, although unsupported by data, is that where business sectors have done this, mandatorily or voluntarily, the number of consumer contacts has risen, as has consumer confidence in the sector and the prevailing standards of business practice. There may be some instances where the cost of providing particular types of information, at particular stages, might be disproportionate. Some sectors may argue that an information requirement would generate a rise in unmerited complaints that would cost significant sums to dispose of. In general, I do not believe that that fear is justified. I believe that the historical evidence supports the view that where consumers know about CADR schemes, there is a rise in requests for information, which can only be a good thing, since it reveals that consumers do not otherwise have enough information, but that the level of unmerited complaints has not risen. Those who feel driven to make complaints that are rejected would cost a great deal more to dispose of through court claims, especially collective actions. I therefore support the policy that consumers should have information about CADR.

However, the issue is 'when?'. It might not be necessary for traders to be subject to a requirement to provide information about CADR options before, or at the time of every purchase, or as soon as any dispute arises. A great deal would be gained if there were a national culture that consumers thought 'CADR' in place of 'courts'. I believe that different sectors raise different needs for information, at different times. Many large retailers print customer care contact information on the back of till receipts. As a matter of policy,

[16] We will propose a new version in our book.

consumers should be directed to contact customer care or trader information or complaint functions *before* referring issues to external CADR systems.

There should clearly be a requirement for traders to inform consumers about CADR options once it is clear that a dispute has crystallised, and cannot be resolved within a reasonable time. The telecoms sector has recently reduced the time for resolution of disputes from 12 to 8 weeks. Different sectors might have different times: the length should be a matter of empirical research.

# IDRAS (IMPROVING DISPUTE RESOLUTION ADVISORY SERVICE FOR HIGHER AND FURTHER EDUCATION)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Professor G.R.Evans

Organisation (if applicable): Improving Dispute Resolution Advisory Service (www.idras.ac.uk)

Address:

Telephone:

Fax:

Email: gre1001@cam.ac.uk

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☒ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: CEO, Chairman and Deputy Chairman consulted

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

IDRAS offers guidance in improving institutional dispute resolution and general guidance to individuals. See website at www.idras.ac.uk.

b) How much does it cost you to provide these services each year?

Not-for profit company with advisers working pro bono. Consultants list to be launched shortly, consultants forming their own arrangements with institutions.

c) What fees do you charge per dispute to whom for these services?

Free initial advice to individual students and employees. Institutional membership available (£500 pa..)

d) Approximately how many disputes do you seek to resolve each year?

We are aware of up to 100 UK-wide

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

No, though the outcome of a successful mediation will normally lead to the forming of a binding agreement.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

Higher Education and Higher in Further Education

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

Case-experience suggests that substantial savings in costs and management time are to be anticipated if higher education providers use ADR.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

ADR saves time and therefore money. Sums paid by institutions in settlements in employment cases in HE often reach £50,000 and there are legal costs and costs in management time over periods of years while such cases drag on. It is very common for employees to spend long periods on sick leave suffering from stress while the dispute remains unresolved, during which their salaries continue to be paid. This has its parallels in the costs of student disputes, particularly where they reach the Office of the Independent Adjudicator and the university has to prepare a lengthy defence, often relying on legal advice. The OIA may award substantial sums if a complaint is found to be justified. Please see OIA website for figures.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

1. Ensuring that ADR procedures exist for all consumer disputes:

1. this will require definition of the respects in which the provision of higher education involves a contract with the student and the extent to which this is a consumer contract. Employees of higher education providers also have contracts with the institution but these are employment contracts. Disputes frequently involve both students and employees. Is there a gap in proposed provision? Need to ensure that mixed-contract disputes can be included in the requirement?

2. Information on ADR and cooperation

Some institutions of higher education have begun to introduce in-house mediation schemes but commonly these are confined to employees and not available to students. There is little use of other forms of ADR, limited use of 'ombudsman' officers. There is limited management 'awareness' of the benefits of ADR, and information on the availability and advantages of mediation can be patchy. Institutions may refuse to attempt mediation. Review of procedures does not always result in the inclusion of ADR as an option. Cross-border disputes may arise where a student from a member state has a complaint against a UK institution of HE.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

The listed requirements (impartiality, transparency, effectiveness and fairness) are abstract and do not necessarily distinguish between training providers and providers of trained and qualified ADR practitioners. These are 'entities' of very different sorts. There is an urgent need for a regulated and quality-assured professional training for mediators in the UK. Arbitration is better-regulated.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

A body able to license practitioners and provide a professional code of practice with provision for disciplinary sanctions and the handling of complaints against practitioners would be very desirable, especially for mediators. Some extension of the role of the Law Society and the Bar Council and their cognate bodies might be appropriate, but it should not be taken for granted that ADR practitioners must be qualified lagal practitioners. The Civil Mediation Council already exists but it has a history of representing commercial providers of mediators and no track record yet in the field of training provision.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

Students and employees in disputes with institutions providing higher education often express a strong desire to use some form of ADR because it

it is felt to level the playing field for the much weaker party up against a large and powerful institution. The saving in time in reaching a resolution is especially valuable to students..

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Institutions are already required to provide Key Information (KIS) in some detail for students. The addition of information about alternative dispute resolution options would not add greatly to this burden.

**Question 9**: Do you have any other comments on the proposed Directive?

It is in the interests of the sector we work with that some overarching expectation such as this should come into being.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

It is hard to say how effective this provision would be for students from member countries or students in transnational campuses who find themselves making complaints. The questions about which institution is responsible can be complex.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# IMRG (INTERACTIVE MEDIA RETAIL GROUP)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

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http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

## Your details

Name: Andrew McClelland

Organisation (if applicable): IMRG

Address: 90, Long Acre, Covent Garden, London. WC2E 9RZ

Telephone: 020 7716 5604 or mobile: 07837 392963

Fax:

Email: andrew.mcclelland@imrg.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☒ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: Responses were

gathered through one-2-one conversations and feedback on proposed responses to questions.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

b) How much does it cost you to provide these services each year?

c) What fees do you charge per dispute to whom for these services?

d) Approximately how many disputes do you seek to resolve each year?

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

Overall, our view is that the impact assessment overstates the financial benefits to both consumer and business and the key assumptions are based on too-small a sample across the EU27. However, we do welcome steps to increase consumer confidence, particularly for the online market but strongly believe in the value of a voluntary rather than mandatory ADR scheme.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

As mentioned in the Call for Evidence, it is particuarly diificult to quantify these costs and benefits, particuarly for the online channel. At a basic level we are not aware of any way to track the number of online retlated disputes that are put before a small claims court. Whilst larger brands would expect to service customer complaints through thier own advanced internal processes, there may be some benefit to smaller or less well known brands in having access to ADR. However, with a typical average order value online at £85, most businesses would find it more cost-efficient to 'write off' the value of a disputed order rather than pursue a case through the small claims court.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

This process would not be fit for this purpose for a number of reasons. Firstly it was never designed to be used in this manner, would not be an efficient mechanism and would probably result in higher costs to all consumers in general who use a card for payments. Secondly, the process does not provide enough transparency and only gives a business retrospective opportunites to challenge. Thirdly, a business will only be aware that a charge-back has been made after the event and this timescale can typically run from a couple of weeks to a couple of months, depending on the size of the business. Finally, it would be difficult and costly for a business to reconcile the chargeback against a specific order. In this scenario, a customer could request a chargeback, with very limited checks being made on the validity of the reason, and receive a refund. The business will then face the prospect of having the funds claimed back by their aquiring bank, not have the goods returned and then face a lengthy appeals process. If this then finds against the customer, it would be extremely difficult for the business to claim the funds back from the

customer, possibly resulting in court action having to be taken and thereby going against the aims of ADR. Further, it may not always be clear whether the chargeback procedure will apply to a particular transaction, e.g.:

- where there are delivery problems.

- where the claim is for fixing faulty goods.

- where the time limit for a claim for faulty goods set by the card provider has expired.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

IMRG would certainly suggest a number of ADR mechanisms based on different industries and/or sales channels so that the appropriate expert advice can be applied. The compentent authority should be in a position to highlight the appropriate ADR for each sales channel/sector and under a voluntary scheme, the registered business can display information about the relevent ADR mechansim on their website, if they are a member of a scheme.UK online trading is covered by Internet Shopping Is Safe (ISIS) which operates as a trust mark incorporating law and best practice, mediation and dispute resolution.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

No response provided

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

The Office of Fair Trading and Trading Standards Institute would have the appropriate stature with industry and consumers to operate in this role.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

It is unlikely to have a major impact on its own as a number of other factors are more important to consumers in their decision making process when making a purchase online. Large and well known brands would all have extensive customer support operations whilst smaller brands may see some benefit as an additional confidence check for consumers. A good retail proposition (useable website, clear product descriptions and good price) are the most important factors. There is also a lot of customer review information available to consumers online so a business's reputation is easily resereached (IMRG research n=5684).

Making businesses display information about ADR's when they are not members will discriminate against them unfairly as they may well be a legitimate business with a good reputation but decide not to be part of the ADR for a number of valid reasons. For example, cost, the effectiveness of their own customer service operations and the types of products they offer.

Also, if it is mandated that a business displays the information about an ADR that they are not part of, this could increase consumer confusion and reduce the desired effectiveness of the ADR logo. Consumers will see the ADR mentioned and assume a business is part of it, the customer would then feel deceived if a problem does arise and confidence in the ADR would diminish.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

The costs are difficult to quantify for this document as different businesses will have different requirements. For example, these costs include providing details of which ADR entities are competent to deal with disputes and whether the retailer commits to use the named ADR entities to resolve disputes with consumers, on the retailer’s:

- website;
- general terms of conditions;
- invoices; and
- receipts.

A retailer that supplies a variety of goods and services may be covered by a multitude of ADR providers. In order to comply with the requirements of Article 10 of the ADR Directive the retailer may have to provide details of all relevant ADR providers.

In addition, similar consumer information is required by Article 13 of the ODR Regulation which would require a trader to provide the consumer with details of the ODR platform on its website and in any email or electronic text message in which an offer is made.

For cross border sales, not only would the trader have to make its website compliant, it would also need to ensure that its internal processes are compliant to ensure that if a consumer submits a complaint to the trader, the consumer would be informed of the ODR platform.

As a website can be accessed from other jurisdictions, most traders will have to comply with the requirements of both the ADR Directive and the ODR Regulation, unless it is clear that they will not sell outside the home jurisdiction. The result could be confusing for the consumer who will be faced with details and hyperlinks to a variety of ADR providers' websites as well as to the ODR platform.

**Question 9**: Do you have any other comments on the proposed Directive?

As mentioned previously, IMRG welcomes initiatives that promote consumer confidence in the online channel particularly but we do have a number of reservations about the proposed directive.

Registration of businesses with the appropriate ADR should be voluntary for the reasons outlined in our response to question 7. Mandatory registration will only bring confusion to the market and increased costs for businesses and ultimately consumers. ADR has the potential to benefit SMEs, but only on a voluntary basis where they can demonstrate their commitment to customer service. A mandatory scheme would not offer the same differentiation and would not bring the same consumer benefits as a business with poor customer service would in effect be using, or be tempted to use, the ADR mechanism as a customer service department.

IMRG also believes that access to courts and judicial process is as important to businesses as consumers and to this end do not believe that either party should be restricted from using the courts to settle a dispute if ADR is not able to satisfy both parties in the event of a ruling. For the majority of cases the pricing point of online trade is such that most complaints would go through ADR on the basis of expense. However, those exceptions should not be precluded from going to court.

Care must be taken when looking at the pricing point for lodging a complaint. Whilst it is understood why there may be demand for a free of charge system for consumers, this must be balanced against the possible demand, costs and capacity of the ADR. Free of charge would make it extremely likely that vexatious complaints are made and it would be wrong to expect a business or the ADR to fund the cost of processing these. ADR should also only be made available to consumers who have already lodged the complaint with the business and have not received satisfaction and confirmation of details from both parties could be seen as the prequalification before ADR is entered into. A modest charge, possibly reimbursed on successful conclusion of the case, could then be levied on the consumer. On this basis it is suggested that the core funding for the ADR mechanism comes from the public purse with elements of the costs being covered by business. As a mandatory or voluntary scheme, it is very difficult to see how the required funding could be

borne by either consumer of business contribution and if the aim of the ADR Directive is achieved i.e. less complaints going to ADR as business customer support improves then the cost per complaint ratio will increase making it harder for the ADR to be self-funding.

Finally, there is already concern about the number of 'trust marks' in the marketplace and adding another one to the mix will increase confusion amongst citizens and business. It would be better for both parties if existing schemes were supported by Government as appropriate.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

No response provided

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# LAW SOCIETY OF ENGLAND AND WALES

The Law Society

# EU proposals on Alternative Dispute Resolution (ADR)

## Call for Evidence

Response by the Law Society
of England and Wales
January 2012

supporting solicitors

# Introduction

1. The Law Society is the representative body for over 145,000 solicitors in England and Wales. It negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

2. The Law Society welcomes this Call for Evidence by BIS. The EU proposals for a Directive and Regulation on consumer alternative dispute resolution (ADR) are important proposals which have significant implications for consumer redress, access to justice and the future of consumer markets more generally.

3. Among the numerous factors which act as a hindrance to cross border consumer transactions sits the issue of redress. If something goes wrong with a cross-border purchase a consumer will often feel intimidated by the thought of having to use the legal system to solve a dispute. Further, even the Small Claims Court can be seen as disproportionately costly (by consumers) for low value transactions. Therefore it is sensible that a suite of options are available to try and help resolve disputes. Among these options should be consumer ADR mechanisms.

# General Comments

***ADR: useful for resolving some disputes***

4. The Law Society believes that ADR can be a useful mechanism for resolving low value business-to-consumer disputes between traders and consumers (B2C). In instances where the court process may be disproportionately costly compared to the value of the dispute then mechanisms such as consumer ADR are helpful ways to ensure that consumers receive appropriate redress.

5. Typically the advantages of ADR systems are that they are:

   - Quicker than the court system.
   - Less formal.
   - Have expertise in the particular areas.

   For these reasons, we support them.

6. In principle the Law Society welcomes the proposed Directive and Regulation. The proposals are an important opportunity to:

   - Set down important best practice benchmarks, which carry weight across the whole of the EU; and
   - Establish the framework for pan-EU cooperation on facilitating consumers access to ADR for resolving cross border disputes.

7. Further the proposals could act as useful catalysts, encouraging the development of ADR as one among a suite of ways of resolving disputes – available to consumers. The latter point is important note. ADR is useful in some circumstances and exists at one end of a spectrum of ways of resolving disputes. ADR is best used to find solutions to disputes that are relatively simple and straight forward. More complex disputes are likely to be more suited to other mechanisms such as the traditional courts system.

### *Pan EU ADR: not a panacea*

8. ADR should not be seen as a panacea that will result in a transformation in the quantity of cross-border transactions. Consumers do not generally enter into transactions thinking that there is likely to be a problem. They tend to rely on a number of factors such as the reputation, past experiences, guarantees and returns policies. The fact that there is an ADR mechanism is (in most cases) unlikely in and of itself to make a consumer buy from a foreign seller or service provider. It could be a reason why they choose one supplier over another.

9. Having a dispute over goods or services takes time, whatever the resolution mechanism, and consumers are only likely to proceed with disputes if the value/importance of the good or service makes it worth their while. A system of ADR covering every transaction is likely to be disproportionate and work needs to be done to identify the priorities and the major areas of trade where it would help.

10. A disproportionate and burdensome system, which is likely to be funded by the industry, may act as a disincentive for trade if traders feel that its costs outweigh the advantages of cross-border transactions.

11. It is worth noting that there is no ADR infrastructure or common understanding of how it might work in England and Wales. A wide range of ADR schemes (of varying effectiveness) currently operate in the UK and there is little uniformity of approach, let alone across Europe. It is too ambitious to develop one which applies universally.

12. We think that this ADR proposal should not be linked to the Common European Sales Law (CESL) proposal. We have significant doubts about the effectiveness of CESL while a properly proportionate ADR system can only be positive. It would be unfortunate if the failure of CESL were to bring down the ADR initiative also.

### *ADR: an alternative way forward*[1]

13. The Law Society considers that the Government should encourage the development of voluntary schemes which uphold high standards of accountability, impartiality in decision making, efficiency and transparency.

14. The Law Society believes that an effective cross-border consumer ADR policy framework should have three aims:

    - Encouraging schemes in the key areas where they may improve cross-border trade.
    - Increasing consumer awareness of ADR and its use, especially by those who currently fail to obtain redress when things go wrong.
    - Ensuring high standards of service and good quality decisions by ADR bodies.

15. In order to achieve these aims the policy framework should be based on three key principles: communication, decentralisation and utilising the effectiveness

[1] For a fuller outline of this proposal see the original response made by the Law Society to the European Commission consultation, March 2011, see Annex.

of networks (especially existing linkages). Such an approach should have four key components:

- Encouraging member states to establish ADR schemes only when and if it is appropriate. Mandating that member states set up consumer ADR mechanisms across all business to consumer transactions is a step too far. As a system ADR needs more time to mature before it can be imposed on all member states. A blanket mandate ignores the situations where it is not appropriate to have an ADR scheme in place, where an ADR scheme may displace an already well functioning system or where the evolution of ADR is the best solution rather than a swift imposition on a sector or economy. A varied ecology of redress mechanisms is the best guarantee of finding the most appropriate solutions.
- EU action to develop a network of hubs (or portals), which can signpost and assist consumers in accessing ADR in other jurisdictions. Legislation may be needed to vastly increase the capacity of the ECC-Net in order to fulfil this role and ensure effective cooperation between the ECC-Net in different member states. Policymakers need to ensure they have the requisite capacity to carry out both these tasks thoroughly and can cope with any significant increase in the volume of work. They should be monitored by the nationally designated Competent Authority.
- The setting of high standards to drive up the quality of ADR schemes. The Directive should mandate member states to establish an ADR accreditation scheme which meets certain EU prescribed standards.
- Dramatically increasing awareness of ADR schemes, which will involve a substantial communications exercise to educate consumers. Both Government and industry may have a role in achieving this.

16. Below we address in turn, most of the questions in the Call for Evidence. The responses are made in the context of the general comments outlined above.

## Call for Evidence Questions

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

17. The Law Society considers the estimates in the Impact Assessment to be a good starting point in terms of analysing the potential impact of ADR on the economies of the member states of the EU. However, some of the proxies used to estimate the impact could do with further refinement in order to offer a more realistic picture of the potential impact of ADR.

18. It is first worth noting that the implication (in the Impact Assessment) that the consumer will always find a better price online in another member state, compared to what is available domestically is over-simplistic. Purchasing online can be driven by a multitude of motivations e.g. unavailability of particular items elsewhere, convenience or trust in a particular brand or trader. Price is only one of a number of reasons consumers decide to purchase what they purchase and from whom they purchase. Therefore it seems over-simplistic to assume that if consumers shopped cross border more they would save more money.

19. The Call for Evidence highlights the fact that the Impact Assessment analysis appears to assume there would be almost 100% take-up among those who encounter a problem with a seller. This seems a little unrealistic. In addition, the Call for Evidence also points out that the Impact Assessment analysis suggests that those who do not participate in cross-border e-commerce (due to uncertainty over how disputes might be settled) would – in the presence of ADR – suddenly take up cross-border shopping. This also seems to be an optimistic assumption. Further, the figures set out in the Call for Evidence do not seem to make allowance for that fact that a proportion of problems will be resolved satisfactorily by the seller (or service provider) in the course of good customer service.

20. Two pieces of research suggest that the latter does happen in a significant number of instances. The first is a recent survey by the Irish National Consumers Agency, which found that 93% of those who made a complaint received a partially or wholly satisfactory resolution to their complaint[2]. The second is a comprehensive piece of research by the OFT which found that around 48% of problems get resolved and a further 14% partly resolved[3] through direct contact with the trader. This suggests that ADR may only be necessary in some cases.

21. It also needs to be remembered that an ADR system is going to require some work on the part of the consumer in contacting the scheme, setting out the dispute and dealing with correspondence. Many disputes will simply not be worth the effort involved. Many consumers who fail to resolve the case directly will decide that it is not worth the time to take the matter further and this will apply both the court and alternative mechanisms.

22. Finally, there has to be a question over the robustness of relying on one-off quantitative and qualitative studies to inform significant changes in policy. A robust and consistent set of results over a period of time would be a reliable indication of a problem that needed to be resolved.

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

23. The Law Society does not have any direct evidence on the costs and benefits to the UK (as described in Annex B and C). However, for small firms (involved in low volumes of cross-border transactions) the costs of being part of an ADR scheme might be a disincentive to engage in such activities. Indeed it may lead to some traders giving redress where they do not need to, in order to avoid the trouble of going further.

24. Further, the cost to the consumer has to be taken into account. As noted above[4], it will take time for a consumer to pursue a case through an ADR scheme. This is a cost to the consumer which they will have to weigh against the loss they have suffered. It is the type of consideration that might make some consumers reluctant to get involved with an ADR scheme.

[2] NCA (2011). '*Level of consumer empowerment hits record high"*, pub: National Consumer Agency, accessed at: http://corporate.nca.ie/eng/Media_Zone/Press%20Releases/consumer-empowerment-ireland.html
[3] OFT (2008). '*Consumer Detriment'*, pub: Office of Fair Trading: London, pg 50.
[4] Paragraph 21 of this response.

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

25. The 'charge back' process available under Section 75 of the Consumer Credit Act is an important element in the suite of methods that consumers have at their disposal to protect them when cross-border transactions go wrong. It is a useful consumer protection and we concur with the views of the Law Commission:

> '*From the consumer's point of view, section 75 is an extremely valuable right. So long as the goods are within the price range, the UK consumer may make a cross-border purchase using a credit card, knowing that if the goods are not delivered, or turn out to be faulty, they have a claim against the credit card company, in the UK courts. This may partially explain why UK consumers are particularly confident internet users*'.[5]

26. It can be very useful in situations where ADR is costly or the consumer considers it too burdensome a process to enter into. Consumers should use it more, where it is appropriate to do so. However, in a strict sense it is not really a system of ADR. At its core it is a liability issue and compensation measure, brought about by the Consumer Credit Act[6]. It is not a mechanism aimed at resolving disputes, which ADR is. It aims to prevent consumers from being stuck with a debt when the good or service they purchased with that debt does not materialise or is faulty.

27. However, its usefulness should not be overstated. It is not necessarily helpful in situations where the consumer does bear some element of fault or indeed where the consumer might prefer repair or replacement over compensation.

28. The Law Society believes that other member states might want to examine whether such a law would be useful to consumers in their respective jurisdictions.

29. Finally, as it is only available for purchases within a certain price range this is likely to still leave a significant proportion of consumers, who find themselves in a dispute with a trader, unprotected . Therefore it is unlikely to be a substitute for ADR in such circumstances.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

[5] Law Commission (2011). '*An Optional Common European Sales Law: Advantages and Problems*', pub: Law Commission and Scottish Law Commission, p 46, accessed at: http://www.justice.gov.uk/lawcommission/docs/Common_European_Sales_Law_Advice.pdf

[6] The 1974 Act was amended by the Consumer Credit Act 2006.

30. The Law Society has a number of concerns about the proposed Directive. As it is currently drafted the Directive is over-reaching. It needs to be more focused and less ambitious in scope.

31. In Article 1 of the Directive, it states that member states should ensure '*...disputes between consumers and traders can be submitted to entities offering...alternative dispute resolution procedures*'[7] . The accompanying explanatory memorandum highlights that the Directive is for '*...all disputes between a consumer and a trader arising from the sale of goods or the provision of services...*'[8]. This is worryingly broad and takes little account of the heterogenous and sometimes complex nature of consumer issues and their amenability to ADR. Further, in combination with no obvious value cap for cases, ADR is given unlimited scope, to which it might not be suitable and it might even end up displacing more suitable dispute resolution mechanisms.

32. Articles 1 and 2 and 3(3), in ensuring all B2C transactions are covered by an ADR scheme and that existing mandatory sector specific ones are subjected to the provisions of the Directive, offer up the possibility of damaging good and effective schemes currently in operation. The Directive also takes little account of the appropriateness of ADR in the wide range of circumstances that the proposals would cover. For example, it has to be questioned as to whether ADR is useful when dealing with very low value transactions or high value transactions. The question is then raised as to whether there should be a minimum value threshold. It is also questionable whether some sectors would require a highly specialised ADR scheme due to their technical or complex nature, but whether a niche ADR scheme would, at the same time, be economical. Further issues around the size of businesses that should be covered by schemes can also be raised e.g. is it sensible to expect micro-firms to be covered by ADR given their particular characteristics.

33. The evolution of ADR schemes i.e. schemes that slowly expand their remit, learning as they go along are more likely to deliver a more effective outcome for consumers than the swift imposition of new mechanisms on a sector or economy. In the latter situation a steep and messy learning curve will undoubtedly follow.

34. The implications of the current scope of the Directive are very significant. The Law Society's first preference would be to remove the mandatory requirement in the Directive and allow voluntary schemes to emerge. If the requirement on member states to establish some form of ADR option for B2C transactions remains in place a second-best solution might be to only apply it to those traders selling cross border and to exempt those sectors where high quality schemes such as the sectoral ombudsmen, already operate. Overriding and interfering with existing effective ADR schemes is counter-productive. The Directive (as it currently is written) appears to either require areas currently outside the remit of ADR schemes to be brought within them or for new schemes to be established in order to cover them. There may be a case for extending the remits of sectoral ombudsmen but this is best done on a

[7] EU (2012). '*Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*', pub: European Commission, pg 12.
[8] EU (2012). '*Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*', pub: European Commission, pg 4.

cautious, case by case basis as the particular ADR scheme grows in experience, knowledge and effectiveness.

35. In the legal sector for example, extending the Legal Ombudsman's remit may mean changes to the Legal Services Act 2007. These complicating factors will likely be repeated in other sectors covered by sectoral ombudsmen.

36. To achieve either the preferred or the second best option would mean Articles 1, 2 and 3 of the Directive being amended accordingly.

37. Further, the Law Society would oppose any attempt to make the Directive more prescriptive than it already is. For example, it currently leaves room for the member states to decide how to organise their consumer ADR e.g. whether general ADR schemes or sector specific ones are most appropriate and fit best with the prevailing circumstances and traditions of the member state. This is important. The particularities of each member state's consumer and legal culture and structures mean that any ADR scheme has to dovetail with those. This can only best be decided upon by the member states themselves.

38. The Directive does not specify a limit in terms of the value of a case that can be taken to ADR. The Law Society supports the member state retaining discretion in this area. A member state may decide that the ADR schemes within its jurisdiction should be able to decide on their own value limits. This might allow some ADR schemes to specialise e.g. some might focus on cases disputes within a particular value-range, others might focus on traders of certain sizes or in certain sectors of the economy. The point is that the member state is best placed to set the framework for this. Each member state has different legal structures and traditions, which any ADR structure would need to interact with and respect. Imposing arbitrary pan-EU value limits could create overlap and confusion. Such a blanket approach would likely lead to waste and duplication, undermining the objective of increasing simplicity for consumers.

39. The Law Society supports non-compulsory membership of ADR schemes. There already exists a compulsory dispute resolution system – the courts. Alternative systems are additional, they are there to compliment the existing system, for example by helping increase access to justice where the court system finds it difficult to reach. Therefore ADR should be encouraged but voluntary for both parties.

40. The Law Society believes that over time the benefits of being a member of an ADR scheme will begin to speak for themselves. The incentives are strong and traders - as more and more join schemes – will see the advantages membership brings e.g. in terms of reduced costs because of speedier resolution and increased revenues[9].

41. The Law Society supports the requirements in Chapter IV (of the Directive) on the monitoring of ADR entities, including the designation of a Competent Authority (as set out in Article 15).

[9] Research found that 85% of firms using ADR managed to reach a settlement with a customer using ADR. 55% of firms rated the main advantage of ADR as the ability to settle disputes quickly, with 25% saying it allowed a firm to maintain their reputation. The same research found 73% of businesses who had used ADR were satisfied with their experience. 82% said they would use it again and 70% preferred it to going to court, with 83% believing it was cheaper than court. Source: European Business Test Panel (2011). '*Alternative Dispute Resolution'*, pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

42. If ADR is to be compulsory, then it is likely to need substantial government pump-priming and subsidy. In supporting an alternative to the courts it is likely to come with significant burdens e.g. it will involve cost and administrative requirements on business. For example the existing sectoral model which operates in the UK has required little public funding as the relevant ombudsmen are usually funded by the businesses in their respective sectors. The Government may wish to consider following this model if any further schemes are introduced. However, targeted, voluntary schemes may well be developed without such subsidy and, in a time of austerity, this is what we would encourage.

43. The Law Society believes that there are currently gaps in the provision of ADR in the UK. OFT findings suggest consumers of services are better catered for (in terms of ADR coverage) than consumers of goods[10]. In addition with only 48% of problems resolved[11], both indicate there is scope for improving consumer access to redress.

44. While consumer ADR is relatively young there are a number of well regarded ombudsman schemes operating in the UK which are seen as offering good models as to how to organise ADR schemes. One of the most often cited is the Financial Ombudsman Service, which resolved nearly 165,000 cases in 2010/11[12]. As would be expected for a relatively young sector, there is room to improve some of the existing schemes[13] and scope for expanding ADR into new areas. The Government should seriously examine the case for rigorous ADR schemes in a number of other large and important economic sectors. These might include passenger air and rail travel. This would be a sensible and gradual expansion of ADR, using the established sectoral model already in operation in the UK. The key lessons from those sectors already with effective schemes can be used to ensure effective ADR schemes are adopted in new sectors.

45. Over the medium to long-term, despite the potentially significant burdens which accompany ADR, it is likely that the voluntary expansion of ADR will generate a net benefit to the economy. This benefit would likely come in the form of:

    - More confident and satisfied consumers, more likely to be willing to engage in more cross-border dealings.
    - The development of better complaints handling systems by traders, leading to improved customer service and customer retention.
    - A better functioning market (as poor firms are driven out or improve their customer service over time).

46. The start-up and running costs of an ADR scheme therefore have to be seen in this medium to longer-term context.

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be**

[10] OFT (2010). '*Mapping UK consumer redress*', pub: Office of Fair Trading: London, pg 2, accessed at: http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf
[11] OFT (2008). '*Consumer Detriment*', pub: Office of Fair Trading: London, pg 50.
[12] FOS (2011). '*Annual review 2010/11: about this document*', pub: Financial Ombudsman Service: London, accessed at: http://www.financial-ombudsman.org.uk/publications/ar11/index.html
[13] The OFT identified 95 schemes across 35 sectors in operation in the UK. Source: OFT (2010). '*Mapping UK consumer redress*', pub: Office of Fair Trading: London, accessed at: http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf

**willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

47. ADR schemes should adhere to very high standards. They are quasi-judicial bodies and need to have the confidence of both sides in any dispute. Therefore, they should be independent with robust governance structures that guarantee this. To help ensure independence they need to be both transparent and accountable.

48. The Law Society in its response to the EU Commission consultation in March 2011[14] highlighted a number of key principles that any ADR scheme should embody. These include:

    - Independence of the decision making body.
    - Transparency of the process.
    - Adversarial principle.
    - Effectiveness principle.
    - Legality principle.
    - Liberty principle.
    - Principle of representation.
    - Consumer convenience.
    - Relevantly skilled staff.
    - Informational (data) security.

49. Therefore the Law Society is comfortable with the principles suggested by the Directive (Articles 5 to 9 inclusive). They match those set out in the 'Recommendation on the Out-of-court Settlement of Consumer Disputes'.

50. However, the Law Society does not consider that these should be binding standards on member states. They should form part of a uniform EU 'gold standard' accreditation for ADR schemes, which member states could be required by the Directive to recognise. Further, that the Competent Authority in each member state should be empowered to award and monitor such accreditation. This would set a high best practice standard or ADR schemes across the EU. The 'gold standard' accreditation would signal to potential users the quality that they can expect from submitting their dispute to such a scheme. It would be expected that this kind of quality assurance mechanism would encourage use by consumers and businesses of those particular ADR schemes which had it. The Law Society would support amendments to the Directive (including Chapter IV) to ensure such an outcome.

51. If policy makers insist on imposing the requirements in Articles 5 to 9, then it is important that member states retain the discretion to decide the details, including in Article 6 of the Directive. This Article describes how those operating an ADR scheme must '...*possess the necessary knowledge, skills and experience in the field of alternative dispute resolution*...'. The Law Society considers this wording to be important in order to make sure that those mediating or adjudicating are requisitely regulated and qualified to be carrying out such a role. The Law Society would encourage member states to develop

[14] LSEW (2011). '*Consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union – Response by the Law Society of England and Wales*', pub: Law Society of England Wales: London.

minimum standards which enabled a range of providers to operate ADR schemes within or across sectors, regions and even economies.

52. ADR is rightly aimed at resolving the non-technical, straight forward, low-value disputes that arise between consumers and traders. It is likely that in many circumstances this will mean the consumer and trader representing themselves in the process. However, if an ADR scheme is wide ranging in its remit it may capture more complex and higher value disputes. In such circumstances it is right that consumers can be represented by a solicitor or other third party. We believe Article 8(b) of the Directive is sufficient to assure this. However, BIS may wish to get absolute clarity on this point, to satisfy itself that this will be the case.

53. The Law Society considers that the Directive does not need to prescribe maximum time periods in which a complaint has to be resolved. This is set down in Article 8(d). The Law Society believes this kind of micro-issue is best left to member states or indeed the ADR schemes themselves to decide. The latter are best placed to make a judgement on the complexity or otherwise of the case and therefore the length of time it is likely to take. However, consumers should be given a clear estimate (at the start of the process) of the likely length of time their case will take. Therefore a transparency requirement would be the best policy option. The Law Society would support a suitable amendment which established this. In the absence of the possibility of removing a time requirement completely, then a second best option would be to have the Directive require schemes to resolve cases in a 'reasonable' period of time, but still avoid specific timeframes.

54. The Law Society supports the discretion that the Directive appears to give to member states in terms of the organisation of ADR schemes, allowing a range of ADR providers to emerge in a member state. With a varied range of ADR providers innovative approaches to operating consumer ADR schemes are likely to develop. This would mean that best practice will evolve rapidly through trial and experiment. This flexibility allows those member states who want to establish a single, uniform national scheme do that. Over time, across the EU, it would be reasonable to expect those ADR schemes, delivering the most satisfactory service and using the most innovative methods, to help drive up standards across the board. The Law Society would oppose a more prescriptive approach, which endangered the benefits of this organic and evolutionary approach.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

55. The Law Society considers that the Government should have a transparent process for identifying a body which could carry out the role of the Competent Authority under the terms of the Directive. It should be a process open to both public and private bodies, who wish to apply for the role.

