Ombudsman Services

Good for consumers – Good for business

Response to the draft guidance on the CMA's approval of voluntary redress schemes consultation.

28 March 2015

CMA's approval of voluntary redress schemes

Ombudsman Services' consultation response

1 Summary - About Ombudsman Services

Established in 2002, the Ombudsman Service Ltd (Ombudsman Services) is a not for profit private limited company which runs national, multi sectorial private sector ombudsman schemes for the telecommunications, energy, property, copyright licensing, the glass and glazing sectors, the Green Deal, the Asset Based Finance Association (ABFA), reallymoving.com and Which? Trusted Traders.

We're an entirely independent, service-oriented organisation. Through the different services we run, we help our members to provide independent dispute resolution to their customers and each scheme is entirely funded by its members. Our aim is to raise public trust and confidence in the sectors we work with by providing effective independent redress when problems arise.

We now have around 9,200 participating companies. During the year ending 31 December 2014, we resolved 53,614 complaints. The company currently employs more than 500 people in Warrington and has a turnover in excess of £27 million.

Ombudsman Services' complaints resolution service operates once a company's own complaints handling system has been exhausted, and we have the authority to determine a final resolution to each complaint. We have an enquiries department which handles primary contacts and where decisions on eligibility are taken. If a complaint is not for us, or has been brought to us too early, we signpost the consumer and offer assistance. Eligible complaints are then triaged. The simplest can be resolved quickly, usually by phone, and taking a maximum of three hours. Around 10% are dealt with in this way. For the majority of complaints we collect and consider the evidence from both parties, reach a determination and seek agreement; about 55% are settled like this. The most complex cases require a more intensive investigation, may require more

information and lead to further discussion with the complainant and the company to achieve clarification. The outcome will be an Ombudsman Services Decision. Whatever process is followed there is always a right of appeal and escalation. An ombudsman can issue a final decision in any one of the processes where it is clear that there is no evidence that would require changes to the initial determination.

Our service is free to consumers and, with the exception of an annual subscription from Department of Energy and Climate Change (DECC) for the Green Deal, operates at no expense to the public purse. It is paid for by the participating companies under our jurisdiction by a combination of subscription and case fee on a 'polluter pays principle'. Participating companies do not exercise any financial or other control over the company. Ombudsman Services' governance ensures that we are independent from the companies that fall under our jurisdiction.

2 General Comments

Ombudsman Services welcomes the opportunity to respond to the CMA's consultation on the draft guidance on the CMA's approval of voluntary redress schemes. We agree with the CMA's assessment that membership of a redress scheme benefits both consumers and business. Redress schemes provide access to civil justice for consumers who have suffered detriment; they act as a consistent, independent and unbiased adjudicator ensuring marketplace fairness. They also take into account relevant regulation, law and technical knowledge. For business, they are a quicker and less costly mechanism than the courts. By use of a redress scheme, companies can also enhance their reputations by having a respected third party involved in matters of dispute. For the purposes of this response we propose that the use of the terms redress scheme and alternative dispute resolution (ADR) are interchangeable – both being alternative approaches to redress than going to court.

Before answering the specific questions set out in the consultation, Ombudsman Services does have a number of general points to make; these will also be worked into answering the specific questions. They are:

- We consider four weeks too short a timeframe for the consultation. Whilst we appreciate that some limited discussions and work has been done around this

area and while the general election is imminent, it is disappointing that more time could not be allowed for consultation. Clearly the CMA will want to ensure that as many interested parties as possible are made aware of the consultation and encouraged to respond within the short timeframe on such a key issue of consumer compensation for competition infringements.

- This is a pivotal time for the ADR landscape and provision of ADR not just for the UK but for the whole of the EU, with the EU ADR Directive (2013/11/EU) coming into force in the UK on 9 July 2015. It is also a key time for consumer protection in terms of the Consumer Rights Bill which is due to come into force later this year. As such, it is vital to ensure enhanced consumer protection measures are put in place, and it is equally important that unnecessary burdens such as additional costs and bureaucracy on businesses is kept to a minimum.

