Centre for Effective Dispute Resolution

Response to BEIS Consultation on

Reforming Competition and Consumer Policy

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1. About CEDR

1.1. CEDR has been a UK flagship organisation within the field of effective dispute resolution and conflict management since 1990. We are registered as a charity in England & Wales (charity no. 1060369) although the vast proportion of our annual income is earned by way of fees and income for professional services. Our main office is in London where we employ around 105 full-time staff; we also work regularly with a global network of some 350+ dispute resolution practitioners.

1.2. CEDR is a leading full service Alternative Dispute Resolution (ADR) service provider, and we work in all areas of disputes and complaints with the singular exception of matrimonial matters and other issues arising out of family relationship breakdown which we regard as being a specialist area of law and dispute resolution practice.

1.3. We operate in five main areas:

- CEDR is one of the world's leading providers of specialist consultancy and training expertise on the role of alternative dispute resolution within civil justice systems and is regularly called upon by major organisations and governments to design and introduce improved conflict management and mediation programmes.
- CEDR's consumer services arm provides dispute resolution for circa 25,000 consumer complaints each year in more than a dozen different industries. These services are delivered in the form of sector specific schemes that have been developed by CEDR in collaboration with multiple stakeholders and regulators over the last 10 years.
- CEDR's B2B dispute resolution arm has been referred over 20,000 disputes to help resolve with its panel of highly skilled mediators, arbitrators and other practitioners. The aggregate claim value of our B2B dispute work is in the region of £1.5 billion per annum.
- CEDR has trained over 10,000 people to become professional mediators in more than 65 countries through what is recognised as one of the world's leading mediation skills training courses.
- CEDR works consistently to promote the use of mediation and conflict management in all areas of business life and civil justice whilst developing the field of ADR for the benefit of all. As well as promoting education and best practice, our Foundation undertakes innovative research into understanding conflict in all forms and methods of resolving it.

2. Track record

2.1. CEDR is an internationally recognised institution and one of the world's leading providers of specialist services in the conflict sector. We possess the necessary

knowledge, experience and expertise that is essential to developing and delivering efficient and effective independent dispute resolution services.

2.2. Within the ADR space, we currently operate a wide range of schemes and services (services). These services cover the full spectrum of ADR methodologies:

- Arbitration: Providing ad-hoc and scheme-based arbitration services for B2B and B2C disputes in accordance with the Arbitration Act 1996.
- Adjudication: Acting as a nominating body for disputes that fall under the Local Democracy, Economic Development & Construction Act 2009 and providing adjudication services for thousands of B2C disputes in multiple industries including aviation and telecoms.
- Complaint's review: Reviewing a regulator or public sector organisation's handling of a complaint.
- Early neutral evaluation: Advisory, administrative, expert search and appointment services.
- Expert determination: Advisory, administrative, expert search and appointment services.
- Mediation: Ad-hoc and scheme-based mediation for B2B and B2C disputes.

2.3. A list of example ADR schemes currently operated by CEDR has been provided at Appendix 1.

3. Responses to the Consultation

3.1. CEDR has considered the Consultation paper and identified a number of questions where we believe our insight may be of assistance to BEIS in relation to the section on improving dispute resolution.

3.2. We would also like to make an observation more generally on the use of the term 'arbitration'. In the consultation document, reference is made to mediation and arbitration as the forms of alternative dispute resolution. CEDR considers it to be important to point out that arbitration as a process, performed in line with the provisions of the Arbitration Act 1996, is of limited value within the consumer ADR space. Arbitration is a formal process which is, in our experience, appropriate only for consumer disputes involving very high sums in dispute or where there is a sector-specific problem with compliance. Arbitration also produces an outcome that is binding on the parties even if it is not to the consumer's satisfaction and an arbitration award can be only appealed on specific legal grounds specified in the Arbitration Act.