56. However, having one Competent Authority raises potential complications from the UK perspective, in relation to the sectoral ADR schemes, such as the Financial Ombudsman Service, the Energy Ombudsman and the Legal Ombudsman (among others). These are already part of well established sector

specific structures, where the existing sectoral regulator has extensive expertise. The Legal Ombudsman for example reports to the Legal Services Board (LSB). Therefore there is a question as to whether under these proposals the LSB would have to relinquish that role? If so, this would have implications for the Legal Services Act 2007.

57. In light of such uncertainty in the UK, the Law Society believes that the Competent Authority should have the power to create a set of criteria for ADR schemes which it would approve/ recognise (e.g. on requirements to send information to it as set out in the Directive), but no particular ADR scheme would have to report to it in governance terms.

58. The proposal above may require appropriate amendments to be made to the Directive, including Articles (15 to 17 inclusive).

59. The Law Society agrees with the duties placed on the Competent Authority, as set out in Articles 16 and 17 of the Directive. The Competent Authority should be required to:

- Survey and maintain an up-to-date list of all the ADR schemes operating in the member state.
- It should be obligated to regularly produce a report on the 'state of ADR' in the country, mapping its development, setting out what is considered emerging best practice
- Highlight where there are deficiencies and gaps in the operation of ADR schemes.
- Information should be required to be promptly shared with the ECC-Net in the same member state.
- ECC-Nets in other member states must be able to acquire copies of this information.

60. Further, formal and ongoing liaison between the ECC-Net and the Competent Authority should be required by the Directive.

**Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

61. Consumer behaviour is driven by a number of factors. It is not easy to isolate one factor that will lead consumers to alter existing purchasing behaviour.

62. The estimate used by the European Commission in the Impact Assessment is (as noted previously) a reasonable start at estimating how behaviour might change but is not robust enough to give a clear idea[15]. Significant research would be required on this issue to identify the strength of any causal relationship between consumer decision making and ADR. However, the Law Society believes that in some cases consumers might feel more inclined to transact cross-border if there is a good ADR system in place.

63. Therefore the Society believes strongly that traders should have to inform consumers explicitly if they are part of an ADR scheme. The Law Society supports the provisions in Chapter III of the Directive on information and

[15] Paragraphs 17 to 22 of this response.

cooperation. In addition, it is crucial that the organisations signposting and facilitating access to ADR across borders have up-to-date information on the schemes they are signposting consumers to and linking with.

64. While membership of an ADR scheme should not be compulsory the benefits of being part of an ADR scheme (over time) should be the biggest incentive for many firms to want to join one.

65. The ways in which a trader should be required to inform the consumer of their membership of an ADR scheme include: on all communications between the trader and the consumer (e.g. e mails, letters, advertisements, the company website). Relevant representative bodies should also have to highlight the existence of ADR schemes, which their members participate.

**Question 8: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

66. There will inevitably be some cost impact on the businesses that join an ADR scheme. They will potentially have new procedures to comply with and have to follow additional obligations in terms of notifying consumers of their membership of such a scheme.

67. A new compulsory scheme would mean state funding – as noted previously. Voluntary schemes however, could be allowed to find their own funding arrangements. The individual decisions of traders and consumers would ensure that those schemes which were good survived and those that were not effective were replaced. It is also worth noting that the Government already pays for the Small Claims Court, which offers dispute resolution to consumers. Therefore there has to be a question over whether the tax-payer should pay twice for schemes that cover very similar ground.

68. One other way to minimise the costs to traders would be, if there were a number of providers of ADR. Traders may join the lowest cost and most innovative schemes. However, in some ways the question betrays a static view of the extension of ADR scheme membership to new sectors and businesses. A more dynamic view would acknowledge the upfront costs associated with membership but would factor in the potential medium to longer-term benefits that could accrue to firms. These include:

- Increased consumer trust and consumer confidence in using a particular trader.
- Improved consumer complaints procedures and thus increased customer satisfaction.
- Better customer retention and thus higher turnover and a greater profits for businesses.

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements?**

**Might these requirements mean business is more reluctant to trade online and cross-border?**

69. The Law Society agrees with the objective of the Regulation i.e. that in order for cross border ADR to work more effectively there needs to be an effective co-ordination mechanism which links consumers and ADR schemes in other countries (if they are available).

70. The Regulation aims to establish a centralised system for matching consumers with ADR schemes. Article 5 of the Regulation sets out the basic elements of the ODR proposal[16]. The prospect of establishing a centralised clearing house at the EU level, which could operate effectively across 27 member states and 500 million people seems unrealistic. The outcome is likely to fall short of expectations. Consumers will continue to fail to get their issues resolved as the system tries to coordinate too much. This may result in unnecessary burdens on business with little practical benefits.

71. Within member states there is already a body that has been facilitating cross border dispute resolution for some time. Over that period it has built up some expertise. It makes more sense to build on something that is already in place and working. The logic of improving and expanding an already functioning system rather than starting with something new and complicated is clear.

72. Therefore the Law Society considers that the best coordinating mechanism for encouraging and developing the use (by consumers and traders) of cross-border ADR is the ECC-Net. Crucially, it has to become an expanded and better resourced network, operating as a single identifiable (and uniformly branded) hub in each member state. The ECC-Net can sign-post consumers towards ADR schemes in other member states through their links with the ECC-Net in that other member state.

73. Therefore the Law Society urges the re-drafting of the Regulation. In particular Chapter II which sets out the key organisational elements of the ODR system. Article 6 on the use of the ECC-Net should be expanded to require member states to confer on the relevant ECC-Net the responsibilities and structural changes needed to turn the ECC-Net into a highly effective and much better resourced consumer complaints hub for cross-border cases. This should involve the extensive marketing of the existence of the ECC-Net and its role, to consumers, across all media in each member state. To pursue such marketing objectives should be a requirement on the ECC-Net.

74. In addition, each ECC-Net should also be required to establish a system of support which can help a consumer directly with their complaint (when a consumer so desires). Some form of case officer model might be appropriate to achieve this objective.

75. There would likely be a need for the ECC-Nets to communicate electronically and securely with each other. Therefore compatible computer systems would be required as would uniform rules on processes, procedures and standards to ensure a consistent service across member states. Specifically there would need to be some kind of requirement on keeping the consumer updated on the

[16] A clear exposition of its key elements are made in 3.1.1. of the Explanatory Memorandum. Source: EU (2012). '*Regulation of the European Parliament and of the Council: on online dispute resolution for consumer disputes (regulation on consumer ODR)*', pub: European Commission: Brussels.

progress of their complaint, certainly by the ADR scheme and possibly by the ECC-Net too. It would perhaps be sensible to allow the consumer to choose how and by who they would like to be kept up-to-date by. This would require further amendments to the Regulation e.g. Article 7 which describes how complaints should be submitted and Article 8 on the process and transmission of a complaint.

76. The ECC-Net would require significant increases in their budget to carry out effectively, the role described above. As a first step the monies allocated to operate the centralised ODR system (outlined in the Explanatory Memorandum[17]) could be used to seed-corn finance some of these developments.

77. The Regulation should also impose duties to maintain clear and constant co-operation between all ECC-Nets in each member state. The modalities of cooperation should be uniform across the EU. There should be a legal obligation in terms of liaison with the relevant Competent Authority and on the need for the maintenance of an up-to-date flow of information and knowledge of the ADR schemes available in the member state.

78. Finally, the Law Society has very specific concerns about Article 9(b) of the Regulation, as it is currently drafted. The 30 day limit imposed on cases seems arbitrary. Ideally any limits on the length of time a dispute takes to settle should be something decided either by member states or the individual ADR schemes. In a world of numerous ADR schemes the swiftness of the resolution of a dispute might be seen as one part of the criteria a trader uses for deciding which scheme to join. Some ADR schemes might trade off cost burden against the speed of resolution. As long as all parties were aware (upfront) of the average time taken and given estimates of how long a case may take, then it is something the parties can decide upon themselves. However, as with the Directive, if complete removal of this requirement proves difficult, then replacement of the specific 30 day limit with a requirement for cases to be resolved in a 'reasonable' amount of time would be a second best option.

79. Further, there is little detail in 9(b) on what is meant by 'complexity'. How is a 'complex' dispute to be defined? It is important that this is clear in order for ADR schemes, consumers and traders to know what they are expected to comply with when they enter such relationships. Would whole sectors for example, be classed as complex areas, with the default position in relation to disputes in those sectors being that they were not bound by a 30 day rule? Would financial services disputes for example be generally considered a complex case? Another example could be legal services. They often involve relatively complicated legal and procedural points and lengthy client-lawyer relationships that are not as short-term and transactional as most other consumer – trader relationships, therefore could legal services be considered 'complex'? Or is 'complexity' to be a decision made on a case by case basis thus complicating any ADR procedure because the first stage will be deciding whether the case is 'complex' or not. The Law Society urges BIS to obtain greater clarity on this issue. Removing the arbitrary 30 day limit would ameliorate this uncertainty by getting rid of the cause.

[17] EU (2012). '*Regulation of the European Parliament and of the Council: on online dispute resolution for consumer disputes (regulation on consumer ODR)*', pub: European Commission: Brussels, pg 5.

# Annex

The Law Society
of England and Wales

# Consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union

Response by the Law Society of England and Wales
March 2011

supporting solicitors

## INTRODUCTION

The Law Society (the Society) is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

The Society welcomes this consultation on the issue of consumer ADR. In our response to the European Commission consultation on policy options relating to European contract law [18] we highlighted that practical and procedural issues were at the heart of the barriers hindering consumers purchasing more products and services cross-border. Research[19] has that shown the barriers that consumers believe hold them back from more cross-border online shopping, include (among others[20]):

- Cultural barriers e.g. language;
- The higher costs involved in cross-border purchasing;
- Preferences for known brands;
- Fear of goods not arriving and standards of after sale care; and
- Payment security, fraud and personal data.

Underlying some of these issues is uncertainty as to how consumers can obtain redress if problems arise. There already exists a European Small Claims Procedure, a European Payments Order system[21] and a European Enforcement Order measure[22]. These already provide some of the key elements of a cross-border redress framework. In addition, cross-border online shopping is no more likely to lead to problems than domestic online shopping[23]. Indeed, most retailers are likely to handle complaints in a helpful and realistic manner. Despite this, it is understandable that consumers feel wary that when things go wrong (in relation to a purchase from another member state) the chances of satisfactory resolution are lower than would apply for domestic purchases.

The Society therefore welcomes the Commission's examination of these practical and procedural barriers which inhibit cross-border commerce[24]. ADR which is tailored to the needs of cross-border consumers and sellers could provide an opportunity to

[18] Law Society of England and Wales (2010). '*Response to the Ministry of Justice Call for Evidence: European Contract Law Green Paper*', pub: LSEW Brussels Office: Brussels and Law Society of England and Wales (2011). '*Response to the Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business*', pub: LSEW Brussels Office: Brussels. http://international.lawsociety.org.uk/node/10660

[19] Some of the key data is highlighted by Consumer Focus in their response to the Ministry of Justice call for evidence on the Commission proposals for an EU contract law. Source: Johnstone, J. (2010). '*The European Commission's green paper on policy options for progress towards a European Contract Law for consumers and businesses*' pub: Consumer Focus: London, accessed at:http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-response-to-MoJ-consultation-on-EC-green-paper.pdf

[20] Some are not related to perceived problems online but are to do with basic access to the internet or methods of payment or a lack of need or desire to shop online. Source: Johnstone, J. (2010). '*The European Commission's green paper on policy options for progress towards a European Contract Law for consumers and businesses*' pub: Consumer Focus: London, accessed at:http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-response-to-MoJ-consultation-on-EC-green-paper.pdf

[21] Europa (No date given). '*European order for payment procedure*', pub: EU institutions: Brussels, accessed at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16023_en.htm

[22] Europa (No date given). '*European enforcement order for uncontested claim*s', pub: EU institutions: Brussels, accessed at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33190_en.htm

[23] An OFT market study found that '*…businesses and consumers are no more likely to experience problems with foreign than domestic internet transactions'*. Source: Office of Fair Trading (2007). '*Internet Shopping*', pub: OFT: London.

[24] As described in the Law Society response to the Commission on contract law. Source: Law Society of England and Wales (2010). '*Response to the Ministry of Justice Call for Evidence: European Contract Law Green Paper*', pub: LSEW Brussels Office: Brussels.

achieve greater access to justice than though using courts in a foreign jurisdiction. This could increase the number of problems which are resolved and in which consumers achieve the redress they deserve. In addition the existence of good systems of ADR has the potential to drive better practice by cross-border retailers and deliver a better functioning market overall, including greater consumer satisfaction.

Such a system of ADR could have a number of benefits for business. With ADR in place there are greater incentives to handle complaints effectively. In turn this will encourage repeat business by consumers (driving up revenues). ADR can reduce the costs of complaints to firms in other ways too e.g. by reducing the length and complexity of disputes. ADR might also help to push poor performers out of the market, leaving more room for good businesses.

However, it is also important to recognise the limitations of ADR. While we accept that there are some outstanding Government or Industry-led schemes which provide fair and transparent redress which is enforceable, this is not the case over the whole spectrum. There are a number of schemes where the decision-making may be suspect and where the decision can easily be avoided by the individual firm either by leaving the scheme or ignoring the judgement. There are few common standards or agreed Codes of Practice and the community is young and diffuse.

In England and Wales, ADR is used for a number of different reasons depending on the situation:

- It can be easier, quicker and cheaper and an arbitrator may be perceived to have greater expertise on a specialist issue than a judge;
- It can deal with matters which a court would not (e.g. poor service questions or questions of professional conduct);
- It can provide a more appropriate solution to a case than a simple court judgement.

It is not suitable for every sort of dispute and it is absolutely crucial that those taking part have confidence in the procedure.

It also needs to be said that the word “alternative” suggests a choice. In many cases an industry-led scheme or Ombudsman service may well provide a swift, fair and effective way of resolving disputes. This may not always be the case and a consumer may well prefer to use a court rather than waste time on a mechanism which is perceived to be ineffective or unlikely to get the right result.

We believe that any form of pan-European attempt at ADR would inappropriate – there are two many differences of law, culture and language to make this viable. Rather, we believe that the Commission should be encouraging a variety of schemes in different jurisdictions and identifying the key characteristics of such schemes.

We believe that the Commission could also undertake work to ensure that courts in the individual EU states are able to provide proper support to litigants with cross-border disputes so that they are able to access the system easily. We understand that Eire has a particularly successful and consumer-friendly system of dealing with such disputes and the Commission could profitably examine this and encourage adoption of similar procedures in other member states.

Below the Society answers the questions posed in the consultation.

**CONSULTATION QUESTIONS**

**1. What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR?**

**2. What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness?**

**3. Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?**

**4. How should ADR schemes inform their users about their main features?**

As these first four questions are interlinked the Society will provide one response.

If consumers are to use ADR (and derive the benefits outlined in the Introduction) then consumers need to be aware of them. Awareness is often one of the chief problems with ADR. There are a number of ways existing ADR schemes try to make consumers aware of their existence. These might be called the 'usual' methods. The Society considers that these 'usual methods' be employed by all ADR schemes and especially those concerned with cross-border e-commerce. These include:

- Direct publicity to the public. This might be through:
    - TV and radio advertising;
    - Online advertising; and/or
    - Requiring public bodies (e.g. local authorities, libraries), consumer representative organisations (e.g. Citizens Advice Bureaux in the UK) and enforcement bodies (in the UK this would be Trading Standards) to hold information on schemes, or be able to direct individuals to information on these schemes or even publicise them directly.
- Requiring sellers to make their customers aware of the scheme they are a member of. This could be done by requiring firms to:
    - Publicise its existence on their website/s;
    - Advertise it prominently on their bills of sale (receipts) and other publications; and/or
    - Tell complainants that they have the right to take the dispute to ADR if they have not received satisfactory resolution from the seller.
- Encourage trade bodies and business representative groups to signpost and advertise relevant ADR schemes. Their collective purchasing power could also be harnessed to reduce any cost associated in publicising a particular ADR scheme.

Many of these publicity methods are used effectively by ombudsmen in the UK, although they could be used more widely.

We also consider that there may be scope for the EU in establishing standards by which consumers can recognize whether ADR is appropriate for their dispute and whether the particular scheme on offer is fair and likely to provide adequate enforcement. It could also develop good practice for individual ADR schemes when dealing with cross-border complaints.

The European Consumer Centres Network (ECC-Net)[25] in particular has a vital role to play (along with public enforcement bodies). This response will address the work of the

[25] The ECC-Net was launched in 2005. It was the result of the merger of 2 previous networks. Source: The European Consumer Centres Network (2008). '*ECC-Net: Information and support to consumers across Europe*', pub: Office for

ECC-Net in greater detail in subsequent answers. However, it is crucial that the ECC-Net makes itself much more widely known to consumers. It also needs to make itself more widely known to the key public bodies and NGOs who operate in the consumer area. Beyond that the ECC-Net must evangelise to the public the existence of ADR for cross-border e-commerce complaints.

Only through this multi-pronged approach to awareness raising can consumers be reasonably expected to become aware of the existence of ADR schemes. The use of a range of methods offers the strongest prospect of generating the familiarity needed for consumers to use such schemes for their cross-border complaints.

**5. What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?**

**6. Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In what sectors?**

**7. Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?**

**8. Should ADR decisions be binding on the trader? Or both parties? If so, under what conditions? In which sectors?**

Questions 5 to 8 also contain significant overlap. Therefore the Society intends to group our response to them too.

The first step in persuading consumers and traders to use ADR for redress is by making them aware of its existence. Methods for doing this are set out in response to the previous questions. Awareness is only one part of the jigsaw. It might be hoped that firms selling cross-border would see the benefits to them of ADR. These could include avoiding costly alternative action (which the consumer would be able to take in their home courts, under the Rome I Regulation (Regulation 593/2008)) and the positive reputational impact of participating in such a scheme.

EU survey results back up this view. Recent research found that 85% of firms using ADR managed to reach a settlement with a customer using ADR[26]. 55% of firms rated the main advantage of ADR as the ability to settle disputes quickly[27], with 25% saying it allowed a firm to maintain their reputation[28]. The same research found 73% of businesses who had used ADR were satisfied with their experience[29]. 82% said they would use it again and 70% preferred it to going to court[30], with 83% believing it was cheaper than court[31]. There seem to be considerable incentives for businesses to submit to ADR.

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Official Publications of the European Communities: Luxembourg, accessed at: http://ec.europa.eu/consumers/publications/factsheet-ECC-Net_en.pdf

[26] European Business Test Panel (2011). 'Alternative Dispute Resolution', pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

[27] 70% of disputes reported by the companies in the survey were settled within three months. Source: [27] European Business Test Panel (2011). '*Alternative Dispute Resolution'*, pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

[28] European Business Test Panel (2011). '*Alternative Dispute Resolution'*, pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

[29] European Business Test Panel (2011). '*Alternative Dispute Resolution*', pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

[30] European Business Test Panel (2011). '*Alternative Dispute Resolution'*, pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

[31] European Business Test Panel (2011). '*Alternative Dispute Resolution*', pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf

However, as we have suggested, there are a number of difficulties associated with ADR, one of the most important of which is the lack of any standards or regulation of ADR providers. We believe that the ADR market is too young and too varied for common standards to be provided at this stage. We believe that this will cause difficulties in making any ADR process mandatory for any industry.

We also believe that it is important to remember that ADR is intended to be an alternative to conventional ways of dispute resolution. The word "alternative" suggests a choice. A business may choose to be part of a scheme to make itself attractive to purchasers but we do not believe at this stage that it is appropriate for businesses to be required to join such schemes or suggest ADR.

In addition, the Directive on Unfair Terms in Consumer Contracts '...*places stringent restrictions on the ability of consumers to waive their right to go to court*'[32]. The Brussels I Regulation (Regulation 44/2001) similarly places restrictions on a consumer derogating their rights e.g. to go to court[33]. In the UK arbitration agreements are automatically void for consumers if the dispute is over a small amount[34].

Therefore the Society does not support the mandatory use of ADR. Rather, the EU should be concentrating on outlining good practice and standards for suitable ADR schemes. If consumers do choose to use ADR we believe that there is scope for decisions to be binding on the business but not the consumer. This works successfully in England and Wales in the case of the Financial Ombudsman Scheme.

In any event, we consider that before ADR is activated the consumer must be required to use the complaints procedure of the firm. Only after that has been exhausted i.e. a number of weeks have passed without satisfactory solution, should the consumer be able to go to ADR. Best practice in this area appears to be to allow a period of 8 weeks to pass before ADR procedures can be initiated[35].

The consultation seems to be aimed in particular at encouraging e-commerce. It is considered good practice to have a clear remit and objective for an ADR scheme[36]. In light of this, two approaches can be discerned as the way to define the scope of the operation of ADR schemes in member states:

- E-commerce retailers who trade cross-border; or
- The consumer sector generally and primarily within a member state.

Both types have their problems and advantages.

- The former is very focused on the main issue behind this consultation. An ADR scheme that looked to resolve complaints coming in from consumers in other member states would not be 'clogged up' and distracted by domestic cases. It could also develop a real expertise in dealing with complaints from other member states.

[32] Kuner, C. (2000). '*Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*', pub: Morrison & Foerster LLP: Brussels.
[33] Kuner, C. (2000). '*Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*', pub: Morrison & Foerster LLP: Brussels.
[34] Organisation for Economic Co-operation and Development (2005). '*OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace: Background Report*', pub: OECD: Paris.
[35] In the UK the Financial Ombudsman Service and the energy ombudsman and the telecoms ombudsman service all have 8 weeks as their standard period.
[36] The World Bank (2000). '*Alternative Dispute Resolution Workshop: Workshop Report*', pub: World Bank: Washington DC, accessed at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf

- The second type would be easier to define. There would be less complexity as firms who no longer trade across borders, or had decided to begin to, would not move in and out of the scheme's jurisdiction. They would be covered at all times. In addition domestic shoppers would benefit from the existence of a retail ADR scheme. There is a risk such a broad ADR scheme would be distracted by domestic issues, as these would inevitably take up most of its time. Complaints coming in from other member states would potentially receive less attention. In addition there would be less opportunity to develop a real expertise in dealing with cross-border issues.

**9. What are the most efficient ways of improving consumer ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?**

The Society considers that, at this stage, the most feasible type of ADR scheme is one that is mainly aimed at business to consumer (B2C) disputes. However, it is standard practice in the UK for ombudsmen for example to cover micro firms[37]. There is no reason why an ADR scheme that deals with cross-border complaints should not cover micro firms too. There appears to be little evidence that this has caused any damage to the focus of those schemes in the UK. Indeed sometimes the difference between a consumer and a micro enterprise, for practical reasons, is very blurred.

A scheme that attempted to cover more than one field (i.e. wider than a B2C focus) would create additional problems. An ADR scheme trying to cover such an extensive range of issues (which would come with dealing with SME disputes as well as consumer) could potentially lead to a slightly directionless and unfocused ADR scheme[38]. Indeed, one where the opportunity to develop the specialist knowledge of a particular field was diluted might mean that the judgments in the various cases were less good than would otherwise have been the case.

**10. How could ADR coverage for e-commerce transactions be improved? Do you think that a centralized ADR scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?**

The Society considers that ADR can play a useful role in facilitating e-commerce, by acting as a credible backstop when problems arise for consumers. The structure of any ADR scheme, aimed at encouraging e-commerce, requires careful consideration. The Society considers that a proposal for a centralised scheme to deal with unresolved e-commerce based complaints is not the right way forward. A centralised solution seems counter to the de-centralised, bottom-up nature of the internet, imposing an old model of regulation on a system that is moving away from such concepts.

The case against a centralised mechanism is even stronger when considering that it will impose one overarching model that will have to take into account the different legal systems of the member states and the difficulty in finding something that will meet the expectations of a diverse range of consumers. Further, the Society considers that a centralised model ignores the principles of subsidiarity and proportionality (to the problem). When a problem can be tackled sufficiently well at a lower level of governance (than the EU level) the subsidiarity principle is in place to ensure that is what happens.

[37] Firms with less than 10 employees. The Financial Ombudsman Service and the Energy Ombudsman are two examples from the UK.
[38] As stated earlier in this response, a focused ADR scheme is vital in order for it to be effective. Source: The World Bank (2000). '*Alternative Dispute Resolution Workshop: Workshop Report*', pub: World Bank: Washington DC, accessed at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf

In light of this the Society believes that a network based ADR solution is best; a model that builds on the elements already in place for facilitating consumer redress in cross-border situations. This is what we tentatively suggested as one way forward in our response to the Commission consultation on a European contract law instrument[39]. A solution that links ADR schemes in each member state to access points or portals in the other member states. Crucially however access points/ portals that will deliver step by step support and expertise.

Action at European Union level is key and the role of the Commission would be central. It would:

- Strongly encourage each Member State to establish a single and robust ADR body to deal with retail/ online e-commerce complaints;
- Develop and encourage high standards and good ADR practices;
- Disseminate these among ADR schemes in the Member States;
- Set out model agreements (memorandums of understanding) between Member State ADR schemes on co-operation and also between the 'portal' organisations in the other member states; and
- Ensure other elements of the assistive framework are in place e.g. the EU Regulation on Consumer Protection co-operation[40] and examine their efficacy and where other gaps may exist.

The portal organisation would be considered the way most consumers from a member state would access an ADR scheme. Obviously if a consumer chose not to use this 'portal' then the consumer would be free to access the ADR scheme of their own initiative. The Society considers that the obvious candidate for this 'portal' is the ECC-Net. The existing arrangements mean that the ECC-Net already carries out this role to a large extent and has a deposit of expertise in place. However it should become a much expanded service. It should evolve an even greater degree of knowledge and expertise in helping consumers with cross-border complaints. It should essentially be able to 'walk' a consumer through taking a complaint to an ADR scheme and 'hold their hand' through the whole process, giving a consumer all the support necessary to enforce their rights.

A subsidiary 'portal' that would make sense in the UK context is the official consumer enforcement bodies in the UK i.e. the local Trading Standards Offices (TSO). Many consumers refer to their local Trading Standards when they face a problem. It would be illogical if they did not have the facility to carry out the same function at the ECC-Net in relation to helping a consumer access an ADR scheme. Indeed the fact that Trading Standards already have links with the UK office of ECC-Net is an important start.

The Society considers that this is the approach most consistent with the principles of subsidiarity and proportionality. There are a number of other benefits too, these include:

- Each member state organising their own ADR, which will enable the evolution of best practice;
- It allows the opportunity for all the ADR schemes to learn from the best ones achieving the best outcomes; and

[39] Law Society of England and Wales (2011). '*Response to the Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business*', pub: LSEW Brussels Office: Brussels.
[40] Regulation (EC) 2006/2004.

- It gives the Commission a key role in facilitating and spreading that best practice.

In contrast a centralised scheme runs the risk of lacking flexibility and adaptability. Further, there is no reason to believe it will deliver better results for consumers or achieve the wider single market objectives any more effectively than a more network based solution.

**11. Do you think that the existence of a 'single entry point' or 'umbrella organisations' could improve consumers' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?**

The kind of networked approach set out above would require a 'single entry point'. A single entry point significantly simplifies things for consumers. By having one point consumers can go to and have that body offering as much or as little assistance as a particular consumer requires would make accessing ADR schemes immeasurably easier. In addition the marketing to the public would be much more straightforward.

An umbrella identity already exists for the ECC-Net but this could be strengthened through greater awareness among the public and even greater exchanges and sharing of people, practices and data. Thought might also be given to developing an umbrella identity for the ADR schemes dealing with unresolved retail/ online cross-border complaints. Achieving this could be more difficult but could deliver marketing benefits and aid consumer understanding. It might be called a quasi-franchising model of ADR.

**12. Which particular features should ADR schemes include to deal with collective claims?**

The Society in principle supports the use of ADR for collective claims. The Society considers that collective ADR can resolve issues of consumer detriment in a more consensual way without recourse to the courts. Recent research by the EU found that businesses were also supportive of the use of collective ADR mechanisms. 59% of respondents in the survey considered ADR a good way to solve disputes over the same issue with groups of consumers, with 30% saying it made dispute resolution quicker and easier[41]. This will reduce the opportunities for over-litigious behaviour. Further, the Society sees no reason why ADR schemes cannot be used for high-value claims as well as low value ones.

In fact the Society suggests that certain forms of ADR are equally-well or even better suited to high-value claims than court proceedings. Therefore the Society would recommend updating existing recommendations to cover issues specific to the management of collective claims. In addition it is worth pointing out that it would also be useful to encourage member states to ensure that their small claims procedures are able to deal effectively with mass claims.

**13. What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?**

In the Society response to the consultation on policy options for European contract law instrument[42] we argued that ADR schemes that involve independent adjudication on

[41] European Business Test Panel (2011). '*Alternative Dispute Resolution*', pub: European Commission: Brussels, accessed at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf
[42] Law Society of England and Wales (2011). '*Response to the Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business*', pub: LSEW Brussels Office: Brussels.

cases is a tried and tested system that appears to work well. A number of good examples operate in the UK such as the Financial Ombudsman Service. In addition there are a significant number of bodies who have tried to set out the principles that should underpin ADR schemes[43]. Most are sensible. Indeed the EU has set out a number of useful principles suitable for ADR schemes in their 'Recommendation on the out-of-court settlement of consumer disputes'[44]. The principles in the recommendation were:

- Independence of the decision-making body;
- Transparency of the process;
- Adversarial principle;
- Effectiveness principle;
- Legality principle;
- Liberty principle; and
- Principle of representation.

The Society considers these to be sensible principles and there is little point in 're-inventing the wheel' by devising new ones when perfectly good ones already exist. However the Society suggests that they could be extended to ensure that any ADR scheme is as consumer friendly as possible. These additional principles might include:

- The scheme must be staffed by personnel trained in both basic legal concepts and mediation/ adjudication skills[45];
- The scheme must be convenient for consumers[46]; and
- Any scheme must guarantee security, including of information (personal data)[47].

**14. What is the most efficient way to fund an ADR scheme?**

A mixture of revenue sources is the best way to fund an ADR scheme. Some state funding is desirable to ensure independence and a steady source of funds. The Danish Consumer Ombudsman[48] is funded in such a way. A levy on a sector is difficult to implement if the scheme is voluntary and operates a very broad and amorphous sector description on areas such as 'retail'. Therefore a second source of funding might be a levy on any refunds / redress paid by firms found to be imposing detriment on a consumer.

**15. How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?**

Independence is best maintained in two ways. Firstly by enshrining the principle in the articles of association/ founding documents. Any ADR scheme must be a not-for-profit body. Secondly it must have formal procedures that ensure independence e.g. appointments to the organisation must adhere to best practice, there must be an independent budget, well understood and clear terms of reference, independent (lay)

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http://international.lawsociety.org.uk/node/10660

[43] E.g. the OECD and the American Bar Association among others.

[44] Described in a paper by Christopher Kuner. Source: Kuner, C. (2000). '*Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*', pub: Morrison & Foerster LLP: Brussels.

[45] Transatlantic Consumer Dialogue (2000). '*Alternative Dispute Resolution in the Context of Electronic Commerce*', pub: TACD: London.

[46] Transatlantic Consumer Dialogue (2000). '*Alternative Dispute Resolution in the Context of Electronic Commerce*', pub: TACD: London.

[47] Consumers International (2001). '*Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross Border Disputes*', pub: CI: London.

[48] Consumer Ombudsman (No date given). '*About us: About the Institution*', pub: Danish Consumer Ombudsman, accessed at: http://www.consumerombudsman.dk/About-us/introduction

representation on the governing board and openness and transparency in the cases taken on by the ADR scheme e.g. the publication of annual reports and data on complaints dealt with and outcomes. Finally there has to be a way for the consumer or firm (parties to a case) to complain about the handling of the issue to someone who is not the person who handled the original case i.e. a facility for independent review. The Financial Ombudsman Scheme in the UK operates an independent assessor mechanism that will judge the merits of a complaint against the service provided and operation of the procedures.

**16. What should be the cost of ADR for the consumer?**

The consumer should be able to access the ADR for free. In order for consumers to obtain redress it has to be the case that the barriers to usage are as low as possible. If fees are high consumers will be deterred from using ADR. This would have two consequences:

- It would reduce access to justice for the individual consumer because fewer would use the mechanism. In these cases the generally more expensive court route is unlikely to be used as an alternative. Leaving in place a barrier that deters consumers from shopping online and cross-border, stunting the growth of cross-border online consumption.
- Secondly, with lower usage, ADR would be less effective at driving higher standards of service in the retail sector. In turn this would mean less well functioning retail markets and no significant change in consumer satisfaction rates.

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# BIS : Call for Evidence: EU Proposals on Alternative Dispute Resolution.

**The Law Society of Scotland's Response**

**February 2012**

**INTRODUCTION**

The Law Society of Scotland (the Society) welcomes the opportunity to consider and respond to the BIS Call for Evidence, EU Proposals on Alternative Dispute Resolution. Having considered the questions posed within the call of evidence, the Society has the following responses to put forward:

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

Response: The Society believes that are benefits to parties using arbitration or other forms of ADR / ODR to resolve disputes and that such benefits may include reduced costs on parties in comparison to certain court actions. The Society support the proposal of an ODR platform if this would improve access to ADR/ODR for consumers and provide an effective safeguard to ensure such access.

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

Response: The Society consider that there can be benefits to parties using arbitration or other forms of ADR/ODR to resolve disputes, and that such benefits may include reduced cost on parties in comparison to certain court actions and a more accessible form of remedy for both consumers and businesses.

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

Response: The Society suggest that it could be argued that the determination element of the 'chargeback' process is a form of ADR, but it only deals with consumer who use a credit card to purchase goods. Therefore, it does not cover transactions made with cash, cheques or debit cards, so does not satisfactorily cover consumer cases. However the Society further suggests that consumers using credit cards could be given the choice of 'chargeback' or ADR/ODR.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

Response: The Society believes that it is important for any scheme to be independent and transparent, so appreciate that certain bodies would be outwith scope. There are various ADR bodies across the UK, including the New Scottish Arbitration Centre. If such bodies wished to be involved in this scheme, they may wish to prepare a bespoke ADR scheme for such matters.

The Society believes that a key element of an effective ADR/ODR is consumer awareness and the gap that requires to be filled is around education in respect of ADR.

The Society is not in a position to estimate how much public subsidy would be required to ensure ADR of the required standards is available for all consumer disputes

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

Response: The standards / requirements for ADR providers appear to be reasonable. The Society supports the suggested deadline, as dispute resolution should be as efficient as

possible. The Society is not in a position to comment upon the likely cost impact of ADR/ODR providers.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfill this role?**

Response: It appears reasonable to create a monitoring role to ensure a consistent approach. However, such a body should provide a balanced monitoring role. Therefore, such an authority should not simply represent consumers, but should be made up of a number of bodies including those representing consumers and businesses. Bodies like Citizens Advice Bureau Scotland, Consumer Focus Scotland, the OFT, CBI Scotland and the Federation of Small Business may also wish to be involved. However, there may also be a role for one independent monitor such as the Lord President, with advice provided from such bodies. The proposed new Scottish Civil Justice Council may be another option.

**Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

Response: The Society cannot speculate on consume behavior, or indeed business behavior. However, the provision of information at least ensures that both parties are aware of their rights, obligations and responsibilities and the options for dispute resolution open to them. The Society, in their response to the Europeans Commission consultation[1] suggested that businesses should communicate to consumers when they are part of an ADR/ODR scheme and this should be communicated via any viable method including websites, terms and conditions, marketing material etc.

**Question 8: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

[1] European Commission Consultation The use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union. Law Society of Scotland Response 2011.

Response: The Society is not in a position to comment on any costs to business of providing additional information requirements to consumers.

**Question 9: Do you have any other comments on the proposed Directive?**

Response: It is also noted that the term ADR can mean any number of things from mediation to binding arbitration, and that greater specificity will be required in any implementing legislation.

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

Response: The Society believes that a platform which provides information and refers consumers to the appropriate ADR scheme has the potential of improving access and awareness. The Society is not in a position to comment on the costing of such a platform.

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# LEGAL OMBUDSMAN

Business, Innovation and Skills

# Call for evidence on EU proposals on Alternative Dispute Resolution and Online Dispute Resolution

LEGAL OMBUDSMAN

# Executive Summary

The legal market is undergoing rapid change. Since the Legal Ombudsman opened in October 2010, our planning has grappled with significant innovation and dynamism in the market, stemming from businesses spotting new opportunities to grow, as well as changes to the regulatory structures introduced by the Legal Services Act 2007. Our experience tells us that these changes are challenging the traditional sectoral approach to professional services and also how consumers should be able to access redress. In our jurisdiction, we can resolve complaints about unregulated legal services if carried out by authorised lawyers, but not if carried out by others, such as will writers or claims management companies. This difference in access to redress and Alternative Dispute Resolution (ADR) causes consumer confusion and may lead to consumer detriment due to the different protections afforded users of different services.

As a result of this, the European Union (EU) proposal on ADR comes at a time that allows us an opportunity to re-examine ADR in the UK and formulate a more strategic and proportionate system which resolves existing gaps, overlaps and inconsistencies.

This paper provides background to the Legal Ombudsman and ADR in the context of legal and professional services in the UK; looking at the different tiers of ADR and how these fit with different sectors. We then look at the challenges which, to some extent, already exist and how they are likely to become more of an obstacle for consumers accessing redress using the changing legal services market to illustrate the need for a new approach in this arena.

This is a key opportunity to reform a fragmented system which has evolved over many years and that can be slow and inefficient. ADR does not need to take a ‘one size fits all’ approach as different levels of ADR should reflect the different needs of consumers within sectors. However, it is vital that a thorough re-examination and re-modelling of ADR should resolve existing overlaps, shortfalls and conflicts rather than increasing confusion for consumers accessing redress.

We welcome this consultation and would be happy to work with the Department for Business, Innovation and Skills (BIS) to form a response to the European Union’s proposals.

# Background

The European Union (EU) has published a draft Directive on alternative dispute resolution (ADR) for consumer disputes and a draft Regulation on online dispute resolution for consumer disputes. The Department for Business, Innovation and Skills has issued a call for evidence seeking views on the impacts of the legislative proposals on the UK to inform the UK negotiating position.

The EU research identified a number of weaknesses in current arrangements, which include gaps in coverage of ADR in some economic sectors and geographic levels, a lack of awareness and insufficient information preventing consumers and businesses from using ADR, and variable quality of ADR schemes. As these issues reflect many of those facing consumers in England and Wales, and are ones we are currently grappling with, these proposals provide an opportunity to consider how redress and ADR can develop to overcome these deficiencies.

The Legal Ombudsman was established in 2010. We are a creation of the Legal Services Act 2007 and deal with service complaints about regulated lawyers in England and Wales, irrespective of whether they deliver regulated or unregulated legal services. This includes nine branches of the profession including solicitors, barristers, legal executives and others such as patent attorneys. This will broaden again to include multi-disciplinary practices with changes to regulation now coming in. In our first year we resolved around 7,500 cases, with contacts from around 80,000 consumers. Our service is available to all members of the public, very small businesses, charities, clubs and trusts, and is free to these consumers.

Our remit is to resolve disputes in a way that is independent, impartial, cost effective, fair and transparent, providing a straightforward path to redress for consumers of legal services. We also feed information back to consumers and the legal profession to help drive up standards and improve consumer confidence in this sector. Through effective use of technology we ensure complaints are dealt with quickly and at less cost than previous arrangements. We operate within a budget of £19.9M compared to the old system which cost £32.5M, according to independent analysis commissioned by the Ministry of Justice.

As a new scheme operating in an area where consumers are interacting with a highly organised and specialist professional service sector, we

understand why access to redress is so important to protect customers if things go wrong. Whilst working in this complex and changing market, the Legal Ombudsman has experienced first-hand the need for responsive and innovative solutions to market changes in the legal services and other professional sectors. This is essential to ensure that the shape of regulation and redress is sufficiently responsive to demand.

This consultation response begins with an overview of the complicated patchwork of ADR that exists in the UK, before looking at some of the problems which exist, and the opportunity which the EU's proposals award to overcome these issues. Answers to the call for evidence questions are included at Annex A.

# Overview of the ADR landscape

The array of contractual services and products available across sectors makes a 'one size fits all' approach to ADR unrealistic and unwise. There are differences in the consumer experience which should properly dictate the structure and governance of schemes. There can be significant disparity in the relative levels of knowledge, influence and status between traders and consumers. In the legal sector, for instance, this can be particularly marked when transactions are, in effect, occasional and forced rather than regular and voluntary (such as in house purchases and probate). On the other hand, there are transactions, such as the purchase of food from a corner shop, where the relationship between trader and customer is much more equal and routine, and the freedoms of the market are more likely to operate in an unfettered manner.

It seems right that this is reflected in the different ADR mechanisms (where these are available). Statutory schemes with official powers provide for those instances where there is significant need to re-balance the power differential between, for example, big business and individual consumers. Lighter touch approaches are fit for purpose for those transactions where the differences in access to information and consumer knowledge are not so pronounced. And, as we have learned during our first period of operation, courts, tribunal and consumer law, as enforced by Trading Standards, provide a vital safety net that wraps around current access to ADR for consumers.

In the UK there is a strong culture for resolving disputes through independent and impartial schemes. These, for historic reasons, are based on a sectoral approach, divided both between public and private

services and then by specialism of a professional or business sector, be it communications, telecoms, energy or finance. A result of this is that consumers are able to receive different remedies from different schemes, as they have different formal powers. Sometimes these differences are significant, especially in terms of adequacy of redress and enforcement. This illustrates the broad consequence of this sectoral approach: that the decisions made in these three levels are isolated and there is no encompassing strategy which binds them together. Some of these inconsistencies might be avoidable, but others stem from differences in the legislation which created them.

The first level of ADR includes statutory private Ombudsman schemes, of which we are one. Private Ombudsman schemes deal with complaints by consumers about traders and include the Financial, Housing, Pensions and Legal Ombudsmen, as well as the communications, energy and property schemes. The services covered by these schemes are in areas where there is a large gap in the information, resources and expertise between individual consumers and often large business. Ombudsman schemes in the UK are free of charge to members of the public and their availability means that consumers can challenge what they see to be poor service without the barriers of great financial expense and the stress often associated with going to court. There are considerable differences in the governance structures for private sector schemes, with schemes such as ours based in statute but others being largely voluntary. In addition, there are private sector adjudication schemes for consumers (CISAS for telecoms, POSTRS for postal services) and arbitration (such as ABTA for holiday disputes).

The second level consists of informal dispute mechanisms that can be provided by industry. These tend to be relatively low in cost and vary in quality, often taking the form of mediation services via their professional association. Within the legal sector, some will writers sign up voluntarily to mediation services - this provides an extra level of security for consumers and increases the credibility of firms. However, it also creates an uneven patchwork of ADR, far more complex than those in the first level. These mediation services are often in the market for a short amount of time. We are currently examining the potential merits of creating a voluntary jurisdiction for unregulated will writers. Evidence of potential consumer detriment in this area was provided by Leicester University's study into potential consumer confusion within the legal services market, which is available on our website at www.legalombudsman.org.uk.

In addition, it can also be confusing when dispute resolution is led by a trader (and therefore not in the proposed EU definition of ADR). There is often a lack of clarity about how the outcomes of any resolution can be enforced. If a trader uses an internal complaints procedures or formal conciliation mechanism where a final decision is made, consumers face a great deal more certainty than in schemes that rely on pure forms of mediation. Because mediation is voluntary and relies on consensual agreement, it does not always result in a resolution and will not be binding. This can therefore be a costly exercise for consumers, without the benefits of access to an ADR scheme.

The third level are the formal courts and the tribunal process, which mop up the complaints which do not fall into the first two levels. At this level, there is potential for a disconnect between ADR and the courts. While they aim for the same result, the remedies they are able to provide and their processes are very different from other consumer protection measures. There needs to be a greater level of co-ordination to ensure that the alternative structures for access to redress and dispute mediation fit neatly into the broader framework of courts and tribunals. This is particularly important given the increased emphasis being placed on ADR mechanics such as mediation playing a more central part of the court process. Our view is that any approach to ADR would benefit from BIS working in a joined-up way with the Ministry of Justice (MoJ) to promote greater coordination between ADR initiatives and other consumer law protections offered through the courts and tribunals system, as part of a broader strategic approach.

## Challenges: existing overlaps, gaps, different geographical boundaries

Ombudsman schemes provide an important path for redress for members of the public. However, there are overlaps and gaps in their jurisdictions, and inconsistencies between their processes. The current patchwork approach to ADR and redress is characterised by complex overlaps between existing ADR schemes. Moreover, consumer behaviour and business providers are no longer adhering to a sectoral approach, with the increased bundling together of products and services that cross professional (such as financial, accountancy and legal) or traditional consumer boundaries. The use of e-commerce, e-purchasing of products and the development and marketing of intelligent computer software are also eroding the distinction between product and service,

creator and provider. In addition to this, consumers are as likely to be confused by the gaps in provision of redress of ADR in other areas.

A key tenet of the Legal Services Act 2007 was to bring consumer benefit from innovation and increased choice through competition in the legal services arena, allowing law firms to seek investment and ownership from non-legal sources. The cases we are seeing highlight that - as is to be expected - business innovation can, and is, happening independently of regulatory structures and frameworks. The area of wills and probate, for example, has shown itself to be at the forefront of some of these market developments, with a rise in use of legal products in relation to wills, and diverse providers in the marketplace - from the post office to banks and then to professional and specialised online providers. Online firms are also often engaged in sub-contracting arrangements which see the reserved legal activity being conducted by different organisations or firms. This has resulted in the evolution of multi-layered and complex business structures, some of which can fall within regulation, and some outside.

As an Ombudsman scheme we have significant concerns about the impact that these innovations are having on consumers with regards to rights and access to redress. We are interested to learn how your proposed approach to regulation will help us all achieve greater clarity in this increasing complex market place.

Consumers deserve clarity about when and why they are able to access redress for some of these business models and service providers but not for others. The complaints we are seeing tell us that companies are finding ways to develop and innovate, leaving evidence of consumer confusion about how to find help when things have gone wrong. Rather than just being part of a changing legal services market, it seems we are seeing a changing approach to how the more complex consumer services are delivered more generally – a joining-up across financial, accountancy and other services, as illustrated in the broad spectrum of providers of estate administration services. As such, we believe that a less segmented response to ADR is central to ensuring that consumers have access to a robust and comprehensive safety net and therefore can have confidence in ADR mechanisms overall.

The service we provide is based on entity rather than activity. This means that if a lawyer is regulated by an approved legal regulator, we can investigate complaints about their service. However, if the legal service has not been performed by a regulated lawyer, we are unable to look into it even if it is something which is usually done by a regulated

lawyer. This can lead to confusion for consumers trying to access redress. Research, commissioned by us, and undertaken by the University of Leicester showed that this is particularly apparent in will writing. Consumers who have used unregulated will writers cannot pursue a complaint through us, yet consumers who have used a solicitor to draft their will can.

The Solicitors Regulation Authority (SRA) has only recently begun to take applications for ABS licences, and it will be some months before firms start to be granted licences. However, we are already seeing significant change in how legal services are being provided. As we have publicly stated, we believe that these changes and the transformative effect of technology may mean that in a few years the legal sector looks very different to how it does today. The increasing interest of financial and insurance companies in providing legal services and their associated products, and the move towards commoditisation of the delivery of those services via online products, mean that the distinctions between what is a legal and a non-legal service (or a legal and non-legal product) are eroding quickly. If, for example, estate agents choose to take advantage of these opportunities to extend the range of their services, we could soon see the creation of one-stop house purchase providers; combining the functions of estate agency, surveying, mortgage broking and conveyancing. Such firms could, as currently set out, be subject to four different regulatory structures and four different Ombudsman schemes. In some cases, depending on which Ombudsman scheme may have locus, then consumers are faced with these ADR schemes having significantly different powers, meaning available remedies (and ability to enforce those remedies) can vary markedly. Such anomalies need to be addressed to make ADR make sense for consumers. For us, even as a comparatively new scheme, there are questions over whether our governance and jurisdiction would have been designed in the same way had these innovations been better understood when the Act was being drafted.

The EU proposals also provide a chance to examine the geographical spread of ADR schemes. Article 5 of the Directive is unclear about how the Member States' obligation to make ADR available for cross border transactions will work in practice. The current EU practice is based on the expectation that the ADR in the Members State where the trader is located is likely to be best placed to deal with complaints. This contrasts to how courts work, where it is the location of the consumer and the law governing the transaction that determines locus for a court to hear a matter. In addition, current Ombudsman jurisdictions vary in the UK, depending on how a sector is regulated (or not). Within our remit, we are

authorised to resolve disputes (and are able to enforce remedies) involving traders who are licensed by a regulator based in England and Wales.

Again, a harmonised approach to territorial issues which ties up to court processes seems warranted to avoid confusion for consumers and also to allow them to better access a range of dispute resolution mechanics, including both ADR and justice structures.

These issues also cause the potential for inefficiency across existing ADR mechanics and structures and pose the threat that ADR schemes will be less responsive to the risks posed by increasing market liberalisation and innovation. The traditional approach to ADR, including Ombudsmen, means that it is likely that there will also be inefficiencies in the overall cost base of these schemes, individually and collectively. The structures in place do not always maximise opportunities for economies of scale, which can assist with efficiencies both in timeframes for case resolution and cost.

Recital 19 and Article 18 (d) of the proposed Directive state that complaints should be resolved within 90 days of an ADR receiving them. With effective structures, we consider that 90 days seems not only desirable, but also achievable for resolving consumer disputes as long as the first tier complaints process, where the complainant has complained to the trader, has already been exhausted. Otherwise, the ADR system could be uneconomically overburdened by cases that the trader was able and willing to solve.

## Guiding principles

The emphasis in the UK in recent years has been for the creation of an increasing number of Ombudsman schemes. There is no question that Ombudsman schemes will need to form a significant part of the ADR landscape; the Ombudsman model has much to recommend it. The British and Irish Ombudsman Association has developed both principles for good complaint handling for member ADR schemes, as well as principles of good governance for schemes. These principles, which have at their heart the concepts of independence and impartiality, as well as proportionality and efficiency, are designed to ensure that recognised ADR schemes are credible and authoritative in their decision making.

Consumer confidence in the ability of ADR schemes to resolve disputes effectively goes beyond simply the absence of bias in decision making. Impartiality is a given for most schemes, but it is the additional need for decision makers to be – and to be seen to be – independent from the businesses or sector within their remit. Without this, and especially where businesses could be perceived to be influential or carry more clout than an individual consumer, the effectiveness of schemes could be called into question. The recent judgment[1], following a judicial review of the Office for the Independent Adjudicator, makes this point, particularly in relation to the need for independence if a scheme is funded directly by a sector.

Our experience of the shift to an independent Ombudsman scheme in legal services illustrates this well. Prior to our creation, the professional bodies handling complaints about their members were owned, run, resourced and largely staffed by lawyers. This lack of credibility, of lawyers being perceived to be judging their own, was a strong part of the impetus behind the Legal Services Act 2007. Our governance mechanisms as set out in this statute are designed to ensure both independence of decision making as well as to ensure that the sector does not have control of funding arrangements or resourcing. Thus both the Chief Ombudsman and the Chair – and the majority of our Board and committees – have to be lay people rather than lawyers. This has clearly been critical to ensuring the credibility of the new scheme in the eyes of consumers and has not proved a significant issue in establishing credibility in the eyes of the profession.

With this in mind, we recommend that Article 6 of the ADR directive is extended to provide that those in charge of an ADR should be appointed by an individual (or a body with a majority) that is independent of those subject to investigation. The length of such appointments should be for a term sufficient to ensure their independence.

## Application of the EU proposals

As you will be aware, unlike the proposed ODR regulation, the proposed ADR directive may be subject to change as it passes into British legislation, although the spirit of the proposal must remain intact.

[1] Mr Amandip Sandhar in R (Sandhar) v Office of the Independent Adjudicator for Higher Education, judgment 21 December 2011

Supposing the proposal remains largely unaltered, the Government will decide whether two important aspects are made mandatory in the UK. The first of these is the requirement for traders to participate with an ADR scheme, and the second is whether or not decisions made by ADR entities should be binding on traders.

A requirement obliging traders to participate in an ADR scheme would join-up redress within the legal sector, with will writing firms, for example, being required to sign up. It would also join-up redress within the wider landscape of professional services, with professionals such as insolvency practitioners and accountants having ADR entities covering their service complaints. Access to ADR for traders brings advantages – it can assist in diverting any persistent complainants to a third party who can assist to break a deadlock, saving time and resources. Learning from the broader pattern of complaints from an ADR scheme can also influence best practice which in turn can help a firm retain customers.

If participation with an ADR entity is not made compulsory, the proposals may take the form of a voluntary jurisdiction. We are currently examining the possibility of creating a voluntary jurisdiction for unregulated will writers. This may echo the shape of any non-mandatory implementation of the EU directive. However, it is already clear that the success of the scheme is likely to depend upon the threat of possible full regulation if traders do not opt for voluntary membership. It may therefore be important for Government not to reject the possibility of making ADR membership mandatory in the future.

Membership of an ADR scheme puts the good, compliant trader at an advantage to his non-compliant competitor. Moreover, a situation where some remedies, such as ours or the Financial Ombudsman's were binding and others voluntary, would increase confusion amongst consumers. It could also lead to ADR being perceived as toothless, when it should be a credible alternative to court action.

However, in expressing a preference for mandatory rather than voluntary schemes, we would prefer that the style of ADR schemes is tailored to consumer need. Mandatory ADR is likely to be appropriate where there is a significant imbalance of power or information asymmetries between consumer and trader (such as professional services) but that voluntary ADR should suffice where there is no imbalance (such as greengrocers).

We are also not arguing for a significant extension of regulation. Regulation and redress are different – a point which appears to be getting lost in the current debate on press behaviour. The case for any

increases in regulation is far weaker than that for an increase in access to redress.

Recital 7 of the draft ADR Directive provides for ADR mechanisms to cover complaints submitted by traders against consumers. Ombudsmen schemes were created to level the playing field between (weaker) citizens/consumers and (more powerful) institutions. It would be inconsistent with how Ombudsmen operate for them to handle complaints by institutions against consumers. It is unclear how any decisions could be enforced against consumers and there is a risk that complained-against traders might seek to confuse issues by counterclaiming against the consumer.

## An opportunity to create a new strategic framework for ADR

The European Commission's proposals provide an opportunity for ADR to be reformed in the UK, given the multifarious factors outlined above. Along with a strategic re-evaluation of the types of ADR and their spread across the various markets, we would suggest that there should be a review of the mechanisms for delivery of ADR, with the aim of ensuring optimum performance and economies of scale. Maximising existing schemes to develop a more strategic approach in this area would reduce costs; the Financial Ombudsman benefits from economies of scale currently unavailable to our scheme. However, with the increased joining up of legal services, especially with areas such as accountancy, there may be opportunities to maximise efficiencies from existing structures.

There may be innovations which may allow ways of meeting the BIOA principles that give consumers better access to redress at less cost and better levels of efficiency. Such a review would also aim to look at the narrow ADR mechanisms in the context of the wider consumer protection mechanisms provided by the courts and tribunals.

It seems essential for formalised ADR schemes to be backed by some level of regulation (although, as with the estate agents industry, this may be limited to a requirement that professionals be part of a scheme) and, where there is to be no mandatory or formal ADR scheme in operation, strong enforcement strategies in other areas of consumer law. These should include a proactive approach to consumer protection in addition to the redress that can be provided by an ADR scheme. The full range of

consumer protection options, including insurance, is fundamental to ensuring effective regulation. We are also keen to ensure that the other aspects of consumer protection – speedy discipline and compensation arrangements, trading standards and consumer law remedies as well as access to courts and tribunals – tie up with redress and insurance, so that the system has robust mechanisms in place enabling consumers to benefit from an adequate, joined-up, safety net. In our recently published Strategy 2012-2015 and Business Plan 2012-2013 we committed to look at how we could use the provisions in the Legal Services Act to create a voluntary jurisdiction under section 164 to fill these gaps and ensure access to free and fair redress for consumers of legal services.

An appropriate oversight and monitoring body would be one like the Administrative Justice and Tribunals Council (ATJC). The remit of the AJTC suggests that it might have been a candidate for the role. Its mission included seeking to ensure that the relationships between the courts, tribunals, Ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users. Given that there is no other body similar to the AJTC in the future landscape, it may be that asking another Government Department re-vamping the British and Irish Ombudsman Association or designating one Government Department (the current fragmentation of responsibility would not seem to meet the requirement) may be a response to the issues of oversight. This EU proposal provides us with an opportunity to look at how we can adopt modern approaches to consider new models both for individual schemes and the system as a whole.

Better information requirements would also help to break down barriers that discourage consumers from complaining. The draft proposals are welcome and would supplement first-tier complaint handling rules in the legal profession. But a single set of rules common across ADR schemes would be simpler to communicate to traders and consumers, providing a consistent approach to complaint handling as well as being simpler to operate. Such harmonisation within the legal sector will also help to contribute towards harmonisation between sectors, as the advent of new forms of regulation, such as Alternative Business Structures and the multidisciplinary traders it encourages will necessitate.

Due to these factors, the EU proposals present a key opportunity to re-model the existing system of ADR to resolve existing overlaps, shortfalls and conflicts rather than increasing confusion for consumers accessing redress. We welcome this consultation and would be happy to work with BIS in forming a response to the European Union’s proposals.

# Annex A

## Legal Ombudsman response to call for evidence questions

**What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

We cannot comment on the reliability of the European Commission's impact assessment. However, we can comment on what you have picked out as the key estimates in the assessment, by applying them to our own experience.

We aim to resolve complaints simply and informally, relieving consumers of the pressure and stress associated with going to court. Given the relatively low value of compensation which tends to be awarded in these cases, and the stress and inconvenience often associated with court action, it seems unlikely in many cases that complainants would have taken their case to court, if our service was not available.

Not all service complaints that consumers would consider to be 'legal services' are covered by the Legal Ombudsman. For example, we can deal with complaints about solicitors who have drawn up wills but we cannot process complaints against non-regulated will writers.

It seems fair to presume that widening the scope of ADR to cover all contractual professional services would cover these gaps and save money for consumers who have received poor service. We will pick up this point again in our answer to question 4, when we talk about the gaps currently existing in ADR.

There can also be complications when legal services are bundled in with other professional services, such as in property transactions. Whilst we have good relationship with other Ombudsman schemes, the difference between regulatory frameworks (we work in an entity based framework, other can work within a transaction based framework) means that consumers can find it difficult to find the best course to redress.

The consultation document seeks views about the benefits to consumers of using ODR for cross-border e-commerce transactions. The legal landscape is undergoing a process of swift change as more competition is entering the market and Alternative Business Structures (ABS), are being introduced. The Solicitors Regulation Authority started to receive applications for ABS licenses in January and firms from overseas are already applying. In this time of quick and immense change, we are working with other consumer redress schemes. We would welcome initiatives to join up mechanisms of redress in the legal and professional services sectors to make sure that complaints handling schemes are consistent, reliable and accessible to all members of the public. We are currently working with other Ombudsman schemes to ensure that consumers are not adversely affected when purchasing these services.

The consultation document seeks comments on financial benefits to traders of ADR. It would be hard to quantify the amount of money we save in legal fees for firms as there is no guarantee that all of our complainants would use the courts if we did not exist. As already stated, given the relatively low levels of compensation that we typically award, and the stress and inconvenience often associated with pursuing cases through the courts, it seems likely that many complainants would not.

Although it is difficult to quantify any financial benefits to the legal profession of our ADR existing, we contribute to the profession by feeding back information, such as publishing Ombudsman decisions, which helps to level the playing field for firms who provide a good service to consumers.

The final point under this section in the consultation document looks at the estimated costs of providing additional information in letters, on websites, and so on. The legal professionals we oversee are currently required to provide information about complaints handling in their client care letters and to provide it again once they receive a complaint. We would welcome an extension of this best practice to other legal and professional services.

1. **Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

Until we have more information about the form ADR will take - whether we would have to extend our remit, whether the scheme would be made

mandatory or binding, how much we would have to change our systems and so on - it is impossible for us to quantify any additional costs.

However, it is very likely that an expansion of existing services would be less costly than creating new services from scratch. Our scheme was deliberately set up to be flexible and adaptable to developments in the sector, so we feel confident that we would be able to alter our processes to deal with the proposals and a potential expansion of our remit. Our modern computer systems should be able to deal with the changes,as our telephony is fully integrated with our IT system, for example.

The consultation document asks us to comment on funding. Ombudsman schemes are funded in a variety of ways. We are funded through the legal profession; lawyers pay an annual levy to their regulatory body, which in turn passes some of that money on to us. In addition, as mentioned earlier, we charge case fees to lawyers in certain circumstances, although this constitutes a small proportion of our funding. If we were to expand our jurisdiction to cover other types of legal or professional services, we would expect our operational costs to increase to cover the new work. We would have to consider where this funding would come from. One option could be through increased case fees for unregulated entities.

Currently, there is no emphasis placed on awarding complainants higher amounts of redress than they would gain if they went through the courts. Instead, when a lawyer is found to have provided poor service, we aim to put things right and put the complainant in the situation they would have been in if they had not received the poor service. Indeed, the compensation we order from firms tends to be relatively small. £30,000 is the maximum we are permitted to order and we have only done this in a handful of cases. We are looking into extending this limit, as part of our review of scheme rules, but we would only order higher amounts if the case merited it. We have occasionally dealt with cases where we would have ordered firms to pay more than £30,000 if that had been possible.

We would like to understand more about the provision mentioned in paragraph 17 of the proposals, which states:

*“The natural persons in charge of alternative dispute resolution should only be considered impartial if they cannot be subject to pressure that potentially influences their attitude towards the dispute. There is a particular need to ensure the absence of such pressure where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member.”*

We are confident in our independence but as we are funded by the legal profession, through the MOJ, we would want to understand how we would need to evidence our independence, when the proposals are adopted.

2. **Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

Section 75 of the Consumer Credit Act 1974 provides valuable protection to consumers who have suffered loss from a transaction while using a credit card. However, it does not provide the comprehensive cover that ADRs afford.

We are concerned that if the Consumer Credit Act were the only source of redress for consumers, it would lead to those who are able to hold a credit card having more protection than those who do not.

The consultation document also looks at the provisions made by the global voluntary scheme, "chargeback". Again, there are accessibility issues with this scheme, as it only covers Visa and Mastercard debit and credit cards. If this was considered as a form of ADR, these customers would be better protected than consumers who do not use these services. The consultation rightly points out that this scheme is voluntary so there is also an issue with its durability.

In addition, these routes to redress only cover financial loss and not compensation for distress, inconvenience, or any other types of poor service which ADRs investigate and order redress for. Nor are these services independent, and it is in the interests of credit and debit card providers that they do not have to provide compensation to consumers.

It is also worth noting that the protection offered to consumers by these two services do not cover traders; the European Commission's proposals on ADR and ODR both entitle traders to lodge complaints about their customers.

3. **What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

The Legal Ombudsman is only in a position to comment on gaps in consumer redress within the legal and professional services sector. In October 2011, we commissioned the University of Leicester to undertake independent research on the legal services landscape. They found that consumers are often unclear on what a legal service is, and what the route to redress is, if something goes wrong.

The research highlighted the difference between public perceptions of a 'legal service' and those legal services and practitioners we have jurisdiction to oversee. There are gaps in redress in the areas of mediation, immigration advice and employment advice, to name but a few. A gap which was particularly noted in the research was unregulated will writing. Under the current arrangements, the Legal Ombudsman can investigate complaints against will writers as long as the lawyer is regulated, but if the will writer is unregulated, we are unable to pursue a claim.

We will be consulting this year on possible voluntary expansions of our jurisdiction to cover some of these gaps. If a voluntary jurisdiction scheme is established, it would fit in well with the proposed ADR directive, as a voluntary jurisdiction is likely to resemble the arrangements that would exist if the ADR directive is non-mandatory on traders. If it is made mandatory, voluntary jurisdiction would serve as a good intermediary stage.

As well as gaps in redress in legal services, there are other professional services which are not currently covered by an ADR mechanism. In our recent response to the BIS Commons Select Committee's inquiry into the Insolvency Service, we explored the possibility of expanding our jurisdiction to cover insolvency practitioners. Insolvency practitioners often come from a legal background and share some regulators with the lawyers we oversee. With this in mind, rather than creating a new ADR scheme, it may be logical to extend our jurisdiction.

We would like to see the gaps in redress in the legal sector closed so members of the public are able to access redress regardless of who they

buy a legal service from. This may become even more complicated in the future as ABS firms start to emerge. We are keen that arrangements which are made to meet any changes in ADR join-up and work well together to create an efficient and straight forward process for consumers. Consumers should be able to expect a similar outcome if the provider of the professional is covered by more than one ADR. If it was viewed appropriate, we would be happy to discuss the possibility of extending our remit to other professional services.

4. **What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop you scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not requires? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

The approach outlined in the European Commission's proposed ADR directive seems, at this point, to fit well with the scheme we already operate at the Legal Ombudsman. If we became an ADR entity under the proposals, we would have to make changes to some of our processes. However, we feel that these changes would be workable and the proposals could lead to an even more effective joined-up system of consumer redress and protection. Below, we have listed the changes that the consultation document invites us to comment on, along with how we see them fitting into our existing scheme:

- Transparency: ADRs will have to make information publicly available about their governance, funding and practical procedures, as well as publishing annual reports and statistics. We already release information on our website, and through freedom of information requests, and we publish annual reports and Ombudsman decisions online. In publishing information, we go beyond our obligations and publish case studies on our website which help to illustrate how our processes work, feeding back to consumers and the legal sector. We also use social media, such as Adam's blog, which is an informal commentary on what happens at the Legal Ombudsman on a day to day

basis. Openness and transparency are a part of our culture and we feel confident that we would be able to meet this requirement.

- Costs: our service is already free of charge to consumers; we are funded by the legal profession.

- Time limits: cases should take a maximum of 90 days to resolve, although in complicated cases this could be extended. Under our current arrangements we have the same goal with most of our cases resolved within 90 days. Customers are required, in the first instance, to complain to their law firm. If their complaint is not dealt with satisfactorily, then they come to us, and do not include this first step within the 90 days. It is unclear in the proposals whether first tier complaints are included within the time limit. Based on our experience, we do not feel this would be realistic.

- An online service: ODR will be conducted entirely online. Currently, we contact complainants using their preferred method of contact. We already correspond with customers via email and letter. However, the majority of our initial contacts are by telephone. Complainants do seem to appreciate having a range of options available to them.

- Accepting claims from other member states: we would be happy to accept complaints about any firm that is regulated in the UK.

- Ensuring personal data complies with relevant rules: we already do this.

- Sharing information and co-operating with other bodies: ADRs will exchange information via electronic means. We already have systems set up where we can securely share information electronically with several different partner organisations.

- Competent authority: information on this is given in the answer to Q6.

- Including information in letters: traders will have to provide information in their initial correspondence to consumers, and again if they receive a complaint, regarding the ADR they prescribe to. Lawyers in the UK and Wales are already expected to provide this information to consumers. Widening this out into other sectors would be an expansion of best practice and ensure more consistency across sectors. We welcome any efforts to

improve consistency of approach between agencies and joined up working.

- Principles: ADRs will have to demonstrate that they are impartial, transparent, effective and fair. These principles chime with our own values, we strive to be independent, fair, effective, open and shrewd.

Perhaps the largest change in the work we do, if the proposals are fully adopted, would be processing complaints from traders about consumers. But, without any indication of how many complaints we could expect, it is hard to quantify what this would mean in terms of increased costs and resources.

5. **What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

Member states will need to designate a competent authority to accredit, monitor and report on ADR schemes. Under the current arrangements, Ombudsman schemes have a parent Government department. The Legal Ombudsman currently reports to the Ministry of Justice. In line with our priorities and values, we would welcome working with any Competent Authority that encourages a joint up partnership approach to ADR.

The Administrative Justice and Tribunals Council would seem a natural choice for this, although it currently faces an uncertain future as a draft order to abolish the AJTC is expected to be laid this spring.

6. **Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

We recently undertook our first quarterly customer satisfaction survey. Our initial results seem to suggest that providing consumers with information on complaints processes in lawyers' client care letters, and

then again when a consumer complaints to the firm, leads to customers pursuing their complaint through the Legal Ombudsman. However, it is likely that some of our respondents would have found us through other channels if the information was not included in the client care letter.

8. **What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

No comments.

9. **Any other comments:**

The consultation document does not seem to have considered the implications of taking complaints from traders about consumers. If these are adopted, we could expect a considerable increase in our workload and this would have to be funded, either by the legal profession or through public funds.

If ADR is not adopted, or isn't made mandatory, and ODR is adopted there could be a situation where the public are better protected when purchasing from traders in other member states than they are in the UK. As an organisation that is committed to best practice, we would be concerned if this scenario unfolded.

10. **What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the OR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

Our main concern about the proposed ODR regulation, hinges on the 30 day limit for resolving complaints. Few of our cases are resolved within a month. Providing a service where communication is purely online should speed the process up. However, much of our communication with complainants and firms is already electronic and the majority of our

cases take up to 90 days to resolve. We expect that it would be difficult to resolve all cases within 30 days.