- As the CMA is aware the ADR Directive requires EU member states to ensure that there is ADR coverage for all consumer contracts and services should a complaint be made. The CMA, no doubt, will be working closely with the Department for Business, Innovation and Skills (BIS) around how BIS envisage that working within the UK. Ombudsman Services, with its portfolio of ombudsman schemes operating in the private sector, is well placed to extend its coverage to many of the sectors where there is no ADR provision and we are working with BIS on this. Consequently there will be ADR provision for any consumer contract or service, unfortunately, the consultation document makes no acknowledgement or reference to that development. It seems that the CMA is actually encouraging the development of yet more ADR provision without working with what will be comprehensive ADR coverage already in place or soon to be in place. This can only go to confuse consumers, place additional burdens on business, as well as damage the public's perception of ADR

- BIS will soon be looking at reviewing the ADR landscape in the private sector and the Cabinet Office published its review on the ADR landscape in the public sector on 25 March 2015. The general view is that the ADR landscape is complex and there are a lot of providers – this is beginning to be referred to as a 'confetti of ombudsmen'. The result is a difficult consumer journey and

businesses potentially having to belong to more than one ADR provider depending upon the services they offer to consumers. For these reasons we think that it is important for the ADR landscape not to be complicated further. No doubt the CMA will be working with BIS and the Cabinet Office on this. Ombudsman Services is very happy to discuss this further with the CMA.

- We welcome this as one of the first examples of damages being provided through and ADR scheme.

3 Specific response to the questions

The consultation sets out six questions and Ombudsman Services has answered each of those questions below:

Q1. Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

A1. The draft guidance approaches things from the perspective of the CMA, namely what the CMA wants business to do. It appears that the CMA has decided what model it wants and that any other interested party, whether business, consumer or ADR provider has to fit in with that model. The balance of the guidance is odd. On certain items it is very prescriptive, for example in the information requirements business must provide to the CMA, the approval process for business to establish an ADR mechanism and the make-up of the Board to determine the scope of compensation for the redress scheme.

However, the guidance does not appear to consider the perspective of the business or consumer. How is the process outlined more beneficial than going to court? How does the process work with the existing and future ADR landscape and enhanced consumer protection legislation?

So, for example, if there was a competition issue in the banking sector, despite there being the Financial Ombudsman Service (FOS) in place, a bank or banks in question

would have to establish a Board, chaired by a senior lawyer or judge, with a very specific skill set in terms of members of the Board and the time and cost of setting up and running the Board and then set up an ADR scheme to operate around that competition issue. The whole scenario would have to be in place for at least 9 months. The simple question is why can't the FOS deal with the consumer detriment here? Surely that would be a much simpler, quicker and cost effective model to adopt. Especially when there is going to be ADR provision available for all consumer contracts and services via the ADR Directive.

We can understand some sector specific expertise will be required but do not agree that a Chair of the Board has to be a senior lawyer or judge. An ADR scheme is an alternative to having to go to court, we see no reason why a senior lawyer or judge has to Chair the Board that oversees the compensation for the redress scheme.

ADR is necessary because the court system can appear inaccessible to many consumers, lengthy in process and high in costs. ADR is an alternative approach to the court system. More appropriate attributes of the Chair of the Board should include knowledge of how effective ADR works, competition issues, compensation arrangements etc. Then it is for suitable candidates to apply for the role of the Chair in an open and transparent process and be appointed on merit. It may well be that the most suitable applicant is a senior lawyer or judge but of course it might not be.

We think the guidance needs to discuss options and work with not only the consumer landscape but also the ADR landscape to really provide an approach that is best for consumers, business and the CMA. At the moment the one rigid approach does not achieve this.

Another model might involve the approval of a single Board that can be called upon as required to cover a particular competition infringement by a business or businesses. This could be maintained centrally by the CMA or say the Cabinet Office. Sector experts could be added as required. This would again help reduce costs and unnecessary time spent on lots of different Boards being set up, often at short notice.

Q2. Is the flowchart in the guidance helpful? Are there any improvements that you feel would increase its clarity and/or usefulness? Please identify any other diagrams you think would be helpful to include.

A2. The flowchart explains the model outlined in the guidance. The problem is that we do not think the model highlighted in the guidance is the best model for the reasons explained in our answer to Q1. If you want to achieve an ADR approach that is accessible, timely, independent and cost effective then the model outlined is not the best model to use. There are alternatives and we think they need to be explored by the CMA and interested stakeholders.

Q3. Is the level of detail on specific topics in the draft guidance appropriate? Are there any parts of the draft guidance which you feel would be improved by being more, or less, detailed?