# LEGAL SERVICES CONSUMER PANEL

LEGAL SERVICES CONSUMER PANEL

# Consultation response

## BIS: EU proposals on Alternative Dispute Resolution

### Overview

1. **The Panel welcomes the intention to give consumers access to ADR to resolve disputes with any trader, but this will only work if the participation of traders is also made mandatory. This would ensure fast and fair redress, act as a deterrent against poor practices and provide a more level playing field. In legal services, such a step would fill gaps in redress provision and accord with consumer expectations. It may also reduce calls to regulate activities not reserved to the profession – such as estate administration and general advice – in a more comprehensive fashion.**

2. **We are greatly alarmed that the Directive would appear to enable traders to file complaints against consumers. People will be less likely to complain about lawyers if they fear this could happen.**

3. **We support the proposed standards for ADR providers, which overlap strongly with recognised good practice in the UK. Ombudsman schemes are a superior form of ADR so any extension of redress in legal services should be implemented through the Legal Ombudsman.**

4. **The single competent authority should provide enhanced accountability for ADR schemes. The Office of Fair Trading would be a natural home for this role, but there would need to be co-ordination with sectoral regulators who perform an oversight role, as in legal services.**

5. **Information requirements would help to break down barriers that discourage consumers from complaining. The draft proposals are welcome and would supplement first-tier complaint handling rules in the legal profession.**

6. **There is an opportunity for the UK to use the Directive to ensure more joined-up delivery of consumer redress to reflect the trend towards converged delivery of services across business sectors. Consumers are increasingly purchasing services in one-stop shops, but redress schemes remain delivered in regulatory silos. Market liberalisation reforms put legal services at the vanguard of these developments; the Panel would be happy to engage in such a process.**

### The proposals

7. The European Union (EU) has published a draft Directive on alternative dispute resolution (ADR) for consumer disputes and a draft Regulation on online dispute resolution for consumer disputes. The Department for Business, Innovation and Skills has issued a call for evidence seeking views on the impacts of the legislative proposals on the UK to inform the UK negotiating position.

8. The proposed Directive follows a series of research studies on ADR and a public consultation in January 2011. The justification is to further develop ADR in order to improve the functioning of the internal market. Weaknesses identified in current arrangements include gaps in coverage of ADR in some economic sectors and geographic level, lack of awareness and insufficient information preventing consumers and businesses from using ADR, and variable quality of ADR schemes. The key proposals in the draft Directive are as follows:

   - All disputes between consumers and traders arising from the sale of goods or the provision of services can be submitted to an ADR scheme. Member States shall determine whether to make participation of traders in ADR schemes mandatory;
   - Consumers should be able to find information on the ADR scheme in the main commercial documents provided by the trader and on the trader's website;
   - Schemes must respect the quality principles of impartiality, transparency, effectiveness and fairness; and
   - In each Member State, a competent authority will monitor the functioning of ADR schemes and will assess whether they respect the quality principles. Regular reports will be published on the development and functioning of schemes.

9. The Panel's comments are limited to those proposals that have the potential to affect consumers of legal services. We start by outlining relevant features of consumer redress in this market and then address key elements of the proposals. Our comments are restricted to the draft Directive on ADR. The scope of the draft Regulation is limited to cross-border disputes. Since cross-border trade is not currently a key feature of the legal services market, we offer no comments at this stage.

## The Panel's response

### Relevant features of legal services

10. The Legal Ombudsman is the statutory redress scheme available to legal services consumers in England and Wales. There are some legal activities which are 'reserved' to authorised persons, such as solicitors and barristers. Authorised persons are subject to the Legal Ombudsman's jurisdiction for all legal activities they provide whether or not these are reserved. However, many other activities, such as will-writing or the provision of general legal advice are not regulated and thus can be provided by anyone. Non-reserved legal activities, where they are provided by unregulated businesses, fall outside of the Legal Ombudsman's jurisdiction, although there is provision in the Legal Services Act (yet to be switched on) for a voluntary jurisdiction. Another dimension is claims management where a complaints scheme, but without powers to award redress, is operated by the Claims Management Regulator, which is formally the Ministry of Justice. This may seem complex, but in fact the description above is a simplistic summary of a regulatory system which is even more complicated in reality.

11. The Legal Services Board (LSB) is the independent body responsible for overseeing the regulation of legal services in England and Wales. It has statutory responsibilities with respect to the Legal Ombudsman, which include appointments, approving budgets and setting performance

targets should these be necessary. Also of relevance, the LSB has made rules in relation to first-tier complaints-handling, which require providers to inform clients in writing at the time of engagement about their route to redress, including to the Legal Ombudsman should attempts to resolve a dispute at the first-tier be unsuccessful.

12. The LSB oversees eight approved regulators who regulate the eight branches of the legal profession. Their codes of conduct include measures relating to complaints-handling. The approved regulators remain responsible for handling complaints alleging misconduct, whereas the Legal Ombudsman resolves complaints about poor service.

13. The Legal Services Consumer Panel is a statutory body providing independent advice to the LSB and others on the consumer interest on issues concerning the regulation of legal services. We have some statutory responsibilities in relation to the Legal Ombudsman, in particular the ability to trigger investigations into extending its jurisdiction and the compensation limit.

**Q1. What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

**Q2. Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

14. We have no specific comments on the estimates in the Impact Assessment, but more generally the Panel welcomes the intention to give all consumers access to ADR to resolve disputes with any trader. This would give consumers access to fast and fair redress, act as a deterrent against poor practices and provide a more level playing field between authorised persons and unregulated businesses in the market. In our sector, this would also match with consumer expectations that all legal services are regulated.[1] Consumers are unaware of the complex boundaries of legal services regulation until they experience a problem and try to find their way through the system; it is unsatisfactory that people are choosing unregulated legal businesses unaware of the differing levels of protection and under the false impression they can obtain compensation from an independent ombudsman if something goes wrong.

15. As previously mentioned, some legal activities are regulated but others are not. Analysis has shown that the reserved activities are not grounded in consumer protection considerations, but are rather an accident of history.[2] The definition of some reserved legal activities is narrowly drawn, again for historical reasons – for example, obtaining a grant of probate is reserved but wider probate and estate administration services are not. This has led to complex business structures which lack transparency and escape regulation. Currently, the only tool available to extend regulation, and thus secure mandatory access to the Legal Ombudsman for consumers, is to reserve more activities to the legal profession. However, reservation is a blunt tool which can unnecessarily

restrict competition and thereby limit consumer choice.

16. The draft Directive could help to resolve this situation as consumers would have a remedy should things go wrong but additional entry or other requirements on businesses would not need to be imposed unless otherwise this was justified. In short, if all consumers had access to the Legal Ombudsman, this would reduce calls to regulate firms more comprehensively. However, this would only work if the UK Government made participation by traders mandatory (see Question 9).

**Q3. Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

17. The call for evidence mentions the ability of many consumers to obtain redress through their card issuer if they make a transaction using a credit or debit card – the so-called 'chargeback' mechanism. This is a valuable route to redress, although it does not offer the full range of remedies – e.g. correcting work or apologising – that an ADR scheme can award. It is also voluntary for debit card providers and is not well publicised. The Panel is not aware of data on payment methods in legal services, but we have anecdotal evidence that use of cheques is likely to be more prevalent than in other markets. This situation can be exploited, for example our work on will-writing includes cases where unregulated businesses visit people's homes and immediately cash cheques and refuse to honour cooling-off periods. Therefore, chargeback is useful but an incomplete solution in legal services.

**Q4. What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

18. The reserved legal activities are as follows:
    - The exercise of a right of audience;
    - The conduct of litigation;
    - Reserved instrument activities, such as elements of conveyancing;
    - Probate activities;
    - Notarial activities; and
    - The administration of oaths

19. All other legal activities are unregulated and so may be provided by anyone. Thus there are many potential gaps in ADR in this sector, such as will-writing, powers of attorney, advice on matters such as divorce and employment disputes. In practice, most consumers use solicitors for legal transactions and so can access the Legal Ombudsman for any legal activity. However, unregulated businesses are gaining a foothold in some markets, for example will-writing companies prepare 10% of wills in England and Wales.[3]

20. We are greatly alarmed that the proposed Directive covers complaints filed by traders against consumers as well as complaints filed by consumers against traders. There is no precedent for this in the UK and we cannot see any rationale for the proposal. The research evidence shows that people feel intimidated by lawyers and lack confidence to complain. This situation would be made worse if consumers faced the prospect of their lawyer or, indeed, a lawyer representing another party in their case, filing a complaint about them. The proposal is a recipe for counter-claiming. We urge BIS to strongly resist this proposal.

21. The draft Directive excludes businesses and other types of person from making complaints to the ADR scheme. The Legal Ombudsman may accept complaints from certain small businesses, small charities and clubs and associations. The Panel represents a range of consumers, including such smaller consumers. We agree that the focus of the Directive should be individual consumers, but other persons also lack buying power in their dealings with lawyers. The Directive should not preclude the Legal Ombudsman from continuing to include such persons from its jurisdiction.

22. The Legal Ombudsman is funded by the legal profession and thus requires no public subsidy. This could continue if participation by traders was made mandatory as the Legal Ombudsman could take traders who refused to pay case fees to court. There is already case law that refusal to cooperate with the Legal Ombudsman's investigations may be treated as contempt of court and carry a hefty fine or imprisonment.

**Q5. What do you think of the standards/ requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

23. The Legal Services Act requires the Legal Ombudsman to "have regard to any principles appearing to it to represent the best practice of those who administer ombudsman schemes". In practice, the British and Irish Ombudsmen Association (BIOA) is looked to as the standard-setting body for ombudsmen, albeit this is a voluntary membership organisation. It has established six good governance principles: independence; openness and transparency; accountability; integrity; clarity of purpose; and effectiveness. It has also published a guide on principles for complaint-handling.[4] There is a strong read-across between the BIOA principles and those in the draft Directive. We do not object to any of the detailed standards in the Directive, although they might benefit from being more outcome-focused and less prescriptive.

24. We are concerned by need to "ensure the absence of [pressure on ADR schemes] where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member" (Recital 17). Of course, such pressure must

be avoided, but this need not occur with the correct governance arrangements. The idea of case fees – the "polluter pays" principle – is a key element of the Legal Services Act. Private sector ombudsman schemes are not a common in the EU so the statement is understandable, but it risks unintended consequences. The Directive should not interfere with the well-held principle in the UK that industry should bear the cost of its own regulation, including the cost of ADR.

25. The draft Directive envisages different types of ADR scheme. Our response naturally focuses on the Legal Ombudsman, as this is the single statutory scheme in the sector. We consider that ombudsmen offer a superior form of dispute resolution as they are free of charge to consumers, their decisions are binding, they follow the BIOA principles and, most importantly, an explicit part of their role is to use the intelligence from complaints to help raise standards in their industry sector. The EU envisages that Member States extend the jurisdiction of existing ADR schemes where possible. We support this sentiment and encourage the UK Government to ensure any extension of redress to other legal services is carried out through the Legal Ombudsman.

26. We do see potential for UK ADR providers to provide their services to non-UK businesses. In the legal services sector, some of the approved regulators already regulate international practice in some respects. The market liberalisation reforms in legal services – alternative business structures (ABS) – may result in businesses headquartered overseas being licensed to provide reserved legal activities. Two major US businesses focusing on online delivery – LegalZoom and Rocket Lawyer – have already signalled their intention to do this. Should their applications be successful, like all ABS firms, they will be subject to the Legal Ombudsman's jurisdiction.

**Q6. What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

27. The Panel welcomes the concept of a single competent authority in the UK to provide enhanced accountability for ADR schemes and enable benchmarking across different schemes. The Office of Fair Trading would be a natural home for such a role given its current focus and functions, which include approving ADR schemes in the estate agency sector. Of course, this depends on the outcome of the BIS consumer landscape review.

28. As previously mentioned, the LSB has a statutory oversight role in legal services, as is the case in other sectors like financial services and communications. It will be important to preserve the oversight role provided by sectoral regulators and ensure that they and the Competent Authority work well together and do not duplicate effort.

**Q7. Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

**Q8. What would be the costs to businesses of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses, and, in particular, for small or medium businesses?**

29. The LSB has recently introduced rules requiring authorised persons to inform consumers about first-tier complaint procedures and their right of access to the Legal Ombudsman.[5] It is too early to know whether these rules have made a difference to consumers' propensity to complain. However, we do have research indicating that only half of consumers would feel confident in making a complaint about a lawyer and 35% of dissatisfied clients do nothing about the situation; in fact, only 13% of dissatisfied clients make a formal complaint to their lawyer.[6]

30. Therefore, we would encourage information requirements as a means of breaking down barriers to complaining. The draft Directive would go beyond the LSB's signposting rules by requiring information on websites and in a wider range of documentation. The Consumer Panel would welcome this.

**Q9. Do you have any other comments on the proposed Directive?**

### Mandatory participation by traders

31. The Directive does not require businesses to be bound by the outcomes of any ADR procedure but it is also without prejudice to any national rules making the participation of traders in such procedures mandatory or their outcome binding on traders.

32. The Directive should not give such discretion to Member States. In any case, we urge the UK Government to signal now that it would be minded to make participation by traders mandatory. It would be very confusing to say to consumers that they have a right to complain to an ADR scheme but the trader is not bound by the outcome – people may well consider it is not worth the time and stress. Given consumers reasonable assumptions that all legal services are regulated, we do not think it viable to rely on consumers to exercise choice between traders on these grounds, especially as people use legal services rarely and lack knowledge of the law. Moreover, less scrupulous traders, who would be likely to receive proportionately more complaints, are least likely to voluntarily participate in a redress scheme. Without this measure, the Directive would add little value to the voluntary jurisdiction provisions in the Legal Services Act.

### Joining-up redress schemes

33. Finally, our submission has alluded to the complex regulatory landscape in legal services. Of course, legal businesses are not the only organisations providing legal services to the public, for example banks

offer will-writing services and in this case the ADR scheme which consumers must use is the Financial Ombudsman Service. Furthermore, the ABS reforms enable businesses to join together to deliver bundled legal and non-legal services in one-stop shops, e.g. a complete home moving service. Such convergence, also seen in other parts of the economy, cuts across structures of regulation in which there are separate regulators and redress mechanisms in individual markets.

34. This is confusing for consumers as they may have to contend with multiple redress schemes, each with its own rules and systems, in what appears to them as a single service, e.g. moving home. There is welcome work behind-the-scenes to promote cooperation between ombudsman schemes, but it is arguable that such measures will only ever 'paper over the cracks'. The EU Directive provides a unique opportunity for the Government to consider more radical options, such as a single entry portal or even mergers between schemes. Some key differences in approach create barriers, such as regulation of activity in financial services as opposed to regulation of entity in legal services, but we do not think these are insurmountable.

35. These considerations need not influence the UK's negotiating position on the draft Directive, but the implementation timescale is quite short and so it should be starting discussions with other departments now in order to be ready when the time comes. As the legal services reforms are in the vanguard of multi-disciplinary practice, we would welcome the opportunity, alongside others organisations inside and outside of the sector, to take this thinking forwards.

## January 2012

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1 Legal Services Consumer Panel, *Quality in Legal Services*, November 2010.

2 Legal Services Board, *Enhancing consumer protection, reducing regulatory restrictions*, July 2011.

3 Legal Services Consumer Panel, *Regulating will-writing*, July 2011.

4 www.bioa.org.uk

5 http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_lsb_signposting_requirement_and_guidance_Decision_document.pdf

6 Legal Services Consumer Panel, *Consumer Impact Report 2011*,

# NCIF (NATIONAL CASINO INDUSTRY FORUM)

Dear Heidi

Thank you for sending the Call for Evidence document regarding ADR for NCiF's response. During our recent conversation I expressed an opinion that as gambling had been omitted from the the EU 3rd Directive on internal markets and services and is covered by subsidiarity that this EU proposal does not apply to UK land based casino operators. I have sought the opinion of UK Gambling Commission and they are in agreement with our interpretation. Therefore, I would be grateful if the following response could be incorporated into your findings.

**"The National Casino Industry Forum (NCiF) is grateful for the opportunity to respond to the Call for Evidence to EU ADR/ODR Proposals. It is our understanding that as gambling in excluded from the EU 3rd Directive for Internal Markets and Services that the proposal for an EU ADR will not apply to the UK land based casino industry".**

**Kind regards**

***Tracy Damestani***
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# NETSA (NORTH EAST TRADING STANDARDS ASSOCIATION)

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Dr Heidi Munn
Consumer and Competition Policy Department for Business, Innovation and Skills,
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Dear Dr Munn,
**EU Proposals on Alternative Dispute Resolution**

This response has been produced by the North East Trading Standards Association (NETSA). NETSA is the partnership body representing Heads of Trading Standards services from the twelve local authorities in the North East of England.

We welcome the opportunity to comment on the above consultation.

Q1) Not within our remit.

Q2) Not within our remit

Q3) NETSA as a partnership body takes the view that there seems to be confusion between chargeback and claims made under the provisions of Section 75 of the Consumer Credit Act 1974 (CCA74), which in the view of NETSA needs to be clarified.

NETSA is of the view that Section 75 of the CCA74 is not and never should be an ADR and the importance of this statutory provision must be stressed to all those companies and businesses engaged in the financial market. Section 75 of the CCA74, covers all breaches of contract in a debtor-creditor-supplier agreement, whereas the chargeback scheme being voluntary, can and does exclude many examples of situations covered by Section 75 of the CCA74.

It is the view of NETSA that there should be no weakening of the statutory legislation. If chargeback is to be considered a form of ADR there must be uniformity with all providers and the provider of the ADR must be independent of the companies and businesses engaged in the financial market.

Q4) NETSA as a partnership body takes the view that whilst the use of ADR across local authority and court boundaries, may be useful in the United Kingdom, the largest source of such disputes is likely to be online transactions. It is our view that there is currently little provision of ADR for online transactions that is meaningful to consumers.

As more retailers/sellers move to using online payment methods such as 'Paypal', which remove the protection offered by Section 75 of the CCA74, along with transactions of contracts valued at less than £100, a scheme with real "muscle" and empowerment for consumers would be welcomed.

Q5) The View of NETSA as a partnership body is that to be useful and trusted by consumers any ADR provider must be independent of the trade it is resolving disputes for.

It is our view that the Financial Ombudsman Service, whilst funded by a levy on finance and insurance companies is a good example of a true ombudsman scheme which is not influenced by its funders. This successful scheme contrasts markedly in our view with other schemes which are funded by their members and therefore do not have the same level of independence and have not developed the same level of trust from the consumer.

Q6) Not within our remit

Q7) It is the view of NETSA that a well structured scheme will develop with trust from consumers and membership of such a scheme is likely to encourage a consumer to use traders who actively participate in the scheme.

Q8) Not within our remit

Q9) It is the view of NETSA that ADR can be a useful tool for consumers to resolve consumer issues that they seek redress for; but it is important that the development of such schemes, must still allow the consumer the capability of choosing recourse through the County Court if that is the consumers preferred choice.

It is also our view that schemes in the United Kingdom, for less than the small claims track limit should only be binding on the retailer. The only drawback is that the businesses most likely to use and be a part of ADR are the reputable ones and the "rogue traders" who will undercut them will not take any notice.

Businesses may only join such schemes if they feel there is little cost to them and very little regulation and enforcement, if they chose to ignore the findings of the bodies set up to adjudicate. Therefore any such scheme must have a robust mechanism for removing members who do not comply with rulings. Rules of membership should also be strictly enforced.

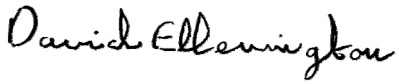
NETSA as a partnership body is firmly of the opinion that consumer education and publicity should be constantly utilised in the development of any scheme.

Q10. it is the view of NETSA that online dispute resolution is perhaps more useful to consumers in the United Kingdom than elsewhere in the European Union, as this is the most likely source of purchase of products by consumers.

Therefore, we believe that ODR would be welcomed by consumers, whilst a 30 day resolution may be difficult in complex disputes there should be no real problem in extending deadlines in a voluntary scheme and as set out within Section 5 of the Limitations Act 1980, which allows a claim within six years in a simple contract claim if there is a breach of contract and therefore there would be no detriment consumers covered by the provisions of English law.

Hopefully this response is of some assistance to the Consultation exercise but if there are any specific enquiries to the issues as raised, please do not hesitate to contact David Ellerington on (0191) 2116119.

**Signed off on behalf of the NETSA Executive. Chair. David Ellerington. 31st January 2012.**



# NLA (NATIONAL LANDLORD ASSOCIATION)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Lawrence Greenberg

Organisation (if applicable): National Landlords Association

Address: 22-26 Albert Embankment, London SE1 7TJ

Telephone: 020 7840 8922

Fax: 0871 247 7535

Email: lawberg347@yahoo.co.uk

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☒ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

I was asked to prepare this response in my capacity as the Independent Case Examiner for the National Landlords Association. It has been considered and approved by the Chief Executive under powers delegated to him by the Board of the NLA. The requirement for a speedy response precluded a consultation exercise with the membership.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

NLA is in the process of revising its procedures and intends to offer all three ADR services, together with full investigation of complaints where necessary.

b) How much does it cost you to provide these services each year?

Not yet established

c) What fees do you charge per dispute to whom for these services?

Initially free to members; possibly charges therafter

d) Approximately how many disputes do you seek to resolve each year?

Demand expected to be relatively low

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

NLA members will be required to comply with the outcome of the ADR. Failure to do so could lead to suspension or termination of membership. We have no powers over complainants.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

Private residential renting in the UK.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

A. The estimates seem reasonable, but It is difficult to comment on their accuracy without understanding how they were reached. We have some concern that the estimate of costs of meeting the information requirements are based on a very small sample of 22 depth interviews.

B. Probably, but much will depend on the detailed requirements which ADR entities will have to meet. They need to be simple and straightforward with a minimum of bureaucracy.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

No. But the discussion seems sensible. NLA is continually encouraging its members to raise their standards of service. Hopefully any additional costs for them to meet the Directive's requirements will therefore not prove to be onerous.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

A. No. There is no consideration or negotiation of a dispute which requires the parties to respond to each other. It may be effective in gaining redress for the consumer, but may leave the provider feeling aggrieved.

B. Consumers may well seek to use this process where they feel it offers them a better chance of redress and where they are purely concerned to achieve compensation. It seems to put greater power in the hands of the consumer and is therefore unlikely to be favoured by our members.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

A. The use of ADR in the UK is perhaps more advanced than in other parts of Europe, particularly since the publication of the Woolf report in 1997. It is still

ambitious to to expect to achieve the consistency and quality of ADR throughout the UK posited by the Directive. We can only assume that it will also be difficult to attain elsewhere.

B. Within the private rented sectors, only those landlords who belong to trade or regulatory bodies are covered by ADR provision (with the exception of statutory tenancy deposit protection). Even then the extent and quality may vary between bodies. We are not able to comment on gaps in the provision of ADR in other sectors.

C No.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

A The standards proposed seem reasonable, but much will depend on how they are expressed in detail and how they are interpreted.

B/C/D NLA will meet the standards in due course.

E/F No.

G. Limited. Mediation relies heavily on a sophisticated grasp of the nuances of language and culture. Few English mediators would be sufficiently fluent and confident to operate abroad. Where arbitration and adjudication rely more on translatable documents or business conducted in English, there may be greater opportunities.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

A. We consider that it would be valuable to have a body responsible for monitoring the functioning ADR entities.

B. Something similar to the Electoral Commission.

C. No

D. Impossible to assess on the basis of the limited information available

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or

whether they would participate in ADR? What evidence do you have to support this view?

A. In principle, one should expect some initial increase in the volume of consumers wanting redress or resolution. However, the extent of take-up will depend on the accessibility and complexity of individual schemes. The more rigorous are their requirements, the less they will be used. Latent demand will also vary from sector to sector and be subject to their history of customer service.

B. There is considerable data from existing Ombudsman schemes, tenancy deposit protection companies and other ADR providers.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

A. The costs quoted in Annex A seem to be reasonable for those firms who have adopted professional good practice and are willing to provide their customers with relevant information as a matter of course.

B. By the provision of templates, standard wordings, examples of ADR rules for them to adopt, etc.

**Question 9**: Do you have any other comments on the proposed Directive?

No

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

NLA does not represent or support its members in cross-border activities so we are unable to comment.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# OFCOM

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

## Your details

Name: Rachel Wingfield

Organisation (if applicable): Office of Communications

Address: Riverside House, 2a Southwark Bridge Road, London SE1 9HA

Telephone: 020 7783 4337

Fax: 020 79813990

Email: rachel.wingfield@ofcom.org.uk

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☒ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: Internal meetings

were held with various colleagues, desk research on public documents carried out and written contributions received from relevant experts.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

b) How much does it cost you to provide these services each year?

c) What fees do you charge per dispute to whom for these services?

d) Approximately how many disputes do you seek to resolve each year?

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

Ofcom does not have information that would enable us to comment on the European Commission's estimates summarised in Annex A of the Call for Evidence.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

As part of a recent review of consumer complaints procedures, Ofcom commissioned market research to provide a better understanding of the consumer experience of making a complaint to a telecommunications provider and of using the ADR process among both residential and small business audiences. The research indicated that ADR significantly improves outcomes for consumers: significantly lower levels of disatisfaction and lower levels of stress and anger amongst users of ADR compared with those with long-lasting complaints who did not use ADR.

The research also showed that ADR improves the prospect of a resolution for complaints that have not been resolved within 12 weeks.For example, 91% of mobile complaints that go to ADR are completely or partially resolved, compared with 51% of mobile complaints that were not resolved within 12 weeks.

The research also examined the time and costs for consumers involved in long standing disputes. It showed that consumers claimed to spend 10-14 hours actively pursuing complaints that take 12 weeks to resolve, compared with 3-6 hours for complaints resolved quickly. Consumers claimed to incur average costs of between £100-200 for long-lasting complaints, compared with approximately £60 for complaints resolved within 12 weeks.

The consultation document, market research report and statement can be found at:
http://stakeholders.ofcom.org.uk/consultations/complaints_procedures/.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Ofcom is not in a position to comment on this question.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

Our understanding upon reading the ADR Directive is that it requires Member States to have ADR in place for all sectors and all services, and requires traders to provide consumers with information of ADR available in case of a dispute, but does not require traders to be members of, or to agree to use and be bound by, an ADR scheme. This differs from the requirement in the national legislation which applies to the sectors Ofcom regulates.

In the UK, and in line with the provisions outlined in Article 20 (1) and 34 (1) of the Universal Service Directive 2002/22/EC as amended by Directive 2009/136/EC, and the 2003 UK Communications Act, Ofcom requires all providers of public electronic communications services to:

- have a Complaints Code of Practice that is approved by Ofcom and with which they must comply (General Condition 14.4); and

- belong to an Ofcom-approved Alternative Dispute Resolution (ADR) scheme and adhere to the final decisions made by that scheme (General Condition 14.7).

The above mentioned conditions, made under Part 2 of the Communications Act 2003, in line with the European Framework Directives, are general conditions of authorisation imposed on providers of electronic communications networks and services.

The ADR schemes are independent bodies which are appointed to deal with unresolved disputes with domestic and small business consumers. Consumers have the right to take complaints that have not been resolved within eight weeks to ADR. The ADR scheme must be approved by Ofcom and must form part of the communications provider (CP)'s code of practice. Ofcom has so far recognised two such schemes: The Office of the Telecommunications Ombudsman (Otelo) and the Communications and Internet Services Adjudication Scheme (CISAS). The ADR schemes are free to consumers (a right that is embedded in the Communications Act 2003) and are independent of both CPs and Ofcom.

In the UK, ADR is an important part of the consumer experience in communications markets. ADR can indeed improve the outcome for those consumers whose complaints might otherwise be unduly lengthy or remain unresolved. It also gives communications providers additional incentives to improve their own complaints handling procedures and to resolve complaints quickly and effectively, and this can be key to managing their customer relations and their business reputation.

To further improve the ADR process and ensure that consumers have their complaints resolved quickly and effectively, during 2010 we established a number of new regulatory obligations on CPs, in the form of a Code of Practice (which came into force on 22 January 2011) and the requirement to improve consumer awareness of ADR (which came into force on 22 July 2011).

The new obligations require providers to:

• comply with an Ofcom Code of Practice for Complaints Handling, which requires them, among other aspects, to ensure the fair and timely resolution of complaints; to have certain low-cost options for consumers to make a complaint; and to have a dedicated Code regarding their complaints process, which must be well publicised, including being no more than two clicks away from their primary webpage.

• write to consumers whose complaints have not been resolved within eight weeks to inform them of their right to go to ADR; and

• include information about the availability of ADR on all paper bills.

In the postal sector, an ADR service is provided by the Postal Redress Service (POSTRS) which is managed by the same ADR provider as operates CISAS. The ADR service has to be approved by Ofcom and is available to customers for non contractual mail services. In practice, virtually all cases arise from complaints submitted to Royal Mail as the universal service provider in the UK. The scheme is free to consumers and independent of the operators who fund it and who commit to complying with decisions by POSTRS. Consumers are not bound by the decisions and can choose to take the matter further if they wish via the courts.

Ofcom is mindful that, as cross-border provision of services increases as part of the Single Market, so the risk of cross-border disputes may also increase. As such, Ofcom has, for example, been supporting BEREC's ongoing consideration of cross-border access and enforcement issues in the communications sector.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

On the question of requirements and standards for ADR providers, under Section 54(4) of the Communications Act 2003, Ofcom has a duty to keep approved dispute resolution procedures under review. Throughout 2011, Ofcom has been conducting a periodic review of the two ADR schemes.This review has included:

• an assessment of the schemes against criteria set by Ofcom around accessibility, independence, fairness, efficiency, transparency, effectiveness and accountability; and

• a comparison of adjudications made at each scheme to understand if there are any significant differences in consumers' experience of using either scheme.

Further details can be found at:
http://stakeholders.ofcom.org.uk/binaries/consultations/alt_dis_res/statement/statement.pdf

We expect to announce the results of this review and proposed next steps some time in 2012.

With regard to the last question, this is a matter for the ADR scheme providers and we would simply remark on the possible linguistic issue and associated translation costs of such service offerings taking place cross border.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

Ofcom is not in a position to comment in detail on the more general aspects of this question, but we note the following about the position in the specific sectors which we regulate and in which ADR schemes exist. In the postal and communications sectors, national legislation has appointed Ofcom as the competent authority to appoint and monitor ADR scheme providers in the communications and postal sectors. Any changes in the European and thus national law should take account of existing institutional arrangements and responsibilities which have been developed on the basis of the specific characteristics of the sectors.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We do not have evidence that would help to answer this question directly. However, we do have some research that helped us better understand consumers' awareness of ADR schemes.

Ofcom commissioned quantitative research which was conducted by Synovate during August 2009, the aim of which was to provide Ofcom with a better understanding of the consumer experience of making a complaint to a telecommunications provider, levels of awareness, usage and experience of the Alternative Dispute Resolution (ADR) process for telecommunications services among both residential and small business audiences. The results of

the research can be found at :http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/annexes/annex8.pdf

We believe that all stakeholders have an important role to play in this respect. Ofcom has worked to raise awareness of ADR in the UK by, for example, increasing the prominence given to information about ADR on its website and by engaging with national media. CPs are obliged to have a dedicated Code regarding their complaints process, which must be well publicised, including being no more than two clicks away from their primary webpage, and to have information about ADR on all paper bills.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

In terms of costs to industry we commissioned some research in the context of our 2009 Review of Consumer Complaints Procedures. It is worth noting that, based on the responses to the information request sent to industry during the exercise, we estimated for example that including information about ADR on bills would cost the industry in the order of £200,000 in one-off costs, which was relatively low when compared to the possible benefit. These costs related to changing the billing design and were based on the assumption that the required text would be relatively short." Further details can be found in the document at http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/summary/adr_condoc.pdf.

**Question 9**: Do you have any other comments on the proposed Directive?

Ofcom believes it will be necessary for the European Commission to consider the issue of compliance with the proposed Directive by existing nationally mandated ADR schemes, which have been designed to meet the needs of consumers of specified services, and whether such schemes should be covered or excluded from the obligations imposed by the proposed Directive.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

Ofcom notices that the 30 day deadline for concluding cross-border disputes appears to be short compared with the 90 day deadline proposed in the ADR Directive.

POSTRS has a KPI of completing 90% of cases within 6 weeks of accepting the complaint for adjudication. It has an additional KPI for no more than 3% of cases to be unresolved after 8 weeks from acceptance.

In Ofcom's call for inputs document published in October 2010 [http://stakeholders.ofcom.org.uk/binaries/consultations/alternative-dispute-resolution/summary/adr.pdf], we highlighted that in 2009, 87% of all CISAS cases were fully completed within 6 weeks, while 52% of consumers received a Provisional Conclusion from Otelo within the same period (the first of the two stages in the Otelo adjudication process). We also noted that in relation to performance against KPIs, there was no reporting or visibility of Otelo's performance in issuing Final Decisions.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# OFT (OFFICE OF FAIR TRADING)

OFFICE OF FAIR TRADING

**By email**

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation
and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H OET

31 January 2012

Dear Dr Munn

**OFT response to the call for evidence on EU proposals for ADR/ODR**

The OFT's mission is to make markets work well for consumers. We support the development of competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices, and where businesses comply with consumer and competition laws but are not overburdened by regulation.

We welcome the opportunity to respond to the call for evidence on the European Commission's proposals on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR). The OFT has extensive experience of accrediting and monitoring ADR arrangements under the Consumer Codes Approval Scheme and the approval of estate agents redress schemes under Consumers, Estate Agents and Redress Act 2007 (CEARA).

Our response is made from the perspective of the value ADR can bring for consumers and markets and we have not commented on wider issues such as the implications for public spending.

We support the principles behind the Commission's proposals to increase the availability of ADR across the EU. From our own research we are

aware that within the UK there are a number of gaps in coverage across sectors and consumers may therefore not be able to have their disputes resolved without going to court. We view these proposals as a useful first step to ensuring greater availability but note the limitations due to their voluntary nature. The proposals will have a limited effect on accessibility to ADR whilst businesses are able to exercise a choice over whether to use it, and whether to be bound by any decisions.

We think it is unlikely that substantially greater coverage of ADR will be achieved by encouraging voluntary mechanisms in sectors where none currently exists, or by urging existing schemes to expand their scope to cover a wider range of transactions. We note that some form of residual scheme will be necessary, not only for areas where schemes do not exist, but for those businesses who do not wish to join a particular membership organisation which provides the nominated ADR scheme for their sector, or if the membership organisation for the ADR scheme chooses not be listed.

Our response to the specific questions within the call for evidence are set out below. If you have any questions or wish to discuss further, please contact me at Nijole.zemaitatis@oft.gsi.gov.uk or 0207 211 8393.

Yours sincerely

Nijole Zemaitaitis
Office of Fair Trading

**Question 1: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

- **We support the Commission's aim to increase the provision of ADR throughout the EU. These proposals are a useful first step towards achieving that objective but may be limited in effect as there is no obligation on businesses to use the ADR mechanisms.**

We strongly support the Commission's aim within the directive to provide greater availability of ADR mechanisms and welcome the draft ADR directive and its attempts to achieve this objective. This, added to the ODR regulation should benefit consumer confidence overall when making purchases both domestically and cross border. However we do not believe that the Commission's objective of ensuring that all complaints can be handled using an ADR mechanism will be achieved under these proposals and as a result the desired effect on consumer confidence will be less than intended.

Ensuring that suitable ADR mechanisms are available is the first step to ensuring that consumers can have confidence that redress may be obtained if things go wrong. Being able to submit a complaint and supply information online will also encourage consumers to view the procedures as quicker and simpler and fits with the rising expectation that online facilities are available in many areas of society.

Effective ADR mechanisms can incentivise businesses to resolve complaints and issues at the earliest possible stage or even take steps to stop problems occurring. In such circumstances the presence of ADR may actually reduce costs for business.

We do however note the limitations of the Commission's proposals as whilst ensuring mechanisms are in place, no obligation is placed on businesses to use them - in many situations consumers will still be unable to use an ADR mechanism because businesses refuse to participate. Although the information provision requirements may encourage greater use of ADR, some businesses (particularly larger retailers) may take the view that their own customer handling procedures already offer

consumers an effective mechanism to resolve a dispute. In some cases this will be correct, but without the participation and influence of brand leaders, smaller businesses may not be convinced of the benefits of using an ADR mechanism, particularly if they view participation as increasing their costs. Consumers' general reluctance to use court mechanisms will not persuade businesses that ADR would be a cheaper alternative. Such reluctance may be viewed by some businesses as a way of avoiding the need to deal with complaints and the burdens this entails.

We note the Commission's own research into the usage of ADR by businesses showed that only 9 per cent of EU businesses had been involved in ADR as a mechanism to resolve a dispute. The UK figure is even lower at 7 per cent.[1] This suggests that the benefits of using ADR are not being fully recognised by businesses and consumers.

In addition, ADR schemes which bind the business to accepting the recommendations or findings provide more confidence to the consumer that their dispute will be satisfactorily resolved. Without this assurance consumers will be entering into dispute resolution procedures with no certainty that they will obtain redress even if the decision is in their favour. Even in sectors where businesses are willing to participate in ADR this may result in overall levels of redress being lower than justified by the level of detriment, as businesses make offers on a 'take it or leave it' basis in the knowledge that they are under no obligation to make the full payment. As a result of this uncertainty we are concerned that the proposed measures are unlikely to inspire consumer confidence sufficiently to remove this perceived obstacle to cross border trade.

We appreciate the legal constraints in this area as a result of ensuring that rights in relation to access to justice under the Fundamental Charter of Human Rights and the Human Rights Act are protected. However, we urge further consideration to be given to an appropriate solution which would achieve the aim of increasing consumer confidence in dispute resolution from a commitment by businesses to comply with judgements/solutions of ADR entities. In the absence of this, we are concerned that the proposals are unlikely to achieve their stated aims.

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[1] Flash Eurobarometer 300.

**Question 2: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

- **We believe a key benefit of the proposals will be to assist in reducing consumer detriment by using ADR to resolve complaints where in house procedures have not been successful.**

We have previously undertaken research to assess the level of consumer detriment within the UK arising from consumer dissatisfaction.[2] A survey completed for the OFT found that 34 per cent had experienced a consumer problem within the past 12 months. Projected across the overall UK population this would lead to an estimated 26.5 million problems. An estimate of the overall annual consumer detriment within the UK economy was £6.6 billion.

Whilst the findings do not directly link ADR provision with levels of detriment, there appears to be scope for reducing detriment by improving access to redress for consumers where attempts by in house procedures have not been successful.

The OFT study found that problems occurred most often in relation to telecommunications, domestic fuel, personal banking postal services (sectors where ombudsman schemes already exist), internet, home maintenance and personal computers (sectors where ADR provision is absent or patchy). The most frequently experienced problems related to poor service quality (31 per cent) or defective goods (24 per cent). Around half (48 per cent) of problems were considered to be fully resolved, with 34 per cent said not to be resolved at all.

In a quarter of cases (25 per cent), the company where the product or service was obtained had done nothing about the problem. Even when action had been taken, consumers were not always satisfied with the outcome. For around one in five (21 per cent) problems, respondents felt they had been given an unsatisfactory explanation, while satisfactory explanations were reported in only six per cent of cases.

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[2] OFT report - Assessing the frequency and impact of consumer - problems with goods and services April 2008 OFT992

Findings from OFT research into online markets (set out below) also show that consumers have experienced problems which could potentially be resolved by the availability of an effective ADR mechanism.

**Attitudes to Online Markets Report by FDS International - August 2010**

In a survey conducted for the OFT by FDS International[3] one in seven consumers who bought goods on the internet had experienced a problem when buying a good or service online. Of these, 37 per cent stated that they had had their confidence lowered by this experience and claimed to use the internet less as a result.

If things do go wrong, consumers are not always confident of where to go for help. When asked in the survey who they would turn to in the event of a dispute, at least sixteen different answers were given. A quarter of consumers who buy goods on the internet stated that either they did not know who to turn to or they would not turn to anyone other than the seller in the event of a dispute.

**Internet shopping: an OFT Market Study, June 2007**

The OFT's internet shopping market study[4] found that 23 per cent of respondents to the survey had experienced at least one problem when buying online in the previous year. The majority of consumers (79 per cent) complained when they experienced a problem – mostly to the retailer – and they usually secured redress (63 per cent had had their problem resolved to their satisfaction). However, 20 per cent had given up trying to resolve the problem and 17 per cent were still trying to secure redress.

From all of the studies, we consider there is an unmet demand for complaints to be resolved where the company's own complaint handling mechanisms have not been successful. This appears particularly relevant for online shopping where the consumer is more reliant on distant means of communication in order to resolve a dispute.

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[3] Attitudes to online markets – FDS International August 2010
[4] Internet Shopping – An OFT market study June 2007

**Question 3: Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

- **We do not agree that Section 75 of the Consumer Credit Act should be considered to be a form of ADR. The process does not meet the requirements of impartiality and proof of breach of contract/misrepresentation is necessary in order to prove liability.**

ADR schemes offer an alternative route for two parties to resolve a dispute whereas Section 75 allows a consumer to pursue a dispute against a different party that is jointly liable. Given that both Section 75 CCA and chargeback schemes involve the participation of commercially interested parties, it is difficult to see how they could meet the stated aim of the directive that 'ADR entities are required to be impartial, transparent, effective and fair' or how the lender could be seen to be an independent arbiter of a dispute between the consumer and business. Unless the origins of the problem are the financial failure of the business where the breach of contract is likely to be self evident and unarguable, the question of whether there has been a breach of contract or misrepresentation will still need to be resolved on the basis of evidence before either the business or lender are liable. A lender who pays out to a consumer without a proper resolution of the dispute is unlikely to be able to recover from the business and it is not therefore in its commercial interests to do so. Here it is worth noting that the Financial Ombudsman Service dealt with over 17,000 complaints about credit cards in 2010/11, a substantial number of which were about Section 75 CCA.

In our view Section 75 CCA potentially complements the aims of an ADR mechanism as a consumer may be able to resolve a dispute with a business under Section 75 (with the card issuer) or alternatively, the consumer may take an unresolved dispute under Section 75 to a provider of ADR (such as the Financial Ombudsman Service). Section 75 and ADR are not necessarily 'either/or' options in our view.

There are limits to the scope of the Section 75 protections and chargeback tends to be reliant on the rules of the card schemes. These

rules can be amended or be subject to different interpretations. This seems unlikely to meet the requirements of fairness under the directive's proposals.

**Question 4: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

- **We recognise that the proposal within the directive for universal coverage may result in potential costs for business and for public funding. An option to restrict the scope to specific sectors or selling methods would reduce costs/funding but would need to be carefully assessed to ensure the aim of significantly increasing access to ADR is still met.**

In 2010 we completed research to map the existing provision of ADR schemes in the UK.[5] The research concluded that it appears that consumers are better covered in relation to services than goods, with far more schemes available in this category (87 in comparison to 17). By considering the ADR map alongside Consumer Direct's classification sectors it appears that there are no redress schemes available in the following sectors

- food and drink
- DIY materials/cleaning products
- clothing and footwear
- toiletries and beauty services
- jewellery, silverware and clocks
- tobacco

[5] Mapping UK consumer redress. A summary guide to dispute resolution systems. OFT May 2010 http://www.oft.gov.uk/OFTwork/policy/mapping-uk-consumer-redress/

- nursery goods
- sports and hobby equipment
- toys and games
- CDs, DVDs and computer games
- photography

As well as the sectors with no coverage, there are a number of other sectors that only have limited coverage, including various household goods, furnishings and electrical products. It appears that a number of typical consumer goods are not subject to specific dispute resolution mechanisms.

It could therefore be the case that consumers with unresolved complaints in these sectors are limited to legal redress mechanisms for resolution. However, there are a number of non sector-specific options available, including schemes specific to certain selling methods, for example, internet shopping and selling in the home.

We think it is unlikely that universal coverage could be achieved by simply encouraging voluntary mechanisms in individual sectors where none currently exist, or for existing schemes to expand their scope to cover a wider range of transactions. We note that some form of a residual scheme will be necessary, not only for areas where schemes do not exist, but for those businesses who do not wish to join a particular membership organisation which provides the nominated ADR scheme for their sector.

A full gap analysis will need to be undertaken in order to estimate how much public subsidy will be required together with an indication from existing ADR schemes of their willingness to participate in becoming a UK ADR entity (assuming it is voluntary to do so).

We have assumed, as the call for evidence appears to have done, that the intention of the directive is not to require all existing ADR schemes to meet the requirements, only those that wish to be listed with a competent authority for the purposes of the directive, although the definition at Article 4(e) could be interpreted as doing so. If being listed is voluntary, ADR schemes which do not wish to be listed, or who do not meet the

requirements, will no longer be usable by businesses in order to meet the directive's obligation to be a member of a listed scheme. This may have implications for the continuing viability of such schemes.

**Question 5: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

- **We agree that all ADR schemes that wish to participate should meet the standards of expertise, impartiality, transparency, effectiveness and fairness as set out in the directive.**

These standards are also included within the criteria the OFT has set out for effective ADR mechanisms within the Consumer Codes Approval Scheme[6] (CCAS) and our approval requirements for estate agents redress schemes under the Consumers, Estate Agents and Redress Act 2007 (CEARA).[7]

We suggest that the following standards within the directive could be strengthened:

1. Mechanisms for the appointment of individuals should also be subject to independence requirements. In addition a minimum period preceding the appointment during which the individual has not occupied a position in the industry covered by the scheme is desirable in order to ensure impartiality.

2. A requirement that the special needs of disadvantaged or vulnerable consumers must be considered so that they, or their representatives can access the scheme easily.

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[6] Consumer Codes Approval Scheme. Core criteria and guidance. March 2008. OFT 390

[7] OFT approval of estate agents redress schemes.Criteria – final. April 2008. OFT 919

3. There should be procedures in place to consider and resolve complaints by consumers or businesses about the service provided by the ADR mechanism.

4. Decisions of the ADR entities should be enforceable in the courts of the member states if accepted by the parties.

For monitoring purposes we suggest that there should be a requirement for Key Performance Indicators to be agreed between the competent authority and the ADR scheme in order to ensure that the schemes effectiveness and in particular customer satisfaction can be assessed.

**Question 6: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfill this role?**

- **The role of the competent authority will be crucial to ensure the optimal operation of ADR schemes in the UK as required by the directive. Sufficient funding will be required to ensure it can carry out its responsibilities effectively and independently to provide consumers with confidence in ADR entities.**

We consider the competent authority role will be crucial to ensuring that consumers have confidence in ADR entities' abilities to resolve their disputes and that the required standards are maintained. Without such a body, self nomination by schemes alone is likely to lead to variations in the accuracy of such assessments.

Potentially the competent authority may be responsible for accrediting and monitoring a large number of diverse ADR schemes throughout the UK, together with any residual scheme. If the competent authority is to fulfil its role effectively and maintain the integrity of the system, this will require significant funding, which could be subsidised in part by the schemes to be accredited. Care would however need to be taken to ensure that the independence of the competent authority was maintained.

We have supported compulsory membership of ADR schemes in certain sectors, where they have been proposed, on the grounds that the ability to obtain redress helps to restore consumer trust in markets. Consumer

agencies can also monitor problems within sectors more effectively and the redress mechanisms can provide evidence for taking enforcement action. However, an approval agency is necessary to set criteria and proactively monitor in order to ensure the quality of the ADR mechanism. Our past experience of approving a statutory, compulsory scheme (estate agents redress schemes) is that it is very resource intensive for the approval body. In addition there are legal considerations that need to be met if such schemes are mandatory.

**Question 7: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

- **Information on whether businesses not only agree to use, but also whether they will be bound by the findings of the ADR scheme is essential if consumers are to include accessibility of redress as a factor when making a purchasing decision.**

We strongly support the directive's consumer information requirements and suggest that in order for consumers to be able to make the most informed choice, businesses should also be required to indicate whether they agree to be bound by the outcome of the ADR process. This would give consumers greater confidence that not only will their complaint be handled by the scheme but that enforcement of the findings is assured.

Businesses should be obliged to provide information on the availability of ADR when they receive an indication from the consumer that they are unhappy with the purchase (reflecting Article 13 of the ODR regulation). If ADR is signposted to consumers when they need it and it is easily accessible there is likely to be a greater take up and this would hopefully lead to increased consumer confidence in making cross border purchases over time.

Consumers are unlikely to base their choice of business solely on whether they agree to use ADR – other factors such as price, speed of delivery, location, and so on will also affect their choice. However, access to ADR may be a key factor for choice of provider for infrequent and/or expensive purchases, markets with a reportedly lower reputation for customer service, new markets/unfamiliar brands. Media reporting of problems in

sectors and suggestions to look out for businesses signed up to ADR is also likely to impact on consumer behaviour. Given the prohibitions against imposing additional formal requirements on information requirements under the Consumer Rights Directive, we are somewhat surprised that in this directive the information is required to be given prominently. We wonder if thought has been given to the relative importance of this information compared to information requirements under other directives.

**Question 8: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?**

Information for consumers on the appropriate ADR mechanism is essential if awareness of schemes is to be increased. Costs could be reduced for businesses by sharing of standard materials/wording etc produced by schemes or professional associations.

**Question 9: Do you have any other comments on the proposed Directive?**

- **We have highlighted below a number of issues in relation to: potential remedies; registration of businesses with ADR entities in other member states; availability of oral hearings; information exchange; availability of compliance information.**

The directive makes no mention of remedies that ADR entities must be able to impose. In our view it is essential that the directive imposes a requirement that the entities have power to suggest a range of appropriate remedies including refunds, replacements, remedial services, compensatory payments etc. Without this, consumers will have little faith in such entities.

Whilst we are in favour of all proposals that encourage an open market we are concerned that recital 14 of the directive could be misused by some businesses. If businesses can register with an ADR entity in any member state rather than those where they trade or are established this may impact on consumer confidence in the system and its accessibility.

We are concerned that Article 9 appears to require oral hearings to always be available. We assume this is not intended.

Great care should be taken in relation to provisions requiring the exchange of information between national authorities and ADR entities as proposed in Article 14. Such information is often subject to restrictions on disclosure and the provisions could significantly impact on the openness of communications between national authorities and those it supervises or regulates, consumers and partner organizations, if there is a possibility that such information will be disclosed in relation to individual disputes being handled by ADR entities.

The level of acceptance of decisions made by ADR entities should be made available to enable the effectiveness of the directive to be monitored.

As the independent redress mechanism requirements for the Consumer Codes Approval Scheme (CCAS) are likely to meet the directive's aims, any replacement scheme will also need to ensure it is future proofed to meet the directive's provisions.

**Question 10: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?**

- **We support the proposal to set up an ODR platform but are concerned that the key issue of language may not have been sufficiently considered as an obstacle for both parties to be able to resolve cross border ecommerce disputes effectively.**

We welcome the introduction of an ODR platform to assist consumers and businesses to resolve online cross border complaints. We would hope that this will provide more confidence for consumers when using unfamiliar brands cross border although we have concerns that accessibility to redress may still be restricted if national ADR schemes only provide for procedures to be carried out in their own language.

Language is likely to be the largest single hurdle for the consumer and the ADR scheme. If the two parties are unable to communicate the type of process and mechanism is irrelevant. We note that consumers will be able

to use any language to complete their form but it is less clear what the Commission's proposals are in terms of language for the national ADR schemes to which the complaints are referred. Further consideration would seem to be appropriate regarding the issue of language once the complaint has been transferred to the ADR provider. For example, ADR schemes could be encouraged to share the costs of translation facilities, or to investigate the cost of translation software packages.

The 30 day deadline seems rather short particularly in view of the role of the ODR platform and facilitators.

The Regulation provides for an ODR platform, ODR contact points in each member state and at least 2 ODR facilitators for each contact point, each appearing to have different roles and functions.  We have some concerns that the number of layers involved could lead to increased costs for member states and possible inefficiencies.

# OIA (OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION)

**Response by the OIA to BIS Call for evidence on EU proposals on Alternative Dispute Resolution (ADR) - December 2011**

The mandates of the Office of the Independent Adjudicator (OIA) derive from legislation, Judicial Review, and the OIA Scheme Rules. The OIA Scheme was designated under the Higher Education Act 2004 which established an independent Scheme to adjudicate on student complaints against universities in England and Wales without charge to complainants. The OIA, which had run a voluntary Scheme from March 2004, began operating under statute in January 2005. The Act makes it clear that the "governing bodies of qualifying HEIs have a duty to comply with the Scheme Rules."[1]

Qualifying Institutions under the Act include all HEIs (hereafter referred to as 'universities') in England and Wales, and each is required to join the OIA Scheme.[2] Scotland and Northern Ireland both have their own separate arrangements[3].

The OIA has the duties of Designated Operator under the 2004 Act to publish the Scheme and supply relevant information to the appropriate UK and Welsh Assembly Government Ministers. It has also recently become a Registered Charity, under the supervision of the Charities Commission.

The OIA is a not-for-profit, company limited by guarantee, governed by its Memorandum and Articles of Association (as amended). This means that the OIA is neither part of a Ministry, nor has access to state funding. It does however subscribe to Nolan Rules of Fair and Open Competition.

As requested by the Government in the Higher Education White Paper 2011, the OIA is currently undertaking a consultation with the Higher Education Sector on ADR – Pathway 3 – Towards early resolution and more effective complaints handling. The OIA is currently analysing the responses and will produce a report in due course.

The OIA welcomes the opportunity to respond to this call for evidence.

***Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?*

[1] Higher Education Act 2004, Part 2, Section 15 (1)
[2] Higher Education Act 2004, Part 2, Section 11
[3] Higher Education Act 2004, Part 2, Section 14

***Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?*

We have no way of knowing whether the key estimates are accurate. However, the OIA believes that access to a form of ADR will have a benefit for all concerned.

We know that the average cost to a university of a case at the OIA is less than £2,000. This constitutes excellent value when compared to the costs for a university in defending a case in a court of law. The Law Commission has recently indicated that the average cost of a day in the High Court supported by junior counsel is £16,242 (at 2009-10 prices).[4] The overall cost of the OIA is approximately £3 million.

The OIA is clear that its processes are far quicker than those of the Courts.[5]

***Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?*

***Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?*

The OIA can meet most of the specific requirements although we would argue that **many** student complaint disputes by their nature are complex and would take longer than 90 days to be resolved. The OIA already makes publically available information about its governance and funding. We also make publicly available annual reports detailing the number of disputes received, resolved and average time taken as well as information about compliance. Our procedures are free of charge for complainants. In 2010, 7 per cent of complaints made to the OIA were from EU students (not British).

***Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?*

The OIA needs to be sure that its independence is not compromised by any 'competent Authority'. Independence is a core mandate of the OIA and is endorsed by our stakeholders as well as the British and Irish Ombudsman Association.

The OIA has no views as to a suitable organisation.

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[4] **Public Services Ombudsmen: A Consultation Paper**, The Law Commission Consultation Paper No 196, September 2010, Appendix A. paras A 21-25.

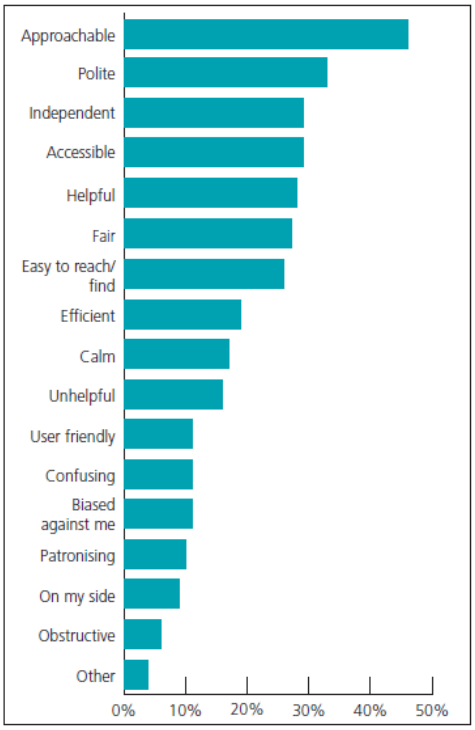
[5] R (Peng Hu Sui) v King's College London [2008] EWHC 857 (Admin)

***Question 7:*** *Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?*

As a result of its Strategic Review and Implementation, and continuous dialogue with all parts of the higher education sector, the OIA has built on its reputation for impartial, authoritative adjudication of student complaints, to construct a consistent, efficient and effective, service delivery organisation.

The OIA's Pathway Report in 2010 examined students' views of the OIA's alternative dispute resolution processes and the university's own processes. It contains useful quantitative information on complainants feeling about the scheme. Figure 5 below shows the complainants' views of the OIA as an independent review scheme.

**Figure 5: What were your first impressions of the OIA?**




**Source:** Report of the OIA Student Survey 2009, Figure 12

***Question 8****: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?*

Please see our Annual Report 2010 for a detailed breakdown of costs.

***Question 10****: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers,*

*businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?*

Students studying at universities covered by the OIA Scheme should not be given a choice of ADR providers since the OIA is the designated provider of resolution for student complaints under the Higher Education Act 2004. The ODR platform should not compromise the independence of the OIA. We do not believe that the 30 day deadline to deal with these complaints is realistic given the nature of students' complaints. We could only deal with complaints about universities within our jurisdiction. This includes all students registered at a university within England or Wales.

The OIA believes that this consultation needs to be joined up with the Higher Education White Paper. The White Paper addresses the issue of early resolution of complaints and is directly relevant to this call for evidence.

26 January 2012

# OMBUDSMAN SERVICES

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Mark Glover

Organisation (if applicable): Ombudsman Services

Address: The Brew House, Wilderspool Park, Greenalls Avenue, Warrington WN4 6HL

Telephone: 01925 532129

Fax:

Email: mglover@ombudsman-services.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☒ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

Ombudsman

b) How much does it cost you to provide these services each year?

Ombudsman Services operates four redress schemes for the energy, communications, property and copyright sectors. The turnover of the not for profit company is in the region of £6.4m.

c) What fees do you charge per dispute to whom for these services?

The service is funded by the participating companies on a veriable scale dependant on size based on a membership subscription and case fee

d) Approximately how many disputes do you seek to resolve each year?

Ombudsman Services is expecting 18,000 complaints in 2011/12 and 185,000 contacts.

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

If a complainant accepts a decision of the ombudsman then the participating company by signing a 'deed poll' is required to accept that decision - the decision can then be enforcable through the courts. The decision is not however, binding on the consumer and they are open to take the matter to the courts.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

Ombudsman Services provides redress for the energy, property, communications and copyright licensing sectors and the scheme is open to residential consumers and micro businesses.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

There are clear benefits to the consumer and business on extending the use of alternative dispute resolution rather than relying on the courts for redress. Courts are often more costly and slower to resolve disputes. Access to the court processes involves greater bureaucracy and is usually more intimidating. The use of new technology in particular can made ADR schemes more accessable.

In terms of adding value to the process, we regually work with our participating companies to identify where things have gone wrong as well as advising companies how they might be able to improve. We also work with the regulators by identifying potential systemic failures so they are able to take action across a sector.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

With an anticipated number of complaints this financial year of around 18,000 and a turnover of £6.4m, the average cost of a complaint is in the region of £350. It is Ombudsman Services' veiw that this compairs favourably with the cost of seeking redress through the courts as it includes the administration of the court system itself as well as the added legal costs of representation and the cost in the time taken to have the matter considered. Our service is free to consumers as the cost is bourne by our participating companies. We have also developed a contact centre which collects information about individual complaints so avoiding the need for consumers to employ a legal representative, further reducing the cost to both the consumer and our companies.

There are however, limits to the compitance of ADR schemes. In the case of Ombudsman Services we deal with residential complaints and those made by micro businesses. The maximum award we are able to make is £5,000 in the energy and communications sectors and £25,000 in the property sector. Anything greater than these should be resolved through the courts.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

OSL is wholly funded by the sector companies and as such there would be no need for public subsidy for the introduction and administration of redress scheme.

The government may be able to introduce new ADR schemes through legislation by requiring a sector to operate an ADR scheme and that each company within that sector must be a member of that ADR scheme. The cost of the scheme would be borne by the companies in that sector as is the case in communications and energy. The cost of the regulator, if it was decided that one was needed to oversee that (or a group of) sector(s) could also be funded by the companies. As part of the legislative arrangements, the government would also need to ensure that each sector had a statement of minimum standards for the treatment of consumers – a Code of Conduct or Practice – against which customers' complaints can be reviewed. The quality, independence and impartiality of the ADR scheme could be assured by a requirement for it to comply with and be a member of an national redress assiciation such as the British and Irish Ombudsman Association.

Such an approach is in-line with the Prime Minister's recent speech on the need for 'responsible capitalism', as the sectors would be self-regulating. It is envisaged that there would also be no cost to the public purse other than initial drafting and legislative time.

In the case of the costs, Ombudsman Services for example operates on the basis of those companies that give rise to the most complaints would pay the most to have them resolved.  Broadly, we ask for a subscription as well as a case fee.  Specific arrangements can be made for small suppliers that do not have significant complaint volumes, so that they pay a relatively nominal amount in their subscriptions. For 2011/2 we expect to process about 18,000 complaints and have costs of the order of £6.4M and anticipate that 2012/13 will be of a similar order.

Ombudsman Services is a 'not-for-profit' company, limited by guarantee. We have a board of directors who are independent of the sectors in which we operate. This structure is vital and guarantees the independence and impartiality of the ombudsman who makes the decisions on the complaints presented. Any legislation would need to ensure simular structures are in place to maintain the redres scheme's independence.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be

willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

Ombudsman Services supports the standards and requirements for ADR that are included in the directive. We do in fact meet the standards including accesability for both consumers and participating companies, we are free to the consumer, independent and impartial.

Ombudsman Services together with other similar energy redress schemes in Europe, has over recent months played an active and constructive role in helping to shape the emerging Alternative Dispute Resolution directive. The schemes Ombudsman Services operate are in-line both with the UK Cabinet Office's guidelines and adheres to British and Irish Ombudsman Association's (BIOA) principles of:

• Independence

• Effective

• Open and transparent

• Accountable

• Operate with integrity

• Clarity of purpose.

We continue to improve our service in-line with the proposals contained in the directive.

Impartiality

The Ombudsman Services' independence is essential to the way we operate and we support the requirement for impartiality in Article 6. Ombudsman Services' governance and operational structures have been separated from those under our jurisdiction and who fund the service. The independence of the scheme is further supported by our appointment by the regulator as well as periodic reviews and re-approval of the scheme.

Our impartiality, however, is not just about independence from the bodies under jurisdiction. Ombudsman Services does not take sides and must also be able to demonstrate its impartiality and independence from complainants. In the case of Ombudsman Services, this is achieved through rigorous processes, evidence-based and clearly reasoned conclusions and consistency of recommendations.

Providing an accessibe service should be a key feature of any ADR scheme: it is Ombudsman Services' view that in-line with the directive, the service should be provided free or at a nominal charge to the consumer. Provision should also be made for those who have language difficulties or have specific needs and there should be a range of ways by which a complainant can interact with the scheme and that the scheme should use plain, jargon-free language in information and reports. In the case of Ombudsman Services;

(a) Technology has a key role to play in raising the awareness of consumers, making it easier for them to engage with the ombudsman and making the process more time and cost-efficient and transparent. In-line with the EU proposals, in April 2011, Ombudsman Services launched a new website through which complaints can be made. This is currently being further developed to allow complainants and companies to track complaints and view progress in real time.

(b) The website also gives details of what we can and cannot do, information on how to complain, details of our process and timescales and what action we could take to put things right.

(c) For those who do not use the internet, we supply leaflets about our scheme. These are written in our case in plain English and are available in other languages and formats on request. Our enquiry officers are trained in collecting all the information necessary by telephone to capture the key elements of a complaint.

(d) We provide translation services and support for those who are sight- or hearing-impaired.

The process

Ombudsman Services supports the directive in its proposal that continuing improvements should be made to promote effective access to ADR schemes including the use of a wide range of channels (telephone, email, online, letter, fax) for customers to submit complaints, help in completing the forms and articulating their problem and help to navigate the process. Ombudsman Services operates a process where, on receipt of this signed form, it contacts the companies to provide the relevant case-file of information held about the complaint.

The EU may wish to consider including in the directive a reasonable opportunity for the complaint to be resolved informally by the redress scheme to the satisfaction of both parties. Only when this cannot be achieved or the case is complex it is referred for further investigation. Each party can consider the report and the recommendations and decide whether to request a review on the basis that either, there is an error in the report or its recommendations or new evidence has become available.

If both parties accept at the first or second stages, then that becomes the final decision, which must be implemented within 28 days. If the complainant declines the Ombudsman's third stage final decision, or fails to respond, then the decision lapses and is not binding. In this case the complainant still has the right to take the matter to court or anywhere else that is considered to be appropriate.

Redress

Any award that is made should be proportionate and place the complainant in a position as if nothing had gone wrong. The EU may also wish to consider including in the directive an element of an award that covers the time, trouble and inconvenience the complainant has suffered.

To operate effectively, arrangements should be included in the directive that allows the operator of the redress scheme to be able to pursue every provider within the scheme and make appropriate recommendations/requirements for redress.

The EU may want to consider ensuring that in the directive there is provision for the effective enforcement of Alternative Dispute Resolution decisions when

they are made. In the case of Ombudsman Services this is achieved through the participating company being required to sign a 'Deed Poll', which means that if a decision is accepted by the complainant, then the decision of the ombudsman is enforceable through the courts. There should also be the ability for the redress provider to report systemic failures to a competent authority and suggest potential solutions.

Other considerations

From Ombudsman Services' extensive experience in delivering redress for the energy, communications, property and copyright sectors, we consider that the EU directive may be strengthened by including the following elements:

a. The EU may wish to consider requiring that there should be a single ADR scheme for a sector. This would ensure that there is no duplication between the different elements with regulatory approval and accountability, the service providers are unable to use their power of patronage to undermine the independence of the ombudsman by transfering to the alternative scheme and it would avoid the potential confusion in the mind of the consumer on who to contact when they have a dispute;

b. Clear advice should be provided at the outset of the complaint on what the alternative dispute resolution scheme can and cannot deal with;

c. Clarity of the process and timescales – Ombudsman Services works to a series of Key Performance Indicators set by the regulator and aim to resolve complaints within six weeks;

d. A guide to the level of potential awards in order to manage complainants' expectations;

e. Provision of an effective and efficient front-of-house contact centre/enquiries service which is able to collect relevant information effectively and efficiently and/or to re-direct complaints that cannot be dealt with to an appropriate resource;

f. Consistent, robust decisions that, when accepted by complainants, are binding on the service provider.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

In the case of Ombudsman Services the Compitant Authority is Ofgem, Ofcom, the OFT and RICS. We consider that both Ofcon amd Ofgem should continue to be the Competent Authority for communications and energy. The Competition and Markets Authority together with RICS would be that authority for property when the OFT is reconfigured.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We agree that consumers behavior can be changed if they are awere of an ADR scheme.  an essential part of having an effective Alternative Dispute Resolution scheme is raising awareness of the scheme as outlined in Article 7 of the directive. Consumers who have a complaint about the service they receive should be advised of their right to take their complaint to Alternative Dispute Resolution by the providers of the service, whether it be:

- Information on their invoices or bills
- In correspondence on complaints
- In the terms and conditions and on their websites

Ombudsman Services also operates a process whereby if a company is unable to resolve a complainant's problem within eight weeks, it is required to issue a '8-week' letter' – telling the consumer that the matter has reached a deadlock and referring the customer to the ombudsman.

Ombudsman Services also issues news releases, does media interviews and speaking engagements, uses social media and trade and consumer events to raise awareness of the service.

Consumer advocacy and advice organisations, participating companies, as well as the regulators, continue to have an important role to play in signposting our service to potential complainants.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Ombudsman Services expects to process 18,000 complaint this financial year. By providing an accessable, free and quick resolution service we are a practical and effective alternative to the courts. ADR schemes such as ours are also in line with the Minisry of Justices recent consultation which envisages that more dispute cases should be resolved through ADR than being considered by the courts.

**Question 9**: Do you have any other comments on the proposed Directive?

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

Providing that the new regulations ensures the independence of the ADR scheme Ombudsman Services supports the use of online technology in helping to facilitate and resolve consumer disputes. Online technology often makes the task of providing redress quicker and easier for consumers. Ombudsman Services already operate a contact centre for the collection of much of our infromation and we are currently working towards using online technology to improve the services accessadility and drive down costs. However, it is important to understand that many consumers - particually the elderly and those who may be economiccally disadvantaged may not have access to the internet. It is important, as Ombudsman Services does to ensure that consumers are able to access the redress service by traditional means such as in writing or by telephone.

Although we are not involved in cross-bouder disputes, we would find it highly improbable that we would be able to meet the 30-day deadline for the concluding of cross bouder disputes.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# PHONEPAYPLUS

PhonepayPlus

# Response to the BIS call for evidence on EU proposals on Alternative Dispute Resolution (ADR)

# Table of Contents

# About PhonepayPlus

PhonepayPlus is the independent regulator of premium rate services (PRS) in the UK. These are added-value services which are charged above a standard rate to a consumer's phone bill or pre-pay account. Some current and popular examples of PRS include voting in TV shows and charitable text donations.

We regulate PRS using a Code of Practice, which is approved by Ofcom. This sets out the rules with which all providers of PRS must comply in order to provide a safe environment for consumers including children. The Code requires, amongst other things:

- Clear and accurate pricing information;
- Customers are treated fairly and equitably; and
- Complaints are resolved quickly and any redress is provided quickly and easily.

Our goal as a regulator is that everyone should be able to use PRS with absolute confidence. Where providers break our Code, we have a range of powers to investigate and address consumer harm including the ability to ban an organisation from operating a service and issue fines of up £250,000 per breach.

We focus on pre-emption and prevention of consumer harm through closer engagement with industry and consumers and take robust action to tackle emerging risks, rather than just deal with harm after it has occurred. This approach to regulation provides for increased consumer confidence, decreasing complaint levels which are essential to support market growth and innovation.