A3. What the guidance lacks is alternative models as discussed above. It also appears to lack any 'drill down' into how the proposed model works in practice and the costs involved. For example, if a business was in a situation where it had to appoint a Board, make an application to the CMA to operate a scheme and have that scheme up and running within three months of approval and then that scheme might only run for nine months. How much does that all cost, including the opportunity costs?

There are lots of questions left unanswered or not even considered. For example, how easy, under the current proposals would it be to appoint a Chair of the Board who is a senior lawyer or judge? These are senior professionals who will have full workloads and other professional commitments. Who appoints the Chair? What measures will there be in place to ensure that the appointment process is open and independent? If the Chair appoints the other Board members, again what measures are there to ensure that the process is open and transparent? Has the CMA undertaken any work around costings for appointing a Board, providing secretariat support and maintaining the Board? Have any costings been provided on what setting up an ADR scheme will be? Where will the relevant enquiry officers, investigation officers, case handlers and ADR decision makers be recruited from? How feasible or easy will it be to do that within

three months? There may well be the additional issue if the ADR scheme has a relatively short time span?

Q4. Is the draft guidance overall sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?

A4. For the reasons given in the answers above we think the guidance as drafted does have significant omissions and needs to be looked at again in terms of options, how it helps consumers and encourages businesses to seek to approve a voluntary redress scheme. There is no depth of thinking in terms of how the model will work in practice, flexibility in terms of models or even analysis as to what the best model might be. Given all the work and attention on ADR and consumer protection at present, more time and thought is required.

There is no doubt that the right to redress is sacrosanct for those who have suffered harm, particularly where they are individual consumers and small businesses. The interests of consumers seeking redress may not be best served by the rigid approach taken in the guidance. What is the process for deciding whether the structure proposed is the most appropriate and cost-effective and will deliver the best outcome for the consumer, or for assessing whether there is a better way using existing ADR models.

A business may wish to offer an existing ADR mechanism to deal with multiple redress claims from claimants where they arise from the same events/infringement of competition law. CMA approval should be available for such ADR arrangements.

We also note that the current guidance contains some detail on how redress can be claimed, and where potential scheme beneficiaries can find details of approved redress schemes. It is our experience that particular attention needs to be given to vulnerable consumers who may have suffered detriment in some way but are unable, by themselves, to access to redress. We believe that, to approve a redress scheme, the CMA should take into account:

- relevant steps taken to support and work with vulnerable consumers; and

- the different access methods consumers can use for that particular redress scheme. Ombudsman Services, for example, supports complaints via telephone or web form. Whichever methods the redress scheme uses, these should be set out for the CMA's consideration and approval, and should be clearly communicated to consumers.

Q5. Are the draft application forms for seeking approval sufficiently clear and user friendly? Do you have any suggestions as to how the forms might be improved?

A5. The forms are clear in terms of the model put forward in the guidance. However, if more options of redress models are allowed the forms will need amending.

One notable improvement point on the current forms is on question 5, it asks about the scope of compensation but then the following questions ask about who is to be appointed as Chair and members of the Board. Doesn't the Board need to highlight what the scope of compensation is?

Q6. Are there particular changes and improvements to the guidance that you consider would encourage businesses to apply to the CMA for approval of a voluntary redress scheme in appropriate cases?

A6. Factors that might encourage businesses to apply to the CMA for approval of a voluntary redress scheme include:

- the potential to increase the reductions in penalty fees. At the moment it is suggested that this is 10%, could that potentially be more if a business complies fully and is apologetic for the infringement?
- the CMA, obviously not excusing the infringement by the business, referring to the business in a positive way publically and promoting the fact that the business is aiming to put things right in terms of consumers affected by the infringement; and
- the CMA putting in place a straightforward process for approval of a voluntary redress scheme that aims to keep time commitments and costs to a minimum

for businesses. This would include allowing and encouraging the businesses to use the existing ADR landscape and the ADR provider that the business is probably already using, for example, the financial sector using the FOS.

4. Other matters

While we welcome and support this initiative, we do have concerns around the timescales involved in this consultation, particularly in view of the flaws highlighted earlier in this response. We also believe that this process could be made more straightforward for both consumers and businesses. We would welcome the CMA sharing its evidence base to support whatever model or models are finally put forward for this.

As previously mentioned Ombudsman Services has considerable experience in the field of ADR. We would be happy to provide clarification on any point in this evidence or if there is any other way we can help, please let us know.

Lewis Shand Smith
Chief Ombudsman
28 March 2015