# General comments

PhonepayPlus welcomes the opportunity to respond to BIS' call for evidence on EU proposals on ADR. In our response, we wish to highlight our experience in regulating PRS, giving swift and effective protection for consumers and delivering a fair and proportionate regulatory system that allows the industry to innovate and grow.

We wish to make clear that whilst PhonepayPlus does not fall under the definition of an ADR entity, as set out in Article 4(e) of the draft ADR Directive, we do have a range of powers to resolve consumer complaints which may be considered to be comparable to those of an ADR provider in terms of effectiveness and securing the best outcomes for both consumers and providers. We also have powers to deal with structural market failures in PRS for the benefit of all consumers, and the industry, which go beyond dealing only with disputes under ADR.

Protecting consumer and complaints resolution

PhonepayPlus' Complaints Resolution Team is responsible for assessing all types of potential non-compliance and uses procedures both within and outside of our Code of Practice to quickly resolve complaints where harm is not significant, thus avoiding the need to go through a lengthy investigative process. The Team works with providers to enable them to resolve complaints directly and provide refunds to individuals.

Since 2010, during the Team's first full year of activity, we have secured redress for over 4,600 consumers and directly intervened to obtain over £30,000 in refunds. Furthermore, we were able to successfully deal with 80% of informal cases within 10 working days.

Resolving low-level consumer harm informally for the majority of consumer complaints allows PhonepayPlus to focus enforcement activity on more significant breaches of our Code.

Formal investigations and sanctions

In cases where the harm is more significant or where the provider is not co-operative in providing redress, then a formal investigation procedure can be opened. Under the formal procedure, an independent Code Compliance Panel Tribunal assess whether breaches of the Code have occurred and decides on the appropriate sanction(s) to impose. These can include, amongst others:

- The requirement to remedy the breach (by taking specific action to prevent re-occurrence of the breach and further harm);
- The requirement to refund complainants in a suitable manner including blanket refunds in particularly serious cases;
- The ability to bar an organisation from operating a service; and
- The ability to prohibit an organisation from providing or being involved in premium rate services generally.

In cases of an immediate and significant threat of consumer harm, PhonepayPlus can initiate an 'Emergency Procedure', which can result in a service being removed from the market immediately (within 48 hours), while a full, formal investigation is launched as soon as is practicable.

Those subject to PhonepayPlus adjudications (carried out by Code Compliance Panel Tribunals) ultimately have a right of appeal to a further independent body, the Independent Appeals Body (IAB).

We also have the ability (where appropriate and permitted by law) to block merchants from other EU territories operating in the UK as all transactions that currently take place in the PRS market are performed through the public switched telephone network (PSTN) and are therefore subject to regulation by PhonepayPlus. This reduces the risk that consumers will need to seek redress from a merchant which is not bound in any way by the law in their country.

PhonepayPlus has worked in the past with the police where the law has been broken and other regulators such as the Information Commissioner's Office and the Gambling Commission, to ensure that the most appropriate competent authority deals with the case, thus avoiding a 'double jeopardy' situation from arising.

PhonepayPlus

# Response to specific questions

We have only responded to those questions where we have relevant expertise from which to comment.

**Question 3:** Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Whilst we broadly welcome the "chargeback" process, the current lower exemption cash price limit of £100 required for Section 75 of the Consumer Credit Act to apply, appears arbitrary. This is increasingly evident in terms of an emerging digital content market place where consumers are making purchases below this threshold remotely and without the ability to sample or validate the quality of the content before they pay for it.

As the digital content market grows the government may wish to consider whether there is a wider case for reform in this area to ensure consumers are adequately protected when buying digital content online.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

The rapid change in mobile technology, and the increasing adoption of smartphones, means that more and more consumers, including children, are using their mobile phones to purchase digital content. This form of transaction is typically and loosely defined as a micropayment, of which PRS is one, where digital content, can be purchased for a small sum of money.

Our experience of regulating PRS has taught us that innovation and technology can move faster than most consumers – or their children's – ability to grasp the consequences of their purchase decisions. If consumers are left confused or disempowered, then this will reduce confidence in the market and stifle competition and growth.

Therefore, we believe it is essential that the government understands, in the context of these proposals, the potential risks to consumers in the fast-moving digital micropayment market

and considers whether we have the corrective regulatory framework in place to protect consumers and support growth in these new and emerging services.

# For more information, contact:

Sarwar Khan, Senior Public Affairs Executive, PhonepayPlus

Email: skhan@phonepayplus.org.uk

Tel: 020 7940 7408

www.phonepayplus.org.uk



February 2012

# PRE-LEGAL.COM LTD

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Justin Lievesley

Organisation (if applicable): Pre-legal.com Ltd

Address: PO Box 746, Harrogate, North Yorkshire, HG1 9PU

Telephone:

Fax:

Email: justin.lievesley@pre-legal.com

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☒ Other (please describe): an organisation that operates ODR platforms for ADR providers

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: EGM 20/01/12

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

b) How much does it cost you to provide these services each year?

c) What fees do you charge per dispute to whom for these services?

d) Approximately how many disputes do you seek to resolve each year?

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

Overall a common ADR solution for consumers and traders across all EU member states is needed to achieve a fair single market. This is especially true for newer member states if they are to be given the opportunity to trade and grow where the same legislation would give confidence to consumers and traders.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

No

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Chargeback is not a valid ADR service. However many credit card users will prefer to use this process as it is seen as a ‘value-add’ they have already paid for and for their on-line purchasing it could be seen as a form of consumer protection. Further there is usually little dispute involved in getting money returned.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

In the UK there is currently a lack of nationwide visibility for recognised efficient, independent ADR organisations. This is also a problem for potential ADR users when geographic, market specialisms and fees are not transparent. The choice for many is the free, independent advice services, paying for legal services or the Court mediation service. The free services may find it difficult to work within the suggested 30 day deadline for completion of the service due to demand and the Court service is quite late in the process. Ideally ADR should be attempted prior to issuing of proceedings.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you

currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

n/a we are an ODR platform provider for pre-action® and ADR® pre and post court services.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

A separate body that could also oversee training and accreditation of ADR professionals as well as monitoring would be ideal. This would give current adr professionals recognition of their experience, training and qualifications and set a high bar for new entrants. This would also allow for specialisms to be given full recognition.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

The possibility of consumers and traders by-passing customer services and a business's established complaints processes for financial gain could make this a route to fraud. It would only be fair to traders to expect ADR suppliers to ensure reasonable processes prior to taking on a dispute.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

This would start with amendments to standard Terms and Conditions, point of sale literature and invoice/statements but would also include employee training for sales and customer service/complaints.

**Question 9**: Do you have any other comments on the proposed Directive?

Evidence of having attempted ADR should be mandatory prior to issuing proceedings requiring a justification by parties that have not done so.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might

these requirements mean business is more reluctant to trade online and cross-border?

We currently supply and through our experience make the following comments.

With ODR regulations not being mandatory it will only be signed-up to by those businesses that already exceed expectations in consumer and trader protection and redress.

The ODR platform and facilitators would be seen by consumers as a legitimate dispute channel but how many businesses with their own processes and procedures would sign-up?

For most businesses this would offer good brand protection.

For some businesses this could improve business processes.

The ADR Directive together with the ODR Regulation would offer a cheaper more direct route to market for ADR providers, however at the lower value end of the market how would the cost of ‘proportionate’ adr services be paid for?

With on-line suppliers there is often third and sometimes fourth party involvement with logistics and delivery couriers.  The contract is between the consumer and the seller and for many disputes the seller may not be at fault.

What are the planned penalties for not taking part?

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# RESORT DEVELOPMENT ORGANISATION

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Sue McNicol

Organisation (if applicable): Resort Development Organisation

Address: Hamilton House, Mabledon Place, London, WC1H 9BB

Telephone: 020 8398 6192

Fax: N/A

Email: smcnicol@rdo.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☒ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: This response has been reviewed by the UK chairman, the Chief Executive and the UK

legislative group, made up of lawyers representing timeshare developers and the two major timeshare exchange companies.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

RDO offers both a complaint handling service (mediaition) and an arbitration scheme

b) How much does it cost you to provide these services each year?

The approximate costs to RDO are as follows: Consumer complaint handling £15,000 p/a and ADR £2,700 p/a

c) What fees do you charge per dispute to whom for these services?

The complaint handling service is free of charge to consumers.

The ADR prescribed fees are as follows:

For a claim of between £1,000 and £5,000, the consumer is charged £75 and the RDO member, £245

For a claim of between £5,001 and £15,000, the consumer is charged £100 and the RDO member, £300

For a claim of between £15,001 and £25,000, the consumer os charged £150 and the RDO member, £350

For a claim of over £25,000, the consumer is charged £300 and the RDO member £500

These charges include VAT and are only refundable if the consumer wins the case. If the case is awarded in favour of the defendant then the costs cannot be recovered by the consumer.

d) Approximately how many disputes do you seek to resolve each year?

RDO represents approximately 60% of timeshare sales in Europe and last year, received 47 complaints (49 in 2010). The organisation typically resolves 95% or so of the complaints made.

Since the ADR scheme was set up in 2005, 5 cases have been taken through the scheme, 3 of which were awared in favour of the claimant.

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

The results are binding on both the claimant and the respondent and enforceable in the courts.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

The services cover all areas of timeshare, except breaches of the management agreement and ancillary exchange services.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

We do not have any specific comments to make about the Commission's calculations or the average estimated loss per consumer but we do wish it to be noted that the calculations would need to be revised for industry sectors that already offer a complaints handling service/ADR. For these sectors, including timeshare, the estimated losses will be significantly lower than sectors with no service currently in place.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

Consumers who buy through an RDO member are covered by the organisation's complaint handling service and ADR scheme. RDO successfully resolves the vast majority of complaints through the complaints handling service but if a complaint is not resolved to the satisfaction of the consumer, he/she has the right to take this to ADR. In reality, this means that just a small number of consumers have the need to take matters further.

Aside from the prescribed fees, there are no other costs to the complainant as rulings are made by the Arbitrator without the need for either party to attend.

Should the 50 or so annual complainants had not had the benefit of RDO's consumer services, the cost to take these complaints to small claims court are estimated at £50,000 per annum. This of course is assuming the cases are straightforward but if the claims is disputed, the costs would increase substantially.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Whilst we are fully supportive of any mechanism that enables customers to obtain a refund if they have a justifiable dispute, anecdotal evidence from consumers in correspondence with RDO's enforcement team - which offers assistance to consumers who have lost money to fraudulent non member companies - indicates that going through the banks can be time consuming, frustrating and confusing. We would tend to promote ADR over and above

other options, although Section 75 or the Chargeback process may be the only realistic means available to consumers if companies are unwilling to sign up to ADR.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

Setting up an effective ADR should be regarded as a priority for all industry sectors as it is an excellent mechanism to resolve complaints in a timely and cost effective manner. Over time, it promotes consumer confidence and the number of complaints tends to fall, as has been the case in the timeshare sector, as companies subscribing to the scheme work within the code requirements.

With this in mind, businesses should be prepared to contribute towards the costs of operating an ADR scheme, through membership of their trade body. There should however be consideration to providing a public subsidy to ensure that schemes around the UK are fully harmonised.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

One of the U.K.'s leading dispute resolution service providers, IDRS (www.idrs.ltd.uk), administers RDO's scheme on a pan European and multi-lingual level and we will be working with them to ensure that RDO is in full compliance with all requirements by the time the Directive is implemented. IDRS is owned by CEDR (The Centre for Effective Dispute Resolution, a long established institution witin the dispute resolution field. We do not believe that there are any requirements that we will be unable to meet.

RDO makes reference to its ADR scheme on the consumer section of its website, providing clear guidance as to how to make a complaint and, if they are not satisfied with the outcome, how to make use of the ADR scheme: http://www.rdo.org/Consumers/Complaints.htm

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation

that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

The Competent Authority should be an existing consumer organisation with pan European links, such as the Basildon-based European Consumer Centre. Its staff are experienced in dealing with cross border consumer complaints and liaising with trade bodies that operate ADR schemes. It would not be appropriate for a privately run organisation to take on this function.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

Signing up to a code of conduct and ADR scheme can only inspire consumer confidence and RDO is in full support of the proposals to require businesses to publicise this on their websites and supporting documentation. It is already a requirement to indicate whether a business signs up to a code of conduct under the newly introduced European Timeshare Directive and we have not received any complaints from members that this requirement has been a barrier to trading.

The proposal can only result in positive outcomes for consumers and businesses.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Although we have not provided figures in our response to question 9, we are of the view that the cost to amend information on members' websites, invoices and other literature would not be prohibitive.

Amending printed materials is, however, a more costly exercise and to keep costs to a realistic level, RDO recommends that the requirement to publicise ADR is mandatory only on the code sponsor's website.

**Question 9**: Do you have any other comments on the proposed Directive?

RDO is fully supportive of the Commission's proposals on ADR and ODR and will continue to work closely with governments, consumer associations and enforcement bodies to ensure that its members and the industry in general apply high business and ethical standards to their dealings with consumers. Any measures that improve RDO's ADR are welcome and will no doubt benefit consumers and the industry itself.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

Given that an increasing number of business to consumer transactions are of a cross border nature, an online facility to resolve any resulting complaints must be made available as it is unreaslist to require consumers to make complaints in the country in which the transaction took place. This is the case for the timeshare industry and RDO's complaint handling service and ADR are available in most languages of the EU.

The availability of an ODR platform is critical to the consumer's ability to resolve the complaint without incurring any significant travelling costs. The cost to businesses would likewise be minimal when an online facility is available.

Timeshare complaints are frequently of a complex nature and a deadline of 30 days might be difficult to work within. A standard 60 day deadline would be more realistic and we would be grateful if consideration could be given to amending this detail.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# RICS (ROYAL INSTITUTION OF CHARTERED SURVEYORS)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Paul McCormack, Policy Manager, Regulation Dept.

Organisation (if applicable): Royal Institution of Chartered Surveyors

Address: Parliament Square, London, SW1P 3AD

Telephone: 020 7695 1762

Fax:

Email: pmccormack@rics.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☒ Other (please describe): RICS is the lead body of its kind in the world for professionals in property, consutrction, land and related environmental issues. As an independent and chartered organisation, RICS regulated and maintains the professional standards of over 91,000 qualified members (FRICS, MRICS and AssocRICS) and over 50,000 trainee and student members. It regulates and promotes the work of these property professionals throughout 146 countries and is governed by a Royal

Charter approved by Parliament which requires it to act in the public interest.

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

This response is informed by the work of RICS regulation that monitors and, inspects and advises Members and Regulated Firms to uphold RICS' professional, ethical and business standards, as a well as against specific schemes. In line with better regulation principles, RICS' regulatory activities are transaprent, proportionate, accountable, consistent, and targeted, and the comments below should be taken in this context.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

n/a

b) How much does it cost you to provide these services each year?

n/a

c) What fees do you charge per dispute to whom for these services?

n/a

d) Approximately how many disputes do you seek to resolve each year?

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

n/a

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

n/a

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

RICS has no specific comments on the key estimates in the EC Impact Assessment. The extent to which the anticipated benefits for consumers, businesses and the single market will be realised will be dependent on a number of factors. In particular, the way in which and by whom the Commission's proposals are publicised to consumers, and the extent to which consumers have confidence in the ADR and ODR mechanisms on offer. The latter in turn will be influenced by the varying extent to which ADR is perceived and understood by consumers in different member states. In addition, different expectations of customer service by consumers in different member states is likely to influence the extent to which they take advantage of new ADR and ODR offerings.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

RICS is not able to supply evidence to quantify the costs and benefits detailed in Annexes B and C. RICS considers that ADR provision should be free for consumers, with the associated costs of such provision borne by businesses.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

RICS considers the "chargeback process" cannot be regarded as ADR as the card issuer is not an independent third party. Consumers are more likely to use chargeback than ADR as it is easily understood and consumers will have confidence in the card issuer to bring a dispute to a speedy resolution. RICS questions, however, the extent to which such a process could be mirrored in other member states given it is based on a piece of UK domestic legislation.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

RICS regards the proposed scope of the ADR directive as sensible. The Directive mirrors many of the requirements that RICS places on its regulated

firms in terms of ADR provision, in particular the requirements for a firm's chosen ADR mechanism to be free for consumers, independent, and to have a transparent, consistent and accountable decision making process.

RICS does not have any specific estimate of the public subsidy required to ensure ADR provision that is fit for purpose across Europe. RICS considers the costs associated with delivering ADR of the required standard across Europe could be significant, particularly in those member states where ADR provision and/or consumer awareness of ADR is relatively immature.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

RICS considers the standards/requirements for ADR providers are generally sound. A reporting mechanism and associated guidance is required to assist those ADR providers who propose to operate cross-border, not least so they understand the competent authority (or authorities) with which they need to engage. The single point of contact system used to implement the Services Directive might provide a suitable model to draw from in this regard. See: http://ec.europa.eu/internal_market/services/services-dir/index_en.htm.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

RICS does not consider there is an existing organisation that has the appropriate skills, experience and terms of reference to fulfil the proposed role of the Competent Authority in the UK context. RICS is unconvinced about the need to establish a Competent Authority in each Member State to monitor the functioning and development of ADR schemes. Such an approach has the considerable potential for the costs of establishing the Competent Authorities being borne by businesses and/or consumers. RICS suggests a pan European Competent Authority could fulfil the same function with cost savings in terms of economies of scale, even allowing for the potential additional costs.associated with operating across all Member states (working in different languages, understanding a range of local contexts etc). Implementation of the ADR Directive could be achieved at Member State level through secondary legislation and local enforcement (for example, BIS and Trading Standards respectively in the UK). Again, the single point of contact system used to implement the Services Directive (see answer to question 5 above), may provide a helpful model from which to draw in developing a way for a pan European Competent Authority to operate at member state level.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

RICS considers that increased information provision by businesses about ADR should change consumer behaviour, subject to that information flow being undertaken in a way that is accessible to consumers and instils confidence in consumers to take advantage of ADR provision. Ombudsmen are better placed than RICS to provide detailed evidence to support this contention.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Clear guidance is needed to explain how to businesses should provide information on ADR to consumers will help ensure costs to businesses from such a requirement are minimised. The guidance should include some examples of what compliance looks like - to encourage a proportionate approach by businesses.

**Question 9**: Do you have any other comments on the proposed Directive?

No.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

The 30 day deadline for ADR providers concluding cross-border disputes will be ambitious given the information flows likely to be involved in such disputes, especially in complex cases. RICS suggests a 60 day deadline might be more appropriate.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# ROYAL MAIL GROUP LTD

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Mandy Talbot

Organisation (if applicable): Royal Mail Group Ltd

Address: 100 Victoria Embankment London EC4Y 9HQ

Telephone: 020 7449 8297

Fax:

Email: mandy.talbot@royalmail.com

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☒ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: We shared the content of the call for evidence with appropriate business units and a senior

managerial committee endorsed the decision to respond to a limited number of questions.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

b) How much does it cost you to provide these services each year?

c) What fees do you charge per dispute to whom for these services?

d) Approximately how many disputes do you seek to resolve each year?

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

The customer services portion of the Royal Mail customer facing website provides customers with information about the escalation route along which a complaint about a letter, packet, standard parcel or services supplied in connection with the same, will progress within Royal Mail's customer services department. It also provides customers with information about the postal industry redress scheme, POSTRS, together with a link to the POSTRS website.

The number of Royal Mail customers who progress a case to POSTRS remains very small. Royal Mail's customer services department successfuly resolves many cases. Of the total number of the complaints received by Royal Mail customers services, more than 50% receive a payment or other compensation. Postal Review Panel, PRP is a ringfenced section within Royal Mail's Customer Services department which, is responsible for reviewing escalated cases from scratch and successfully resolves many cases which would otherwise go to POSTRS. It is also responsible for receiving cases from POSTRS and after investigation drafting a response, if appropriate.

Not all parties who complain to Royal Mail are permitted to bring a claim to POSTRS as customers who are party to commercial contracts are excluded, though the recipients of their mailings are permitted to make a claim. The figures are very small as a percentage of the total number of consumer complaints. Consumer complaints within the Royal Mail Customer Services department can include complaints by businesses as well as "true consumers" as defined by the European Commission, as long as they do not obtain mailing services under a commercial contract.

Royal Mail 's published data on customer services complaints

(fiscal year 1 April to 31st March)

| Fiscal year | 2009/10 | 2010/11 |
|---|---|---|
| Total no of business & consumer complaints (B&CC) | 1,195,553 | 1,230,398 |
| Paid complaints for B&CC | 642,615 | 631,780 |
| Consumer complaints only | 793,493 | 757,262 |

POSTRS annual year runs from the 1st of October to the 30th September and as such does not align with the Royal Mail financial year. POSTRS is mandated to deal with complaints about the postal industry. It is permited to accept cases for adjudication if the postal operator concerned is a member of

POSTRS and if the dispute does not arise out of a commercial contract, unless it is the recipient who is complaining. Attached are the last published statistics for POSTRS from their 2010 annual report.

Number of enquires accepted by POSTRS

Q1 (Oct 08-Dec08) 68

Q2 (Jan 09-March 09) 119

Q3 (April 09-June 09) 95

Q4 (Jul 09-Sep 09) 85

Of the 303 that were dealt with by a POSTRS adjudicator, 24 resulted in a decision wholly in favour of the Claimant, 99 partially in favour of the Claimant and 180 in favour of the postal operator.

The number of cases that have been dealt with by POSTRS in subsequent years is increasing but it does not appear to have had a substantial impact on the behaviour of customers. When POSTRS was set up in 2008 it was presumed that 1,000 cases would be referred to it annually by the postal industry. At present the total number of referrals has not exceeded 500 per year. However any broadening of the scope of postal redress to include all contractual disputes between retailers and consumers will have cost implications for business in terms of staff employed, compensation paid and in payments per case referred to redress.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

Royal Mail does not currently provide information about Alternative Dispute Resolution on its invoices but does provide information on its customer facing website and in some customer facing literature. As long as the requirements to add the information to a broader spectrum of documents and for other businesses within the Royal Mail Group can be addressed over a reasonable period of time, the cost of providing additional information should not be prohibitive as such changes could be addressed alongside other communications.

**Question 9**: Do you have any other comments on the proposed Directive?

Royal Mail Group Ltd provides postal services under contract and Schemes made under the Postal Services Act 2000. It consists primarily of the collection and delivery of mail within Great Britain, including the delivery of items which originate abroad and the disptach of items from Great Britain to

the rest of the world. Royal Mail enters into Business to Business and Business to Consumer contracts for the processing of letters, packets and standard parcels. Parcelforce Worldwide; its parcel delivery business, also enters into Business to Business and Business to Consumer contracts for the dispatch and collection of parcels. Parcelforce Worldwide also has a robust customer services department for dealing with complaints from business and consumer customers, which suceeds in resolving the majority of complaints through a process of escalation and appeals.

Royal Mail currently pays POSTRS, the postal industry redress scheme run by IDRS Ltd, an annual sum plus a payment for each case which POSTRS refers to the PRP in Customer Services. It is believed that the other postal operators contribute a very small amount in addition to the amount paid by Royal Mail. Further there is a flat fee for each case that POSTRS deals with on behalf of Royal Mail. The majority of the cases are brought against Royal Mail. As such should the Directive become final and thereafter is reflected in UK law without amendment then the burden on Royal Mail will increase at a time when mail volumes are dropping. The burden would be in respect of additonal fees paid to POSTRS, compensation and additonal staff which would be necessary to deal with cases referred to the business by POSTRS. Parcelforce Worldwide, Royal Mail Group's parcel delivery business does not currently participate in the POSTRS scheme. It has a customer services team who deal with both consumer and business customers in respect of both domestic and international transactions. Should the "Directive" become law and the Regulation be adopted in its current form this will impact adversely on its business, because it supplies services to consumers as well as businesses, by adding additonal costs.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

Royal Mail Group does not believe that the 30 day deadline for the resolution of disputes arising out of contracts entered into on line between traders and consumers is desirable and / or feasible, especially when it involves cross border transactions. The 90 day deadline for dealing with contracts which are not entered into on line will, we anticipate mainly involve domestic rather than international transactions where most parties have the benefit of a common language, legal system and to a certain extent expectations of the redress process. Therefore these disputes should be much easier to resolve than those which have an online or international aspect but ironically will have a much more generous target for resolution.

The ODR platform will require that ADR providers to whom it has referred an online contract dispute, which may frequently involve cross border transactions, resolve a dispute within 30 days of submission. This will be

impossible for many international transactions involving mail. Under the Universal Postal Union (UPU), set up under the auspicies on the United Nations to provide for the smooth transmission of mail around the globe, postal authorities have up to two months, if the enquiry is made on paper and 30 days if made electronically, to respond to an enquiry from another postal authority about the delivery of an item of mail. This applies to enquires made by Royal Mail about letters or packets and parcels handled by Parceforce Worldwide. As such should the 30 day time limit be strictly imposed when dealing with postal disputes arising out of international transactions, the target of the claim will almost certainly not be in a position to defend itself properly or at all. For example where customers have not completed customs documents properly items may be detained by customs authorities, not lost or damaged but the postal operators may not be able to prove this within the 30 day period. We understand that the 30 day time limit originates in the Directive and domestic regulation dealing with distance selling to consumers but would argue that it has no place in the resolution of potentially complicated cross border transactions. In the Consumer Protection Distance Selling Regulations it is merely the time period in which traders have to fulfil a contract.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# SCOTTISH ARBITRATION CENTRE

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

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You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Andrew Mackenzie

Organisation (if applicable): Scottish Arbitration Centre

Address: Dolphin House, 4 Hunter Square, Edinburgh EH1 1QW

Telephone: 0131 474 7844

Fax: 0131 474 7841

Email: chiefexec@scottisharbitrationcentre.org

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☒ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

We promote Scottish arbitration and Scotland as a place to arbitrate. We have facilities for hire for arbitrations and other ADR hearings. However, we are at present developing the Centre into an institutional model, so that we can provide serviced arbitrations in a similar way to the LCIA or other international arbitration centres.

b) How much does it cost you to provide these services each year?

As noted, we do not provide a service at present, but we do hire out rooms for arbitrations and other ADR hearings. However, our proposed service model will have fees attached, although these are likely to be much more cost effective than the LCIA or other international arbitration centres.

c) What fees do you charge per dispute to whom for these services?

See above.

d) Approximately how many disputes do you seek to resolve each year?

As noted above, we are developing a service model at present, so cannot estimate how many disputes we will seek to resolve.

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

As noted above, we are developing a service model at present, so have not serviced any disputes. However, decisions in arbitrations under the Arbitration (Scotland) Act 2010 and in other institutional arbitrations are binding.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

Although our focus at present is on commercial disputes, we promote, and will in the future service, any form of arbitration.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

We consider that there can be benefits to parties using arbitration or other forms of ADR/ODR to resolve disputes, and that such benefits may include reduced cost on parties in comparison to certain court actions. We also appreciate that the proposals, certainly in the initial set up, would involve a cost burden on relevant businesses. However, we are not in a position to determine whether or not these proposals would result in the anticipated benefits.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

No. However, as noted above, we consider that there can be benefits to parties using arbitration or other forms of ADR/ODR to resolve disputes, and that such benefits may include reduced cost on parties in comparison to certain court actions.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

It might be argued that the determination element of the "chargeback" process is a form of ADR, but it only deals with consumers who use a credit card to purchase goods. Therefore, it does not cover transactions made with cash, cheques or debit cards, so does not satisfactorily cover consumer cases. However, consumers using credit cards could be given the choice of "chargeback" or ADR/ODR.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

We consider the efforts to ensure independence and transparency within the scheme are important, so appreicate that certain bodies would be outwith scope. There are various ADR entities across the UK, including the new Scottish Arbitration Centre. However, there is a cultural problem, and the gap that requires to be filled is around education in respect of ADR. Of course, if

such entities wished to be involved in this scheme, they may wish to prepare a bespoke ADR scheme for such matters. If the ADR scheme is to be provided to consumers free of charge or at a nominal rate, subsidy will have to provided from somewhere. This may require public funding. Of course, there may be savings elsewhere for Government, given the reduction in court cases (and civil legal aid in Scotland) that such a scheme would result in.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

The standards/requirments for ADR providers appear reasonable. However, as an ADR provider, should we consider involvement, we would require time and additional resources to provide such an ADR scheme. We support the suggested deadlines, as dispute resolution should be as efficient as possible. Again, if the ADR scheme is to be provided to consumers free of charge or at a nominal rate, subsidy will have to provided to ADR providers from somewhere.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

It appears reasonable to create a monitoring role to ensure a consistent approach. However, given that Scotland has a separate legal jurisdiction, a monitoring body for an Scottish ADR entities should be based in Scotland. Such a body should also provide a balanced monitoring role. Therefore, such an authority should not simply represent consumers, but should be made up of a number of bodies, including those representing business. Bodies like Citizens Advice Scotland, Consumer Focus Scotland, the OFT, CBI Scotland, and the Federation of Small Businesses may wish to be involved. However, it may be preferably to give the role to one independent monitor, such as the Lord President, with advice from such bodies. The proposed new Scottish Civil Justice Council may be another option.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We cannot speculate on consumer behaviour, or indeed business behaviour. However, the provision of information at least ensures that both parties are aware of their rights and the options for dispute resolution open to them.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

As noted above, we appreciate that the proposals, certainly in the initial set up, would involve a cost burden on relevant businesses. We cannot estimate the costs. However, we consider that the impact would be lessened if this was a mandatory scheme, which would allow for collective provision of information.

**Question 9**: Do you have any other comments on the proposed Directive?

We welcome this initiative. However, we do not consider that this is a credible scheme if it is not mandatory, and if decisions taken in respect of disputes are not binding on parties. Decisions in arbitrations are binding on parties, so this should be a requirement in respect of the proposed ADR Scheme. Furthermore, the implications of a non-mandatory ADR Scheme would result in an inconsistent approach to the scheme across the Member State and throughout Europe. This would create a more confusing system for consumers in terms of dispute resolution. Finally, the timescale for implementation seems ambitious, given the change involved.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

An ODR platform which provides information and refers consumer to the appropriate ADR scheme appears sensible. Of course, if businesses are required to provide such details it may be redundant. Some ADR schemes may be online schemes. An ODR scheme may be more likely to meet the deadlines, and will be more cost effective, given that premises for the hearing and transportation is not required.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# THE DISPUTE SERVICE LTD (TENANCY DEPOSIT SCHEME)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

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Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Steve Harriott, Chief Executive

Organisation (if applicable): The Dispute Service Ltd

Address: 2 Brunel Court, Corner Hall, Lawn Lane, Hemel Hempstead, Herts HP3 9XX.

Telephone: 01442 210226

Fax: 01442 257290

Email: 07811 557670

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☒ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

TDS is a not-for-profit membership-based organisation which runs one of the three schemes which provide Tenancy Deposit Protection in accordance with the provisions of the Housing Act 2004. Our membership being made up of letting agents and landlords with a need to protect tenancy deposits with our scheme. We currently protect nearly 900,000 tenancies, and deposits valued at in excess of £1bn.

Our governance arrangements include the establishment of a Members' Forum, which includes a representative cross-section of members, as well as an e-consultation network whereby all those members who are interested in commenting further, are asked regularly for their views on the services we offer, and their future improvement.

We also have a dedicated Member Relations Team and key account managers for our major clients.

Although we have not consulted directly with our members in view of the short time scale for responses to this consultation to be submitted, we are confident that our knowledge of the sector in which we work gives us the ability to make an informed response to the consultation questions asked.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

We offer adjudication in relation to disputes about the return of a disputed deposit at the end of a residential tenancy. It is a paper-based adjudication system; our adjudicators rely on evidence submitted by the parties to the dispute. This is a service offered in accordance with the tenancy deposit protection legislation in the Housing Act 2004.

Further details of our service are given in the attached Annual Report for 2010-11.

b) How much does it cost you to provide these services each year?

We consider this information to be commercially sensitive, in so far as it relates to the overall operating costs of our business. However the cost of providing the ADR mechanism itself is free at the point of use to the parties.

c) What fees do you charge per dispute to whom for these services?

We do not charge any fees per dispute at the point of access to our ADR service.

We do charge members of the scheme either an annual membership subscription fee, or a charge for protecting individual deposits with us. This generates our income which funds the cost of operating our service.

We also charge a fee where the parties wish us to adjudicate on a tenancy deposit dispute which is not covered by the satutory scheme. In these cases we charge a fee of £500 + VAT, or 10% of the deposit + VAT, whichever is the greater

d) Approximately how many disputes do you seek to resolve each year?

In 2010-2011 we dealt with approximately 12,000 disputes.

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

Yes. Our scheme rules make it clear that, in agreeing to adjudication, the parties accept the decision of the Independent Case Examiner as final and legally binding.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

Our service is limited to disputes between landlords and tenants for the return of their deposit at the end of particular types of residential tenancy. To use our scheme, the landlord/letting agent concerned must register the tenancy deposit with us in order for any subsequent dispute to be covered by our scheme.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

They appear reasonable based on the information provided as part of the consultation exercise.

As a leading provider of alternative dispute resolution within the private rented sector, we believe that quick, easy, impartial, and low-cost dispute resolution is key to giving consumers coinfidence that problems can be put right. Enhancing that process with an effective means of access to ADR online will also be critical. The advance in on-line shopping should be matched by a comparable methodology for on-line redress.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

Not specifically, but we agree in general terms with the cost-benefit analysis put forward.

When tenancy deposit regulation was first brought into place, it was seen by many landlords as an unnecessary burden. However as the scheme matured, the number of disputes referred to it grew, reflecting the growth in appetite for such an ADR mechanism alongside increasing consumer awareness.

That said, our experience suggests that the return of well in excess of 90% of the tenancy deposits registered with our scheme most cases are resolved locally between the landlord and tenant when the tenancy ends - without the need for a dispute to be referred to adjudication.

This may in part be driven by the information made available by our scheme about how potential disputes are likely to be dealt with. Giving guidance to landlords, tenants and agents to help them resolve their disputes forms an important part of our overall methodology. We believe that any such ADR mechanism needs to be open and transparent about their adjudication decision making principles. This helps resolve disputes at a local level, but also drives up consumer confidence in the mechanism itself.

Nevertheless the fact that approximately 12,000 disputes are referred to us does endorse the view that there is a strong need for such resolution as an alternative to the Court process.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Such mechanisms can only be effective as a form of ADR if consumers using them believe that the ultimate decision over whether their complaint is justified, is one that is impartial, transparent, effective, and fair. If it is perceived that such decisions are made by a corporate/commercial entity who has a greater interest in keeping justified complaints to a minimum, the mechanism will not promote great consumer confidence.

It seems plausible to suggest that consumers with access to section 75 or chargeback redress may seek to use these avenues to resolve disputes in the first instance. But if those mechanisms are not independent in their decision-making, a mechanism for subsequent ADR will still be needed.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

We consider that consumers and traders faced with a dispute are likely to evaluate the time cost and money involved in pursuing redress through formal legal systems. We agree that fears of that nature are likely to restrain consumer confidence and leave disputes unresolved. We therefore consider that the Directive's proposals are to be welcomed.

The weaknesses in the current availability of ADR appear to be that not all sectors or product/service types have access to an effective means of ADR; those that do exist may not all be subject to some (or the same) form of independent accreditation to verify their fairness and effectiveness; and consumers may not be aware of their exisitence and scope. We are not able to quantify how much public subsidy might be required, but we do agree with the view that the effectiveness of the Directive's proposals will depend on effective consumer education.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

We agree that they are critical to demonstrating impartiality, effectiveness, transparency and fairness.

We already:

- make available information about our governance, funding, and procedures

- make publicly available annual reports detailing the number of disputes received, resolved, the time taken, and their outcomes

- ensure that access to ADR is free at the point of entry

- resolve disputes in 28 days or less

- allow the parties to submit complaints online

- exchange information with the parties via electronic means

- process personal data in accordance with relevant Rules.

Due to the possibility of landords or tenants being overseas at the time their dispute is raised, we accept disputes from overseas complainants. However at the current time those disputes are confined to deposit disputes about UK tenancies.

As an approved tenancy deposit scheme operating under the requirements of the Housing Act 2004, we are already subject to stringent operating and reporting requirements with the [Departmnent of] Communities and Local Government. We recognise the value of those requirements, and consider that all ADR schemes should be able to demonstrate a similar level of compliance in order to hold the confidence of their users.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

We welcome the proposed role. The difficuty is likely to be that there are already a wide range of bodies - such as CEDR (the Centre for Effective Dispute Resolution), BIOA (the British and Irish Ombudsman's Association), and the Chartered Institute of Arbitrators - all of whom prescribe standards for ADR provision. If faced with a plethora of accreditation schemes or standards, consumers may remain confused, leaving the need to operate a single standard through a overarching authority. We imagine that the creation of such an authority is likely to prove costly and contentious.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

Yes. It is our belief that the ability for landlords or agents to demonstrate that they belong to a tenancy deposit scheme with an effective form of ADR is a key selling point for new business. One might argue that the need for tenancy deposit protection, being a statutory requirement, is a 'given' and that it is not therefore something that new customers shop for.

The argument might be stronger in sectors where the provision of a form of ADR is more voluntary in nature. One might draw an analogy with the payment protection scheme offered by the Furniture Ombudsman. This is a mechanism to protect consumers who have paid in full before the supply and fit of a fitted kitchen, fitted bathroom etc. The Furniture Ombudsman holds an amount of money in a Protected Account which can be used to pay compensation to a consumer who has a justified complaint about the installation. This drives up consumer confidence and counterbalances the nervousness surrounding advance payments.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

This will vary from business to business depending on whether they already participate in an ADR scheme. However landlords and agents using TDS already provide much of this information. In the private rented sector, there are also many similar schemes offering a form of consumer redress which many agents already offer information about e.g. the Association of Residential Letting Agents, Property Ombudsman etc.

One might take the view that for businesses already committed to using some form or standard raising (e.g. a Code of Pracitce) or independent redress mechanism, the requirement to provide information is an extension of existing good practce. The cost will be greater for those business for whom such good practioce holds no current interest.

The costs to business can be reduced by the Scheme involved working with their customers to make available the correct information through their websites with linking/signposting both to the business concerned and their customers. The Scheme also has a role to play in making avilable information of the right content/standard for business to then incorporate into their own literature.

**Question 9**: Do you have any other comments on the proposed Directive?

Not at this time, other than we wish to be included in any further consultation and in the dissemination of information concerning the Directive's progress.

The cost to individual consumer sectors might be reduced if sections of the retail sector were to combine to offer a cross-company dispute resolution mechanism (for example, similar to FSO dealing not just with banks but also insurance,and other parts of the financial sector.)

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

We support them in principle, and the cost-benefit position is likely to be similar to that already examined.

The 30 working day dealine for concluding cross-border disputes appears overly-stringent if measured from the moment when a scheme first receives a dispute, but would be less so if measured from the adjudicator receiving the parties' submissions once the opportunity to submit and gather evidence had been given.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# THE MEDIATION ROOM

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:
http://www.bis.gov.uk/consultations
You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

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Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk
The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Graham Ross

Organisation (if applicable): The Mediation Room

Address: 47 Rodney St, Liverpool, L1 9EW

Telephone: 08450 573943

Fax: 0870 130 3337

Email: g.ross@themediationroom.com

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☐ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- x Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- x An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: discussion

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:
a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication. Online mediation and adjudication

b) How much does it cost you to provide these services each year? Little cost other than time.

c) What fees do you charge per dispute to whom for these services? £35 to £2,250 dependent on subject matter and process.

d) Approximately how many disputes do you seek to resolve each year? 500 +

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way? Not at present but current negotiations with an organisation would involve such an obligation

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details: No

**Your responses to the Call for Evidence**

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

**Answer:** Firstly, I have to point out that I have only been alerted to this Call for Evidence on the 30th January, and not, therefore, had time to properly read through the Impact Assessment My responses should be read in that context. I may wish to add further comments at a later stage when I have been able to fully read the Assessment and am available to assist with for any further investigations and discussions

I agree that the benefits will be achieved. I believe they may, in fact, have been underestimated/overlooked in relation to :-

a) Benefits to traders :-

i) increased cross-border sales, generated through increased trust,
ii) savings in less irrecoverable management time (and legal cost) spent in defending claims in the small claims courts and
iii) reduced chargeback costs/penalties
iv) increased justice and fairness in handling claims compared to the chargeback system

b) Benefits to consumers:-

i) lower pricing from increased cross-border competition for products and services.
ii) subject to ease of verification of participation, less exposure to higher risk/fraudulent traders by restricting purchases to websites participating in ADR/ODR,

.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

**Answer:** No but, given time, can obtain such from the product of over 10 years research, development and practice in ODR .

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

**Answer:** No. Quality of justice and balance between rights of consumers and traders,

and transparency of the decision making processes, is poor and unreasonably weighted in favour of the consumers. This is made worse with PayPal transactions due to the disconnect between trader and consumer with PayPal taking on a surrogate role for the consumer. In both areas, the commercial interests of the card company (to over-protect itself under s75 or, in the case of Visa Debit, to promote use of its card to consumers) and of PayPal (to promote its use by consumers) discourages true balance.

For the above reasons they also do not qualify as quality ADR that meet acceptable standards since the decision makers, acting as adjudicators, lack neutrality.

Whilst these systems seem at first to benefit consumers, they ultimately suffer through increased pricing of goods and services as traders make provision for chargeback losses that are higher than such that the true inadequacies of their products and services may justify.

The credit card (s75) chargeback system is notorious for not doing enough to identify, and reject, non-qualifying non consumer purchases.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

**Answer:**

There are the following gaps in scope:

**i)** Both the ADR and ODR provisions are too restrictive in applying only to traditional transactional based disputes and omit new and emerging areas of disputes that have developed on the Internet, such as disputes over consumer reviews of products and services. Much work is being done in developing ODR in this field. With reviews becoming an increasingly common element of e-commerce sites, and the potential for false reviews, eg by traders on their own products or those of competitors, to impact on the purchase decision, disputes in connection with the reviews themselves should be dealt with under the same regulation

ii) Whilst there are additional reasons why consumers need ADR solutions in cross-border transactions,it seems unwise not to extend the scope to local transactions.

iii) Given the ease by which consumers can become traders, eg through eBay shops, drop-shipping, affiliate schemes, Amazon etc, and the difficulty however to identify when such transition takes place, it would be wise to extend the scope to all sales to consumers, including sales by non-traders, whether or not in the grey area

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate

that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

**Answer:** ADR practitioners who include in their work mediation/facilitation online need to specifically undertake training in ODR. There are special skills required, for example, in generating and developing trust with people you do not meet in person. More than that specific ODR solutions, especially those using game theory, require different knowledge and skills and a skill in ensuring confidence in their use by the participants. It is also important they have experience of roleplay work before they handle live cases. I have trained mediators in ODR for over 5 years, including creating a program for the UK's Ministry of Justice and Milan Chamber of Arbitration ( who operate Resolvi Online). ODR is much more than drawing up and posting messages.

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ODR enables UK ADR providers to offer their skills worldwide.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

**Answer:** No comment at this stage

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

**Answer:** Yes.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

**Answer:** There should be no cost other than the nominal in adding a website link.

**Question 9**: Do you have any other comments on the proposed Directive?

**Answer:** Yes but not had the time. The Commission is referred to the newly published book, “Online Dispute Resolution: Theory and Practice” , published in 2012 by Eleven International Publishing (ISBN 978-94-90947-25-5. which is a 571 page detailed examination of the subject (and for which I co-wrote the chapter 'ODR in Europe').

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

**Answer: A**ssuming that the form of ODR applied is not just a simple communication platform for mediation discussions, then not only will the cost/benefit be positive but ADR providers will certainly be well able to meet the 30 day deadline. In addition there would be no additional costs to business for reporting the facilities. However it is by no means clear what the Commission has in mind when it refers to ODR

It may be helpful to what is planned by the Commission to look at the distinction between the human and the technological processes that are included within the broad definition of ODR.

Developments within ODR , both as to its procedures and its technological solutions, have been discussed and examined by a global ODR community that was formed in 2002 in Geneva at the first annual United Nations International Forum on Online Dispute Resolution. This network, which continues to meet around the world each year (and next meets in Prague in 2012 being the first time it has been held in Europe since the 2007 event in Liverpool) has seen the involvement of academics, technology developers, lawyers and ADR providers almost all of whom appear to be outside of the Commission's notification register. These two loops need to be joined together. This disconnect was seen a few years back when I found that I have to split myself between an EEJ Net meeting on ODR and a meeting of CC-Form an EU funded project to provide the sort of ODR signposting much like the Commission's current Regulation. A lot of advanced technology is being developed to significantly improve the various systems that could come within the definition of ODR, such as blind bidding, expert analysis and games theory. It would be unfortunate if the plan of the Commission results merely in the setting up of a specific low technology solution that simply uses the Internet as a form of communication between consumers, traders and ADR providers. Most of the online forms of ADR such as have been seen with in the discussions within EEJ-Net members are merely online versions of written adjudication based ADR ,albeit perhaps with occasionally simple forms of neutral facilitation.

Given the average modest values involved in consumer dispute, in comparison to the costly man hours applied to their resolution, and given the significant increases in workload that will inevitably follow from the Commission's plans, and the resultant pressure to increase turnover of cases per person employed in the process, the risk is that the plans may lead to higher levels of dissatisfaction, through quality and delays, with the core dispute resolution processes themselves. In other words, ODR will have achieved little other than to significantly increase the workload on existing systems, through increased consumer awareness and increased speed of communication, without introducing any processes that can improve the level of fair and just handling of disputes.

The way to avoid , or at least reduce, the extent of such an unintended consequence, must lie in the encouragement by the Commission of the use of the emerging creative applications of technology that can, in going beyond merely providing a platform for discourse by adjudicators or mediators, reduce human intervention, so as to enable systems to be scalable to cope with increased demand and, at the same time, to do so, as many such systems can, in a way that increases,not reduces, the level, and sense, of justice and fairness resulting from the form of ODR applied. It would be a great mistake to assume that the greater the level of human contribution to the dispute resolution process, the greater the quality and degree of justice and fairness. On the contrary, technology and machine intelligence can have the opposite effect and offer significant advantages over human limitations.

Two examples of how technology itself can have this effect can be found in the products currently being refined by Modria (www.modria.com), a spin-off of eBay and PayPal whose CEO, Colin Rule, was Head of ODR at those companies for over 10 years and , as such, helped develop the novel systems used in handling literally millions of disputes. Modria continues to operate these novel ODR solutions for both eBay and PayPal but which now are available for general use. One system constantly trawls the internet for the content of reviews of products and services and uses machine learning techniques to build up a library of content and patterns to help identify those reviews that may be fake. This process can be adapted to look at the words and phrases used in complaints to identify content that might challenge the genuine nature of the complaint or indeed reinforce its strength. No human facilitator could possibly undertake such tasks yet their value to delivering justice to the supplier is clear.

The point should also be made that justice in dispute resolution in consumer transactions should not be focused entirely on the consumer. The power of internet networking to facilitate less than genuine complaints, just as with less than genuine product/service reviews, shows that traders are as entitled to the justice from ODR as do consumers. In fact, there is arguably a more direct correlation with the objectives of the Commission in that , given the voluntary nature of the linkage to the eventual EU ODR platform, trust in what is delivered as a service needs to be built up equally if not more so, with the traders as with the consumers. The less trust in the system by traders, the less participation by traders and thus the less access to ODR for the consumers.

The second example of how technology can directly improve the level of justice through ODR being developed by Modria is in the empowering of consumers to control more of the dispute analysis and resolution process itself in a more automated manner. This can be achieved through automated systems that take consumers with complaints through a self-administered process which evaluates the nature and strength of the complaint as well as the evidence in support and then ultimately provides a machine selected series of appropriate, fair and just outcomes to select. Whilst the technology may not resolve all of the disputes it should manage a large majority of them and thus

better assist the human handling , albeit with online communication, of the remainder. The real gain of such systems is that they learn from the outcomes selected by the parties to constantly improve the level of justice as perceived by the consumer community as a whole whilst at the same time building up a knowledge base of how disputes are best handled so that consumers can learn themselves how to moderate their expectations and thus resolve more disputes themselves.

Considering these observations about technology leads me to the view that, rather than leaving it up to the referred ADR organisations to individually consider adopting technology solutions beyond online communication, so that access to best practice ODR and the higher levels of justice that can uniquely be provided by technology, is driven in a piecemeal and unco-ordinated way, that the Commission also sets up a system for notification of specific technologies and provides on the EU ODR platform access to them for consumers and ADR organisations alike. Such would lead to faster implementation of best practice in ODR and better empower consumers/businesses and ADR organisations to select the latest technology for their use without having to make individual research/investment/implementation decisions

**In conclusion**
Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.
Please acknowledge this reply x

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☐x Yes ☐ No


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# THE SCOTTISH MEDIATION NETWORK

**THE SCOTTISH MEDIATION NETWORK response to BIS Call for Evidence**

**December 2011**

1. **Q1. What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, businesses and the Single Market?**

Key estimates:

- *Savings to EU consumers*: There would be savings to consumers – those with a dispute could avoid the need to take disputes small claims courts and pay the related fees. Often consumers lose out on these fees if case isn't subsequently resolved. In order to pursue a dispute through court undoubtedly involves a substantially greater amount of time and money to a consumer. In some jurisdictions it involves paying a fee to raise a claim – which is not refundable if the case isn't successful or even if it does not proceed to trial. For instance, on a study we carried out at Newcastle combined court, we found that the costs to a pursuer for issuing a claim are as follows:
    - Pursuer pays a fee to issue a claim – this ranges from £25 to £108
    - They also pay a fee for a hearing 2 weeks before the hearing. This fee can be up to £325 if the claim is £5000.
    - Must also pay an allocation questionnaire fee of £40, if claim is over £1,500.
    - So the maximum a pursuer could end up paying is £473, and the minimum is £50 – just to bring their claim to court.

  There are obvious cost savings to the consumer here.

  Mediation is arguably the most proportionate way of dealing with a case with low monetary value - the law may not be the most proportionate way of dealing with a case with low monetary value. If ADR is not successful in resolving the dispute then it does not rule out the option of litigation and so there would be no loss suffered by the pursuer.

- *Benefits to businesses* by using ADR instead of going to court: improved business relationships, costs far less than litigation, especially if online or over the telephone – we have found that a dispute can be resolved over the telephone in as little as one hour. Consumer and trade disputes were found to be easily and quickly resolved through telephone mediation.[1] There would certainly be benefits for businesses by using ADR instead of litigation. Although we do not possess any specific quantification for such savings, we are aware of a number of reports that have shown ADR to be beneficial to businesses. Research and experience has shown that mediation can be instrumental in preventing damage to business relationships. The CBI (Confederation of British Industry) emphasised the strong business interest in avoiding litigation and settling disputes through ADR. The CBI sees this as having

[1] At the Newcastle Combined Court Telephone Mediation Service

the greatest potential for savings in litigation costs.[2] The Business Experts and Law Forum (BELF) report, published in November 2008 made clear the value businesses place on avoiding litigation and on resolving disputes, using mediation as a key dispute resolution option and recommended that it should form an essential part of any modern civil justice system.[3] Establishing mediation as a privileged forum for business negotiation would be highly advantageous to a member states commerce.

- *The Commission acknowledge that the information requirements placed on businesses will lead to costs: estimate that these will be around254 euros (£217) per business or 771 million euros (£660 million) in total.* We have no evidence to support this.

**Q2. Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and C and/or provide details of any additional costs or benefits?**

There has been a proliferation of in-court and court annexed mediation services in England and Wales and three in Scotland. They were dealing mainly with small claims consumer/trade disputes. Although not the same type of online ADR proposed in the Directive, findings do demonstrate that using a form of dispute resolution as an alternative to litigation in small claims consumer disputes brings savings in costs and substantial benefits. The Scottish Mediation Network produced a log-frame combining the findings of these mediations services. A copy of this has been attached for your reference. Overall conclusions demonstrate that mediation is highly successful in resolving small claims, and produces high levels of satisfaction among disputants. Mediation services were found to provide a cheaper, faster and more effective dispute resolution service than traditional procedures. Costs of the pilot mediation services appeared to be lower than litigation (in so far as overall cost of civil cases can be calculated) but with added satisfaction for the parties. This research provides evidence that mediation offers distinct benefits to parties engaged in small claims litigation.

The social and community benefits of mediation are increasingly widely understood, and experiences and research from the UK and beyond point to potential cost effectiveness and the positive impact mediation can have on court time and resources. This brief summary of such benefits highlights the potential to be gained from ADR:

Reduced costs
Mediation can save money. Substantial cost and time savings have been made possible through the use of mediation by UK Government departments.[4] UK government savings of £360 million have been attributed to the use of ADR,[5] legal aid reductions appear to

[2] Review of Civil Litigation Costs: Final Report, By the Right Honourable Lord Justice Jackson (December 2009). Availableat http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf at p 356
[3] http://scotland.gov.uk/Publications/2008/10/30105800/0
[4] The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence, Social Research Findings No. 50/2004, Fiona M. MacDonald, p 1.
[5] http://www.justice.gov.uk/news/press-releases/moj/moj-newsrelease230611a.htm

have been made through the use of mediation and there are often savings in the commercial sphere for businesses using mediation.[6] Recent research for the Scottish Government compared costs and outcomes of mediation and legal remedies for neighbour disputes and anti-social behaviour cases, selected randomly from mediation services and local authority investigations, it found that litigation can cost fifteen times more than mediation.[7] Further, a comparison of Scottish and English approaches to neighbour disputes showed savings were achieved when mediation was used. [8] In relation to costs for the client, the National Audit Office (NAO) research in 2007 found that on average mediation cost £753 and took 110 days, while court cost £1,682 and took 435 days.[9]

Access to justice

Increased use of mediation would allow increased access to fair resolution in civil law disputes, ensuring those who cannot afford, or choose not, to tackle such disputes through litigation have access to justice.[10] This is consistent with the principles contained within ECHR Article 6.[11]

Preventing damage to business relationships

The CBI (Confederation of British Industry) emphasised the strong business interest in avoiding litigation and settling disputes through ADR.[12] The CBI sees this as having the greatest potential for savings in litigation costs.[13] The Business Experts and Law Forum (BELF) report, published in November 2008 made clear the value businesses place on avoiding litigation and on resolving disputes, using mediation as a key dispute resolution option and recommended that it should form an essential part of any modern civil justice system.[14] Further, and indeed worryingly, the BELF Report suggested that businesses choose English rather than Scots law because mediation "receives only ad hoc judicial support" in Scotland.[15] Establishing mediation as a privileged forum for business negotiation would be highly advantageous to Scotland's commerce.

Savings in judicial time

The evidence strongly suggests that mediation in Small Claims and summary causes can free judicial time for scheduling other matters.[16] Further, court staff have to deal with fewer enquiries because matters are being aired between parties direct in mediation.[17] In addition, a successful mediation can have a marked effect on reducing waiting times, as

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[6] LCD. 2003. *Monitoring the Effectiveness of the Government's Commitment to using ADR*. London

[7] http://antisocialbehaviourscotland.org/asb/files/The%20Role%20of%20Mediation%20in%20Tackling%20Neighbour%20Disputes.pdf

[8] Hunter, C., et al. 1998. *Legal Remedies to Neighbour Nuisance.*

[9] National Audit Office, *Legal Services Commission: Legal aid and mediation for people involved in family breakdown,* Report by the Comptroller and Auditor General 256, Session 2006-2007, 2 March 2007

[10] The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence, Social Research Findings No. 50/2004, Fiona M. MacDonald, p 1.

[11] http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

[12] Review of Civil Litigation Costs: Final Report, By the Right Honourable Lord Justice Jackson (December 2009). Available at http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf at p 356

[13] *Ibid*

[14] http://scotland.gov.uk/Publications/2008/10/30105800/0

[15] Report by the Business Experts and Law Forum, www.scotland.gov.uk/Publications/2008/10/30105800/0

[16] For instance Manchester County Court Small Claims Mediation Service saved a total of 172 hours of judicial time during the 1 month pilot, Evaluation of the Small Claims Mediation Service at Manchester County Court Final Report to the Better Dispute Resolution Team, Department for Constitutional Affairs, Margaret Doyle, September 2006

[17] www.scotland.gov.uk/Publications/2010/04/22091346/0

the Exeter Pilot[18] displayed. The mean time measured from referral to mediation was 34 days – this represents a third less waiting time than going straight to a court hearing.[19] Research at Exeter demonstrated that even where the case does not settle at mediation there is a reduction in delay, as the mean time for the case to come before a judge is 93 days – which is 2 weeks less than the national target. [20] This is achievable because the date of the hearing is set at the time the case is referred to the small claims track so the mediation, even with a negative result, does not cause any delay to the entire legal process.

Litigants are better prepared

A potential benefit of mediation is that even if parties do not resolve their case at the mediation, the fact that they have spent focused time discussing the issues will help litigants to be better prepared for their court hearing - issues are narrowed for trial, and parties still get to have their day in court. At the in-court mediation pilots in Glasgow and Aberdeen Sheriff Courts it was found that even if mediation did not lead to settlement, parties welcomed the assistance to have a conversation about the dispute in mediation – issues were identified and they could still have their day in court.[21]

Proportionate response to low value claims

Many small claims cases operate at a level where personal difficulty and emotion complicate arguments about relatively small sums of money. Therefore, the small claims court is a potential vehicle for the use of mediation, when the law may not be the most proportionate way of dealing with a case with low monetary value. Traditional litigation may be an unsuitable, uneconomical and disproportionate route for such cases.

Mediation for small claims is arguably the most proportionate way of dealing with a case with low monetary value. Further, as highlighted in both the Exeter and Glasgow and Aberdeen mediation schemes, the informality of mediation is greatly appreciated, as there is a perception that court is a daunting experience.[22]

One of the much valued benefits of mediation is the possibility of achieving a creative settlement of the type that could not be ordered by a judge in traditional court hearings.

Higher compliance rates

Perhaps the most problematic area for small claims is the enforcement of judgements. On the small claims track in England and Wales, around a third of claimants who had been successful in the court room had still not received any payment 6 months after the date of the court hearing.[23] As opposed to adjudication, the consensual nature of the mediation process can help secure compliance with case outcomes by affording disputants the opportunity to refuse to agree to any settlement they find unsatisfactory. In a mediation study conducted at a justice court located in the USA, respondents reported that the act of signing an agreement in mediation held special significance for

[18] An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court Final Report for the Department of Constitutional Affairs, Dr Sue Prince and Ms Sophie Belcher, University of Exeter 2006
[19] Prince S, 'Institutionalising mediation? An evaluation of the Exeter Court small claims mediation pilot' [2007] 5 Web JCLI (web journal of current legal issues).
[20] *Ibid*
[21] http://www.scotland.gov.uk/Publications/2010/04/22091300/1
[22] Sue Prince, "Institutionalising Mediation? An evaluation of the Exeter Court small claims mediation pilot" [2007] 5 Web Journal of Current Legal Issues at p 10; Ross and Bain, 2010, pp.22,23
[23] Baldwin J, 'Evaluating the Effectiveness of Enforcement Procedures in Undefended Claims in the Civil Courts', (London: DCA Research Programme, 2003) at p 3

them such that these respondents felt their signature on the agreement meant they were making a commitment to follow through with what they promised.[24] Defendants reported that the act of making a verbal agreement with the plaintiff was the driving force in securing their compliance. Findings suggested that parties felt a stronger obligation to uphold an agreement they had made personally with another party, as opposed to having an order imposed on them by a judge.[25] It appears that because the parties are involved in, and agree the settlement terms, they are more prepared to comply than when an independent, judicial decision has been made. This is reflected in the data recorded in the log-frame, where compliance rates were 100% in some cases.

The Scottish Mediation Network agrees with the contention that more widespread coverage of ADR combined with greater awareness by consumers should lead to greater use of ADR and that there is currently a lack of awareness and insufficient information preventing consumers and businesses from using ADR entities. Consistent with the recent Directive on Cross Border Mediation[26], Article 9 (*Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services)* the Scottish Mediation Network believes that more should be done to raise awareness and increase information provision on ADR. Raising awareness will be instrumental in increasing consumer confidence in using ADR. Many disputing parties are not aware of the options, or the full benefits, to be gained from mediation and may therefore dismiss this option too readily. Better understanding of the role and benefits of mediation need to be fostered within businesses and the public. Studies have shown that proper publicity can be a powerful determinant of success and should include a clear explanation of mediation.[27] Literature observes that negative public perceptions must be addressed in tackling a lack of knowledge or negative assumptions about mediation, and underlines the importance of on-going improved marketing, awareness raising, monitoring and feedback. Social research on mediation in Scotland concluded that, "relevant, reliable and widely available advice could contribute to encouraging early participation in mediation and support efforts to widen access to justice".[28]

We strongly advise that steps are taken to ensure that members of the public are at least aware of the option of mediation so that they can make an informed choice as to whether they would like to attempt it or not. Professor Genn has recommended a programme of 're-education' to establish the benefits of mediation.[29] In her study on the Central London County Court Pilot Mediation Scheme although 86% of parties who responded a questionnaire said that they knew before coming to court that they would be attending a mediation, there was little evidence that they knew either what mediation was or the nature of the mediation process.[30]

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[24] Jennie J. Long, "Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes" *Conflict Resolution Quarterly,* vol. 21, no. 2, Winter 2003 at p 148

[25] *Ibid*

[26] DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union, L 136/3

[27] *The Housing Corporation 2001. The bIGPicture Mediation to Resolve Disputes in Social Housing*

[28] Fiona M. MacDonald, *'The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence',* Social Research Findings no. 50/2004

[29] Genn H, 'The Central London County Court Pilot Mediation Scheme Evaluation Report' (London: LCD Research Series, July 1998). p. 154.

[30] *Ibid*

COSTS OF ADR

Most small claims mediation services are funded by the Government on a project basis. This has not proved to be a sustainable source of funding. A more effective strategy would be to have the small claims mediation services funded through the Legal Aid budget or the Scottish Courts Service budget, or alternatively funded by the parties. The aim is to have provision of a mediation service mainstreamed and not dependant on project funding, which by its nature is short term. Where mediation services are provided on a pro bono basis, mediators incur significant costs in maintaining their accreditation (they have to pay the annual registration fee to the Scottish Mediation Register and pay for insurance costs and the cost of continuing professional development). Therefore, in this case some form of remuneration would have to be put in place. The National Mediation Helpline charges £50 per party for each hour of mediation (for disputes £5,000 or less) and requires parties to bear the cost of room hire etc. between them. Where telephone mediation has been used, there is a significant reduction in costs as there is no need for room hire or travel costs – mediations can be concluded over the telephone in as little as one hour – for instance where there is a trade dispute. Therefore in the proposed scenario, where there would be an online ADR platform, it is likely that there will be far greater cost savings to consumers and the state. Businesses may indeed bear this cost.

**Q5. What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so that it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are there any missing? Can you see potential for UK ADR providers to provide their services to non-businesses?**

The Scottish Mediation Network is not an ADR provider as such; rather it is a referral service. It works to promote mediation and also runs a helpline from which we make referrals and arrange mediations. The Scottish Mediation as an ADR body currently meets the following standards of the proposed directive:

- Article 7.1
- Article 8c: we work to ensure moderate costs in respect of referrals we make to a panel of mediators – where a request for mediation has come in on our helpline; registered panel mediators are required to charge on a sliding fee scale starting at £50 per hour, per party where the value of the claim is under £5,000. We also make referrals to free community and family mediation services in Scotland. Outside of this, independent mediators charge as they wish and we do not have any role in ensuring moderate costs in this scenario.
- As regards the ADR providers that we refer mediation on to – they have to meet specific criteria to be included on the national register that we govern (the Scottish

Mediation Register) These standards are listed at: http://www.scottishmediation.org.uk/?faq-item=practice-standards

# UK CARDS ASSOCIATION

THE UKCARDS ASSOCIATION

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The UK Cards Association is the leading trade association for the cards industry in the UK. The Association is the industry body of financial institutions who act as card issuers and/or acquirers in the UK card payments market. It is responsible for formulating and implementing policy on non-competitive aspects of card payments. Members of The UK Cards Association account for the majority of debit and credit cards issued in the UK, issuing in excess of 56m credit cards and 85m debit cards, and covering the whole of the plastic transactions acquiring market.

The Association promotes co-operation between industry participants in order to progress non-competitive matters of mutual interest and seeks to inform and engage with stakeholders to advance the industry for the ultimate benefit of its members' consumer and retail customers. As an Association we are committed to delivering a card industry that is focused on improved outcomes for the customer and ensuring compliance with regulatory requirements.

Whilst the views expressed in this letter represent the consensus view of Members of the Association, individual participants in the UK card payments market may also wish to submit their own responses to the consultation.

THE UKCARDS ASSOCIATION

The consultation, and the issues raised by the EU proposals, are clearly wide-ranging and extend far beyond the scope of The UK Cards Association. As such, we have focussed our comments to those aspects of the consultation that are specific to the card payments industry and specifically question 3. However, we have also made some more general comments which would apply irrespective of market sector.

**General**

We would make the following general observations:

- It is not entirely clear to us how it is intended that the proposed ADR would interface with existing schemes and other protections for UK consumers (e.g. ATOL and the Financial Ombudsman Services) that are in operation within the various industry sectors;
- The process adopted by the ADR is unclear. We would suggest that there is a need for a clear articulation of how the end-to-end process might look. For example, how the ADR would function when the business had ceased to trade, its powers when a refund was required, and in what capacity would the ADR action/handle claims (e.g. in the case of card related transactions, would it deal direct with the retailer or engage with the card issuer and acquirer?);
- We would suggest that any ADR facility needs to have robust controls in place to ensure that it is not open to abuse or encourages wrong behaviour. The credit industry has had first-hand experience of this where Claims Management Companies have been systematically abusing the process offered by the Financial Ombudsman Service;
- The consultation suggests that an ADR can provide a 'low cost and fast alternative' for those seeking to resolve disputes. We would disagree that this is always the case as, as has been suggested by FOS in its recent consultation on Plans and Budget 2012/2013[1], some cases are deemed to be complex (and in the case of PPI, FOS is proposing an additional, and not insignificant, case fee for such cases). It might also be argued that where an additional service is being provided to EU consumers which is aimed at 'creating savings' there is an inevitable increase in costs to businesses which they would look to recover in some way;

[1] http://passthrough.fw-notify.net/download/966023/http://www.financial-ombudsman.org.uk/publications/ombudsman-news/99/99.pdf

THE UKCARDS ASSOCIATION

- What process would be put in place to monitor ADR schemes for fairness and consistency of decision? To whom would the ADR be accountable?
- It is not clear how the requirements of the ADR proposal would sit with other EU legislation e.g. the Payment Services Directive and Consumer Credit Directive;
- In the case of card transactions, if another party were to be involved in dispute resolution, there would be a requirement for PCI DSS (data security standards) compliance i.e. there would need to be assurances about how the card data was stored etc.

**Dispute Resolution for Cards - Question 3**

As the consultation rightly identifies, there are several existing protections available to UK consumers in the event of a disputed transaction. We therefore believe that the cards industry, through section 75 (CCA), chargeback provisions, self-regulation, and, ultimately, the Financial Ombudsman Service, already offers a strong and robust consumer protection environment.

- Chargebacks are provided for under card scheme (e.g. MasterCard and Visa) rules and can be invoked under certain prescribed circumstances and timescales.

- Section 75 is a legal provision which is only available on credit cards although issuers may, at their discretion, choose to make like protections available on debit card transactions. With the imminent changes to the consumer credit regime and other section 75-related consultations (i.e. the Law Commission's recent consultation on Redress for Misleading and Aggressive Practices[2]), it is difficult to understand exactly how the existing legislative framework will be delivered in future. It would therefore appear to us to be a challenge to rely on section 75 as an ADR if, in the short to medium term, its future is unclear and uncertain.

[2] http://www.justice.gov.uk/lawcommission/consultations/misleading-aggressive-pracs.htm

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- PSRs – it could be argued that the PSRs now provide a further level of protection for the consumer, if not override what has previously been in place i.e. where Regulation 61 (PSP's liability for unauthorised payment transactions) requires an immediate refund in the case of unauthorised transactions (again under certain circumstances).

We do not believe that the above protections can, in themselves, be positioned as a form of ADR as they are either voluntary or legally required provisions which are very clear and should not be seen as providing some form of arbitration facility.

That said, the card industry already comes under the jurisdiction of the Financial Ombudsman Service which we believe provides an effective mechanism for the consumer should they require alternative dispute resolution. It is therefore unclear to us how or why the existing protections themselves (i.e. chargeback and section 75) should be positioned as the ADR.

We would be concerned about positioning section 75 as the ADR as, there is a risk that the consumer will increasing see section 75 as the primary (or only) route to pursue. The existence of section 75 does not abdicate the supplier of goods/services of their responsibilities or liability under the contract and it is usually in the consumer's interest to seek recourse from the supplier in the first instance. Presenting section 75 as an ADR could appear to absolve the retailer of responsibility and pass on liability for an incomplete transaction or a breach of contract to the card industry. As is already the case, the card industry, usually through the card issuer, picks up the cost of a section 75 claim, not the business which is in breach of contract. Nor should the card issuer and the provisions of section 75 be seen as the default option and/or removing responsibility from the consumer to take adequate precautions, i.e. not buying travel insurance as the card will cover any problems!

We believe that if chargebacks and section 75 are positioned as being on a par with an ADR there is a real danger that it could create an expectation of compromise and arbitration in the minds of the consumer which is not the intention of section 75

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The introduction of a further party or model in the case of dispute resolution would raise concerns as to the order of priority in the event of a claim i.e. which route should the customer adopt. Given the range of approaches in the card environment there is a real risk that a consumer might choose to work through the various claims models in the event that they did not get what they considered to be the 'right' outcome of any claim or make multiple claims in relation to the same event. This introduces the risk of double or even triple jeopardy for financial institutions – suitable controls therefore need to be in place.

In conclusion, while we believe that there should always be appropriate consumer protections in place, irrespective of industry sector, in the case of the consumer credit industry we believe that this model already exists, is well understood and operates effectively.

Should you have any queries or wish to explore our comments further, I and the team at UK Cards would be please to meet with you to discuss our views.

Yours sincerely

Jacqui Tribe
Manager, Legal, Regulatory & Schemes

# UK ECC (UK EUROPEAN CONSUMER CENTRE)

BIS | Department for Business Innovation & Skills

# Call for Evidence: EU proposals on Alternative Dispute Resolution: Response form

A copy of the Call for Evidence on EU proposals on Alternative Dispute Resolution can be found at:

http://www.bis.gov.uk/consultations

You can email, post or fax this completed response form to the following official at the Department for Business, Innovation and Skills (BIS):

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 5111
Fax: 020 7215 0357
Email: Heidi.Munn@bis.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this call for evidence is: **31 January 2012**

**Your details**

Name: Sonia Payne

Organisation (if applicable): UK European Consumer Centre and European Consumer Centre for Services

Address: Trading Standards Institute, 1 Sylvan Court, Sylvan Way, Southfields Business Park, Basildon, Essex, SS2 4AZ

Telephone: 01268 582 243

Fax: 08456 089 600

Email: soniap@tsi.org.uk

Please tick the boxes below that best describe you as a respondent to this call for evidence:

- ☐ Individual
- ☐ Charity or social enterprise
- ☒ Consumer body
- ☐ Regulator
- ☐ Local Government
- ☐ Central government
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Medium business (50 to 250 staff)
- ☐ Large business (over 250 staff)
- ☐ Business representative organisation and/or trade body
- ☐ An organisation that offers consumer alternative dispute resolution services
- ☐ Other (please describe):

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled: Discussions in the form of meetings.

If you are responding on behalf of an organisation that offers consumer dispute resolution services, it would be very helpful if you could answer the following additional questions about your organisation:

a) What kind of alternative dispute resolution services do you provide? E.g. mediation, arbitration or adjudication.

First tier advice and mediation. We will attempt to mediate with the parties and if that is unsuccessful, we will attempt to refer to an appropriate industry-specific ADR body before advising of judicial action.

b) How much does it cost you to provide these services each year?

Approximately 490,000EUR.

c) What fees do you charge per dispute to whom for these services?

Our Service is completely free of charge to consumers.

d) Approximately how many disputes do you seek to resolve each year?

6000 a year (figures based on UK ECC estimates).

e) Are the parties involved in the dispute in any way obliged to follow the outcome of your dispute resolution service? If so, in what way?

We do not make decisions on cases as we attempt to obtain an amicable resolution between the parties. This is a decision that the parties reach themselves.

f) If your services are limited to only certain kinds of consumer to business dispute, e.g. certain sectors, then please provide details:

We provide general cross -border consumer advice and assistance but there are certain sectors that we cannot advise on as there may be a more appropriate advice body or a particular sector is not covered by consumer law. For example, we provide only very basic advice in financial matters as this is a complex industry which may require expert advice. If we receive a cross-border case regarding a financial institution, we will most probably refer the consumer to Fin Net - the financial dispute resolution network. We also do not provide advice on property disputes as it is not covered by consumer law. We will always try to advise on anything else that we receive but if not, we will always signpost the consumer to a more appropriate body if this is at all possible.

## Your responses to the Call for Evidence

**Question 1**: What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A of the Call for Evidence? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

It is unclear what the estimates are based on. The cost of ADR will be different for large multi-national companies as opposed to smaller companies and this is because larger companies are likely to have more websites in more languages and have more staff to train. They may even subscribe to more than one ADR scheme but a smaller company will only have one website to work on and usually carry out their work in one language. Larger companies may even have to pay higher membership fees to ADR bodies as the price of membership may increase with the size of the business.

The benefits of ADR will only be realised if membership to an ADR scheme is mandatory - or mandatory for certain business such as larger companies or companies trading in a sector where there are many complaints from consumers or not much consumer confidence such as timeshare or timeshare-like traders. If membership is not mandatory, traders will not always be inclined to offer a dispute resolution service and the whole point of ADR will be missed.

Increased consumer confidence will benefit the Single Market by increasing shopping so the key estimates are likely to be realised. This is particularly true for cross-border purchases as there is a known lack of consumers confidence as consumers do not know where to turn if something were to go wrong.

The key estimates and figures are only assumptions and the figures are based on market research carried out by 22 businesses so it is worth noting that it may not be representative of the Single Market as a whole.

**Question 2**: Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C of the Call for Evidence and/or provide details of any additional costs or benefits?

We envisage that costs to businesses whill be high to begin with as ADR's in the UK are already insufficient. If new ADR bodies are created as a result of this new Directive, there will almost certainly be initial fees both for the new ADR body and the business member. There is a risk that these costs will be passed on to the consumer in the form of higher prices.

If ADR's are seen by consumers as being beneficial, it will definitely increase consumer confidence.Another benefit of ADR is that it could reduce the losses incurred by consumers as they may be more willing to pursue their complaint via an extra-judicial means if they know another avenue is available. Businesses could also use cases referred to ADR as an opportunity to train their staff.

One of the drawbacks of ADR we have found so far is that sometimes the penalties imposed by an ADR body can be insufficient in comparison to the amount involved so it does not always act as a deterrent.

**Question 3**: Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

We do not feel that section 75 of the Consumer Credit Act or 'chargeback' should be considered as a form of ADR. Every case is unique and it would be unfair to expect a particular procedure to be followed by a consumer, even where another procedure is more appropriate. A consumer may be better off claiming from the credit card company directly if, for example, the ADR body charges a fee for its services and does not provide a binding decision. In some cases, it can be more appropriate for a consumer to follow the ADR procedure and use the section 75 and chargeback as a 'last resort' before court action.

As there is a time limit in which to make 'chargeback' claims, we do not consider that a case should be referred to ADR first. In fact, we advise consumers that if they are unable to resolve a case directly with the trader, then to request a 'chargeback' as the time frame for claiming is usually 120 days whereas ADR's tend to have more generous time frames for claiming.

**Question 4**: What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

It could be considered unfair to consumers if an ADR scheme is operated by traders. In trade associations the board of Directors are usually made up of people who are part of a company that is a member of the trade association. We feel that if this is the case, and the trade association provides an ADR service, it should be made clear to the consumers who exactly makes up the board of Directors and if possible provide an alternative ADR scheme that a consumer can use if the ADR scheme is made up of individuals who work on behalf of companies.

In cases where arbitration is provided as a form of ADR, we feel that the decision made should be binding on the trader otherwise ADR is not attractive to consumers. Also if there is an appropriate ADR body, there should be an obligation on the trader to become a member of it.

A trader can display a logo of an ADR body on their website even if they are not a member of the scheme. We think that membership to an ADR body should be mandatory and traders should only be able to display the ADR logo

with express permission from the ADR body. This permission should come from the membership to the ADR body.

One major gap in the UK ADR market is lack of arbitration. Something that could be created with the new ADR Directive is brand new ADR bodies that cover all industry sectors. Knowing that there is a form of redress should anything go wrong will assist the consumer in making a more informed decision. Another option could be that instead of creating brand new ADRs, existing ADRs could be made to be more far-reaching.

We do feel that ADRs generally are not 'consumer friendly'. They tend to use a lot of jargon that consumers feel overwhelmed by and they may not have enough information in order to make an informed decision. We do feel that perhaps this could be something that could be addressed in the UK transposition of the ADR Directive.

A concern that we have is that according to the ADR Directive is that businesses will be able to start a case against a consumer as well as vice versa. We do not feel that this is fair as businesses have access to legal advice much more easily than consumers and are usually competent with knowing what the law is. A consumer is likely to feel trapped if a case was brought against them by a trader as they do not necessarily have the legal assistance at their disposal.

**Question 5**: What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

If it is mandatory for a trader to respond to communication from an ADR body, there is a lower chance of there being spurious claims as a trader will be more keen to have a case resolved before it is referred to ADR. If a trader fails to respond to communication from and ADR body, the case can be referred to the appropriate Trading Standards department in order to carry out enforcment action against the trader.

The 90 day limit is inappropriate for mediation unless the response from the trader is mandatory. Our experience of mediation has shown that a trader may not respond to the initial communication  so follow up communications are sent resulting in the trader eventually replying or the case being closed due to the trader not replying – either way this causes an undue delay to the case. Our Service would be much more effective if traders were obliged to reply. Also the eventual replies can sometimes be a few months after the initial contact so this is why we believe the 90 day time limit is inappropriate.

The Services Directive already provides that a trader must respond to communications but this is not being enforced by Trading Standards.

Reiteration of this obligation in the ADR Directive will reinforce this obligation both to Trading Standards and the trader.

There should be a distinction made between arbitration and mediation and this should be made clear to consumers. Complaints could follow a two-stage process - the first being mediation and then arbitration if mediation is unsuccessful. There could be financial penalties for traders if a case is referred to arbitration to encourage the trader to enter into mediation and persuade them to obtain an amicable resolution directly with the consumer.

The Financial Ombudsman Service is a good model for this as the financial institution will be fined if a case is referred to them and them fined again if the case is found in favour of the consumer. This could act as a catalyst to encourage traders to settle complaints directly with consumers.

To encourage the growth of the Single Market, we would suggest that ADR bodies in countries where the Directive applies, provide their services to all consumers in all countries as standard. This will eliminate any confusion for consumers as access to redress will be so much easier for consumers.

**Question 6**: What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

BIS already provide a list of approved ADR's so it makes sense to continue this. The Trading Standards Institute is also a suitable candidate as they already compile a list of Trading Standards bodies and are well-known to local Authority Trading Standards departments.

**Question 7**: Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

With the right education consumers would change their behaviour. At the moment the general public does not know what 'ADR' is, what it stands for and how it can be advantegeous to their case. If ADR is made more available and its benefits are publicised more widely, consumer confidence would increase thereby ultimately encourage spending.

Our experience shows that consumers are willing to pursue their case via ADR once they have been made aware of it. Usually, the UK ECC will advise consumers of an ADR body if it is applicable to their case. Prior to contacting the UK ECC, consumers usually are unaware of relevant ADR bodies. Consumers are usually willing to use ADR as an alternative to Court action which they usually find daunting, costly and time-consuming. This is evidenced in our case-load. We believe that if there was an ADR body to

cover all domestic (UK to UK) cases, it would be a very successful ADR and would also be very busy.

**Question 8**: What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

The costs to smaller businesses would be a lot smaller than to bigger businesses as smaller business have fewer staff and generally only have one website to amend to fit the new requirements. According to the Services Directive, businesses should already be providing information as to membership of an ADR on their website.

**Question 9**: Do you have any other comments on the proposed Directive?

It is not clear in which country the case will be handled if it is a cross-border case. Will it be the country of the consumer's residence or where the trader is based? This opens up issues such as the language barrier and potential translation of the case and it's supporting documents.

Generally we feel that it is inadequate as it does not go far enough to distinguish between mediation and arbitration. If the ADR Directive legislated for the creation of new ADR's rather than focussing on the existing ADR's, it would be more far-reaching. The existing ADR's individually are sufficient in themselves but there are not enough of them so the whole ADR landscape is insufficient for consumers' needs.

We also believe that more should be done to make consumers aware of ADR in general and the benefits of ADR should be publicised.

We feel that the ECC-Network could be a general ADR body for all cross-border cases. The Network is already established and we provide advice on almost all consumer topics so it would make sense in our opinion, to further our scope to arbitration. Our remit involves us using all official EU languages so the language barrier will not be an issue. Under the ADR Directive, the language barrier has not been addressed so costs in translation may well be added to the costs in handling the case.

**Question 10**: What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

It appears as though the ODR will be a facilitator for ADR cases. It would have been more appropriate, in our opinion, to make the ODR a body that provides arbitration or mediation on online disputes only. ODR's that exist in

other member states appear to have the remit to settle disputes. Sometimes a fee is chargeable but this is nominal and almost always cheaper than Court.

One of the drawbacks of the ODR Regulation is that it creates a voluntary ODR. This means that traders can 'opt-in' - so if a consumer decides they want to refer the case to ODR, the trader can refuse. We believe that ODR should be mandatory for all online traders.

Article 8.4 provides that where parties fail to reply to the ODR body, the case cannot be processed. We do not agree with this as we believe that the case should still be processed. The consumer should not choose the most appropriate ADR body as they may not be aware of all ADR bodies out there. This decision can be made by a third party (i.e. the ODR body).

ODR should not apply only to cross-border disputes as there is no national ODR service in the UK so it makes sense to have it apply to all consumer disputes - national and cross-border. This makes for a more comprehensive ODR system that consumers can use for all their consumer disputes.

The costs/benefits should be the same as it is for ADR - we cannot envisage that it would cost more.

The 30 day deadline we believe is unreasonable. Many external factors could cause undue delays to the handling a case such as the caseload that the ODR body has, failure to respond by the trader, lack of information provided by the consumer etc. Complex cases will always take longer to settle due to extra documentation and the possible provision of expert opinions.

The costs of both ADR and ODR are nominal and should not be enough to dissuade the trader from trading online or cross-border. Although there are costs involved, the beneifts of ADR/ODR still outweigh the disadvantages. We do feel that businesses in general could benefit in more education on consumer law since it is constantly changing. Membership to an ADR or ODR body will always make a trader look more reliable and legitimate thereby encouraging consumer confidence.

**In conclusion**

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents and/or calls for evidence?

☒ Yes ☐ No

# VIRGIN MEDIA LIMITED

BY EMAIL
Dr Heidi Munn

Consumer and Competition Policy

Department for Business, Innovation and Skills

3rd Floor, Victoria 1

1 Victoria Street

London, SW1H 0ET

31 January 2012

Dear Dr Munn

**Call for Evidence: EU proposals on Alternative Dispute Resolution.**

Virgin Media welcomes the opportunity to comment on BIS's call for evidence on the EU's proposals on Alternative Dispute Resolution.

Virgin Media's key concern with these proposals is that the drive towards increasing ADR procedures for all consumer disputes should not interfere with or disrupt the existing systems of ADR that already exist in the telecoms industry. Virgin Media has worked closely with Ofcom to implement the existing ADR arrangements and would argue that these procedures are working well for consumers.

Virgin Media also has one key concern about the regulation for online dispute resolution for consumer disputes. As currently drafted the wording for a "cross border online sale of goods or provision of services" means an online sale of goods or provision of services where, at the time the consumer orders such goods or services, the consumer is resident in a Member State other than the Member State where the trader is established."

Virgin Media's services are solely provided in the United Kingdom but it accepts online orders and it can envisage a theoretical situation in which a resident of another European jurisdiction who is moving to the UK places the order whilst in that other jurisdiction. If there were to be a dispute theoretically Virgin Media could be caught by this draft proposal. Virgin Media believes there should be a clear carve out to make it clear that where as here Virgin Media does not ban cross border sales but where services are always delivered in the United Kingdom, providers are not caught by these new measures.

Please let us know if you would like to discuss.

Yours faithfully

**Virgin Media**

# WHICH?

CONSULTATION RESPONSE

Dr Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Victoria 1
1 Victoria Street
London SW1H 0ET

DATE: – 01 February 2012
TO: – Heidi Munn
RESPONSE BY: – Dr Robert Reid

# ADR in the UK: Which? response to BIS call for evidence

## Introduction

Which? welcomes the opportunity to respond to this call for evidence on the EU proposals on Alternative Dispute Resolution (ADR) from the Department of Business, Innovation and Skills. We believe that it is of paramount importance to the UK's growth agenda to ensure that UK consumers have confidence in the services and traders with which they engage. Central to the development of this trust is a mechanism for redress.

We believe that the first port of call for any unhappy consumer should be a trader's own customer services and we promote good customer service by raising awareness of good and bad practice through our regular surveys of customer satisfaction across multiple industry sectors[1]. However, we also believe that should a consumer find themselves in a dispute that cannot be resolved through the trader's normal procedures then access to timely, cost effective and independent dispute resolution procedures as an alternative to court action, is a desirable alternative.

[1] For example, we publish Internet Service Provider satisfaction research every 6 months.


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There are already some good examples of alternative dispute resolution schemes across various sectors of the UK economy that offer a free service for consumers that is binding on business and independent, for example Financial Ombudsman Services and the Legal Ombudsman Services. These schemes provide confidence to consumers and savings for consumers and businesses by avoiding the need for timely and costly court proceedings. However, the current ADR landscape in the UK is beset by a number of problems:

- **Gaps** - There are many sectors which are not covered by ADR schemes at all, leaving consumers with no option other than court should disputes fail to be resolved by the trader.
- **Quality** – There is significant variability in the principles and standards that are adhered to by ADR schemes across and within sectors.
- **Competing schemes** - There are also some sectors in which there are competing schemes, prompting accusations of a 'race to the bottom' for consumers.
- **Low consumer awareness** – Even where there are good schemes in place more could be done by business sectors to raise consumer awareness of their existence, schemes should also have more intuitive names.

We support the intention of the EC's proposals to ensure that consumers in all sectors can buy goods and services with confidence that should something go wrong they have access to dispute resolution that does not involve the cost and stress of going to court. Although we do not agree with all of the provisions within the proposals and feel that they fall short in some key areas, we do welcome the opportunity the Directive provides to BIS to really get to grips with what an ADR scheme for the UK should look like.

In this response we have answered the specific questions that have been raised by BIS, but we also call on the government to take this opportunity to convene expert stakeholder working groups and to conduct cost benefit analyses of possible options to explore exactly what ADR should look like for the UK. We believe that effective ADR can support the government's growth agenda by providing consumer confidence across all sectors. These proposals provide BIS with the opportunity to ensure that the right ADR schemes are in place to provide confidence to the UK consumer and to promote confidence in UK businesses.

**Question 1**: *What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, businesses and the Single Market?*

We feel that the implementation of effective ADR in all sectors across all member states will be beneficial to consumers and businesses and will encourage cross-border retail in the Single Market. By effective ADR we mean schemes that are independently governed, free to access, are mandatory for businesses to join and whose decisions are binding on business. Such schemes are already common in the UK's regulated industry sectors, for example the Financial Ombudsman Services (FOS), and the Energy Ombudsman.

Effective ADR also has a role to play in increasing standards: Simpler dispute resolution means people are more likely to complain and so drive change within a market.

We agree with the theory postulated in the impact assessment provided by the Commission that ADR offers consumers and businesses the opportunity to make significant savings through resolution of complaints and avoidance of court costs. We do not have specific data to confirm or challenge the figures that the EC puts on these savings.

We view the EC Proposals as a great opportunity to improve the consumer landscape and increase commerce in the Single Market. Access to effective ADR will offer consumers a cheaper, fairer and more equitable environment in which to engage with businesses over disputes, as well as increasing consumer confidence in cross-border shopping and providing businesses with an added incentive to ensure that their own complaint handling procedures are fair and effective.

However, the European Commission's impact assessment takes a broad view of ADR across the EU. It is essential that before engaging in discussions on the establishment of ADR schemes across all sectors of the UK, BIS undertake a full cost benefit analysis of proposed models to ensure that any solution provides the best solution for UK consumers, businesses and growth.

**Question 2**: *Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?*

We believe that access to effective forms of redress is the single most important issue in terms of developing the internal market and a properly implemented regime will significantly enhance

consumer confidence to trade cross-border[2]. We strongly advocate that the EU should focus on getting this right rather than concentrating on the Common European Sales Law. A well known, well trusted system of ADR in the UK has the potential to benefit UK traders by building confidence in EY consumers to shop cross border.

The costs and benefits outlined in Annexes B and C list a number of benefits to the uptake of ADR schemes. We would add a fourth potential benefit to this list. Namely, that wide uptake and awareness of ADR incentivises traders to improve standards and reduce complaints.

Although we do not have evidence of a direct link between the existence of ADR and consumer confidence, we do have research that suggests that an important barrier to cross-border shopping is the fear that the consumer will not be able to access redress should something go wrong. From a survey of the British public conducted in October 2011, 54% of consumers who said they would rather buy from a UK retailer stated that they would do so because they were concerned about getting an exchange or refund if something went wrong[3].

Which? also found that 19% of UK adults had complained in the past 12 months and 50% of those were not happy with the outcome of that complaint. Of those that were unhappy with the complaint resolution 10% took their case to an independent dispute resolution scheme[4]. This means that a significant number of consumers were left with no redress or only recourse to court action. We believe that this represents a cost to consumer confidence on top of the cost to consumers and business of going through court proceedings.

**Question 3**: *Do you think that the "chargeback" process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use "chargeback" or make claims under Section 75 or the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?*

These are not ADR schemes but are contractual or statutory alternatives for claims that are available to consumers in certain circumstances. Where a consumer is using either regime, their claim becomes a claim/potential dispute with the card company and replaces the dispute with the trader. Such claims therefore cannot be considered ADR: an ADR scheme must always involve

[2] Which? research conducted in October 2011 found that of those questioned who would not shop cross border, 54% said it was because they were worried they would not be able to get an exchange or refund if something went wrong (398)

[3] Which? public omnibus research conducted in October 2011 (n=1272)

[4] Which? public omnibus research conducted in October 2011 (n=2100)

a participant who is not a party to the claim (either statutory or contractually) and that third party should be independent.

We do not think that either "chargeback", or Section 75 should be considered forms of ADR. Both schemes provide confidence for consumers in light of liquidation of the company they are dealing with but neither provides dispute resolution services as outlined in the Commission's proposals.

Section 75 of the Consumer Credit Act offers protection only for credit card purchases, and as such is not a universal protection scheme. In addition, section 75 only covers purchases within a specific price range, and there is currently some uncertainty as to how the involvement of various payment interfaces (eg. PayPal) effects the protection it offers.

We have research (attached) to suggest that poorly trained card issuer staff have provided incorrect or incomplete information about claims on credit cards. For example, in only 1 of 120 calls to card issuers was the customer services representative able to offer the correct advice on the correct money values within which a S75 claim can be made[5]. We have received a large number of complaints about poor advice or unfair charges relating to S75 claims from our members that demonstrate consumer confusion and significant barriers to redress through the scheme.

Chargeback is a contractual scheme between issuers and networks - not a universal consumer protection scheme. Chargeback is often not written into the contracts between card issuers and consumers and we have received numerous complaints regarding the lack of information provided to consumers on the scheme. As such it does not represent a universal scheme for consumer redress.

Chargeback is especially problematic as the decision by the card company to refund money to a consumer does not legally bind the trader. This could result in consumers being giving the false impression that a dispute has been resolved when in fact the trader could still pursue them for payment.

Finally, and most importantly, neither of the schemes meets the standards on impartiality, effectiveness and fairness for ADR schemes as set out in the Commission Proposals.

**Question 4**: *What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any*

[5] 'Credit Card Claims' Which? Magazine, February 2011

*estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?*

We are largely satisfied with the scope of the Directive. We strongly support Article 2.2 which ensures that trader's own internal dispute resolution processes and court action are not considered to be ADR schemes under the scope of the Directive. We call on BIS to ensure that these exemptions are maintained during discussions within the Council.

However, there are areas that we feel could be improved. We are concerned by section 3.1.1 of the explanatory memorandum which states that the Directive will include complaints brought by traders against consumers, as well as consumers against traders. We feel that a key function of ADR schemes is to avoid costly legal fees. Given this ADR is able to address the financial asymmetry between traders and consumers. We are concerned that allowing traders to file complaints against consumers might result in vexatious complaints intended to spoil/delay proceedings, and urge BIS to consider excluding trader-led complaints from ADR coverage.

We believe that filling the numerous sectoral gaps in the provision of ADR in the UK is extremely important. Sectoral gaps are mainly concentrated in the unregulated industries, for example the construction industry.

However, there are also significant gaps in coverage within regulated sectors due to unclear jurisdictional boundaries complicated by rapidly developing markets, market convergence, and regulated sector overlap, derogations from sector-specific directives and group consumer credit licenses for example.

Such a situation exists in relation to consumers bringing claims about work carried out under the Government's Green Deal home improvement programme. Access to an independent ombudsman is particularly important in the Green Deal system because of the complex set-up and myriad issues that might arise. The involvement of the Financial Services Ombudsman (FOS) and the Energy Ombudsman is required. According to DECC, FOS should be the port of call for any 'clearly financial' disputes while other disputes sit with EOS. While this split seemingly works well on paper, we are concerned that in practice the owner of a dispute will be difficult to pin point. This would require a clear definition of what is 'clearly financial' which will not be easy to determine. Consumers should not be left guessing which service they should approach.

Given that current ADR schemes in regulated sectors are self-financing, we believe any public subsidy to ensure the availability of ADR in all sectors would be reasonably low and mainly confined to start up costs and raising awareness. We believe that in order for a scheme to have

the greatest chance of being self-sufficient ideally membership should be mandatory and there should not be competing schemes in any given sector.

We call on BIS to investigate potential funding mechanisms further in the context of ADR scheme requirements and to publish cost benefit analyses of different proposals.

**Question 5:** *What do you think of the standards/requirements for ADR providers that are proposed by the EC? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?*

While we welcome the standards for ADR providers proposed by the EC, we urge BIS to work further with consumer groups, ADR schemes and industry to agree the best possible approach to ADR in the UK. The EC proposals offer BIS the opportunity to address the current gaps in ADR coverage and to ensure that the current high level of service offered to some sectors is not eroded. The UK already has a number of very successful ADR schemes (FOS, LOS) that set a standard that we believe other schemes should be required to meet. We want BIS to ensure that any new ADR proposals do not allow for a lessening of the standards of existing schemes.

We are concerned by the omission of the principle of independence that was in the 1998 Commission recommendations. We want the principle of independence as written in the 1998 Commission recommendations to be included in the standards for ADR providers. The principle of independence should ensure that any decision making body, either collegiate or a single person, is independent. It ensures that the person responsible for decision making is expert in their field. That the person(s) responsible are in office long enough to ensure independent action can be taken without fear of being removed from post and that the person has not been employed by the sector for which they are appointed for three years or more. We do not feel that the principle of impartiality as it is described in the proposed Directive offers the same level of independence. Relying on the use of the wording 'have no conflict of interest with either party to the dispute' is ambiguous, open to interpretation and as such does not provide for the same level of independence as the clearly defined 1998 principle of independence.

We believe that, for ADR schemes to offer the protection and savings that are suggested by the Commission, membership of them should be mandatory for traders. We feel that voluntary membership undermines the intentions of universal ADR as it allows traders to opt-out of their responsibility to consumers. Mandatory membership could create a strong funding base for schemes and means that consumers can have confidence in all their dealings with businesses

across multiple sectors. We ask BIS to consider how schemes can be made mandatory within all sectors while not proving too burdensome on small businesses. This could be through exemptions from mandatory membership for traders with turnovers under a set level combined with the requirement to join ADR should complaints be made against the trader. A system of fees for mandatory membership of ADR that are based on the number of complaints received. Or perhaps the development of a general system similar to that in Denmark where although traders do not have to sign up to a scheme they are all answerable to it (in Denmark this scheme has state support).

Further, we support the existence of a single ADR scheme in each sector as we are concerned that the existence of multiple schemes might cause a 'race to the bottom' as schemes compete to attract members. Competing schemes only work for consumers when they too are given a choice of schemes to turn to. In addition, the presence of multiple schemes would also serve to dilute the potential revenue of individual schemes making funding more problematic.

In line with our model ombudsman paper (attached), we would push for UK ADR schemes to be free for consumers to access. This is currently the case in many successful UK schemes and we believe that these schemes should provide the benchmark against which others should be judged.

In this paper we also call for decisions to be binding on businesses but not consumers. We fear that by allowing non-binding decisions traders the EC will essentially open the door to traders opting-out of their commitments to consumers and falling-back on the knowledge that many consumers would rather not proceed to court action to resolve the issue. This effectively defeats the object of an ADR scheme.

It is important that ADR schemes are able to impose firm and clear sanctions for non-compliance and collaborate and share data with industry regulators in order to work towards market improvement. This is an objective that is easier to achieve in the regulated industries, but may prove more challenging in unregulated industries and we call on BIS to research how such requirements could be met in a UK ADR system.

**Question 6:** *What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?*

We support the proposed role of a Competent Authority to ensure that ADR schemes meet the requirements as set out in the Directive and supplemented by the additional requirements set

out in our response. This role must be completely independent of the ADR scheme itself and include consumer representation in the selection of its governing bodies. Within the regulated industries this role has been filled by the sector specific regulator. However, further research is required from BIS to investigate the potential costs and benefits of different competent authority models before a particular model can be recommended to monitor non-regulated industries.

A potential solution would be to combine a single point of entry for consumer ADR with the competent authority responsible for the accreditation of schemes. Such a structure would allow an overview of ADR coverage to be monitored and adjusted to allow for market changes as well as ensuring the quality of existing schemes and providing consumers with an easily recognised route to redress. Similar schemes have been developed in Scandinavia and the Netherlands.

We call on BIS to convene a working group to investigate the options available for establishing a competent authority in the UK. Existing bodies for consideration could include Trading Standards Institute or the British and Irish Ombudsman Association.

**Question 7:** *Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?*

As outlined in our response to question 2, our research suggests that a lack of redress if something goes wrong is an important factor in consumers' decisions not to shop internationally. The availability of ADR in all sectors would offer a sense of security for consumers. However, our research suggests that awareness and use of ADR is very low amongst both consumers and businesses[6]. Therefore, the way in which traders inform consumers of the existence of ADR schemes, the ways in which ADR schemes raise their own profiles and the approach to broader awareness-raising by consumer organisations and government are all essential to increasing consumer confidence.

It is essential that any information supplied to consumers is carefully assessed for its impact. The type of information provided and where it is provided should be carefully considered so as not to lead to consumer confusion. BIS should research whether the information requirements should require businesses not in ADR schemes to clearly state so, therefore putting pressure on them to join. Traders that are in schemes could provide information about the schemes in their terms and conditions, customer services and help information. A requirement to put the

[6] 6% of consumers with a cause to complain in the past 12 months raised their complaint with an Ombudsman (all adults 2100)

information upfront could lead to a deluge of complaints to the ADR body without prior resort to the trader's own dispute resolution procedures.

**Question 8:** *What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small and medium businesses?*

We feel that the information requirements are a positive step; however we want to ensure that consumers are not confused or misled by any information provided by traders. It would be useful for BIS to assess the level of information that consumers require in order to fully engage with ADR. We expect there would be a one-off cost for businesses but cannot estimate exactly how much. We would expect any costs to be off-set by efficiencies derived in the dispute resolution process as a result of the ADR schemes being established.

**Question 9:** *Do you have any other comments on the proposed Directive?*

We support the Commission's proposals for ADR in all sectors and feel that this would be a very positive step forward for consumers seeking redress. We feel that this is a unique opportunity for the UK to lead the way in consumer redress and that the successful implementation of quality ADR in all sectors will give the UK a competitive advantage by making its traders more attractive than international competitors. However, there remain many questions about the details of such schemes and we therefore urge BIS to take this opportunity to work with consumer, ADR and industry stakeholders in order to develop the most effective ADR schemes possible.

**Question 10:** *What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the ODR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?*

We welcome the ODR regulation as an initiative to increase consumer confidence in cross-border shopping. However, we do not feel that these proposals amount to a genuine ODR scheme, but rather an online portal for consumers to search for ADR schemes. This is misleading for consumers. We want ODR to be done properly as it may otherwise be detrimental to consumers by offering a false sense of security.

We are concerned with Article 8.4 which states that the dispute will be not proceed unless both the consumer and the trader agree on an ADR platform. This completely undermines the

proposals and makes ODR useless to consumers as businesses are able to simply refuse to cooperate.

The ODR proposals are based entirely on the provision of functioning ADR in all member states. However, member states have the freedom to implement ADR schemes differently which means that ODR might be potentially confusing/misleading for consumers. If the ADR scheme in a consumer's home state stipulates that access to a scheme is free and the decision is binding on business, they might assume that this will be the same in all member states.

We do not feel that the costs to businesses would be detrimental as the ODR scheme is based on the pre-existence of ADR, which means that businesses will have already needed to implement changes in order to comply with ADR requirements. Information provisions could all be carried out at the same time so that ODR requirements do not place an additional cost burden on businesses. We imagine that this would not be a hindrance to businesses trading cross-border. We feel that an increase in consumer confidence should translate into an increase in business for traders, which would incentivise cross-border trading and offset any small potential cost.

We are not an ADR provider, however we are concerned that 30 days is an impractical timeframe for dispute resolution and is not consistent with the 90 days given to ADR schemes under the Directive.

# WOODS OF SHROPSHIRE LIMITED

Dear Dr Munn

I've been in conversation With Andrew Mc Clelland at ISIS , with reference to the above.
I'm finding it incredibly difficult to recognise the need for this regulation or indeed the entirely unnecessary expense that will be incurred by good businesses that will gain no tangible advantage from it. The truth of the matter is that good businesses look after their customers and want them to return. Bad businesses might let a customer down once and never get them back again. If they continue to perform in a disreputable manner their business will wither on the vine as customers will choose to go to those who provide good service and resolve conflicts to mutual benefit.
In ten years of trading successfully online I can honestly say that we have really very few conflicts in a year , all are resolved in house to mutual satisfaction and none have ever required recourse to court action.

Even if we do end up having to refer customers to some new arbitrator via our website , there is absolutely nothing to say that in the event of a customer making an unsuccessful appeal to an arbiter that they will then take what they think to be appropriate action. If the Supplier chooses not to be bound by the arbitration then do we take it that the ADR company will then take the supplier to court to enforce the decision – which is what might have happened anyway!

I do not want this to sound like a rant – I just cannot see the necessity for all of this , it will incur extra cost to companies ,these costs will eventually be passed onto the customer either through higher cost prices or from a levy should they choose to opt in. (it will be very difficult incidentally to get customers to actually opt in – customers do not like to opt in if they feel it is an unnecessary extra , or if their personal details are possible going to be distributed)

Finally , the chargeback system already provides very good protection to the consumer , quite often to the suppliers detriment as the money is taken back off us , prior to our being able to prove our innocence in any particular matter. We have in the past lost out to unscrupulous customers , instigating chargebacks without good reason. This will result in a lengthy procedure to prove our case and to attempt to reverse the chargeback – this is not always possible as if the chargeback has been instigated fraudulently the customer may have worked out how to deny our claims ' that is not my signature ' is always a good one especially if the goods have been signed for with a squiggle , or 'delivered to a neighbour'

If I can supply any further information with reference to my belief that this will be a costly , unnecessary scheme , that will benefit very few people then please do not hesitate to contact me by return

Regards

Charles Wood

www.woodsofshropshire.co.uk