3.3. CEDR champions the use of adjudication as a more appropriate mechanism for the resolution of the vast majority of consumer disputes. Adjudication is a process which is carried out by a competent decision-maker (the adjudicator), who weighs up the evidence provided by the parties and produces a fully-reasoned written decision. An adjudication decision is not typically subject to appeal, and is binding on the trader (via a contractual commitment to the ADR provider) only if it is accepted by the consumer. For high-volume, low-value

consumer disputes, CEDR would emphasise that adjudication is a more suitable methodology to use than arbitration.

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

   4.1. Consumer confusion in relation to the options for ADR is often cited as a reason for low take up. In mandatory sectors, where businesses are required to signpost ADR, consumer awareness of their options is high as the company must tell the consumer which ADR body they subscribe to and how to contact them. The communication sector is one of the best examples of good signposting. Ofcom, in collaboration with the two approved ADR bodies, CEDR and Ombudsman Services, monitor the performance of companies in signposting ADR to consumers and are pro-active in holding companies to account for failures to signpost effectively.

   4.2. In an ideal world all companies would provide their customers the appropriate information on ADR once deadlock is established. Where this the case the consumer would not have to make their own enquiries and would instead quickly be able to engage with ADR. All companies that subscribe to ADR with CEDR are required, as a term of the contract for the service, to provide information to customers about CEDR and how to contact us once the complaints process is complete and deadlock established.

   4.3. Traders should have an enhanced obligation to signpost vulnerable customers to ADR, given the risk that such customers may not be able to access information about ADR independently. CEDR would therefore suggest that the expectations on traders around signposting customers to ADR should be even higher where vulnerable customers are concerned.

   4.4. CEDR would also recommend that traders and ADR bodies themselves also carry out staff training in order to identify and to assist vulnerable customers in accessing and making use of ADR.

   4.5. CEDR also suggests that a central, trusted, resource of information on ADR should be made available to the public. The logical place to host this information, in our view, is on the government website ww.gov.uk rather than to rely on a private company or a patchwork of ADR and consumer support bodies.

   4.6. Potential uses of a www.gov.uk resource could be to provide guidance for consumers on what ADR is and when to use it and a searchable database of businesses that informs the consumer on the appropriate ADR body to approach and how to do so. Information on what dispute types each ADR body deals with, how the process works, expected timescales and any applicable fee would also be useful.

   4.7. If it is possible to collate the information from businesses via other data that www.gov.uk collects, such as Companies House, maintaining the database of ADR subscriptions could potentially be quite straight forward to collect and useful to consumers and consumer advocates.

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

   5.1. CEDR considers that it is of the utmost importance for businesses to have an appropriate period of time in which to investigate and attempt to resolve complaints. Allowing consumers to come to ADR before the business has had a reasonable opportunity to do this does not add value. However, it is also vital to ensure consumers are able to escalate their complaints to ADR in the event that they are dissatisfied with the way in which their complaints have been handled.

   5.2. In terms of balancing these needs, CEDR believes that businesses should be encouraged to 'deadlock' disputes more effectively. A dispute is 'deadlocked' when a business agrees that it is unable to offer a resolution that the consumer is satisfied with, and therefore accepts that the dispute can be referred to ADR. Where businesses perceive that a dispute has reached that stage, they should immediately 'deadlock' and allow the consumer to go to ADR. However, not all businesses do this. CEDR suggests that an option to consider would be mandating that businesses carry out a check on all complaints that have been ongoing for four weeks, to determine whether they should be 'deadlocked'. If a business is still investigating the complaint, or it has reasonable grounds to believe that there is a realistic possibility of resolving the dispute, then it can refuse to 'deadlock' the dispute and continue until the eight-week deadline is reached.

   5.3. In the event that the government is minded to reduce the eight-week timeframe, CEDR would like to highlight that the appropriateness of doing so will depend on the particular industry in which a dispute has arisen. In the vast majority of telecommunications or postal disputes, for example, a shortened timeframe is less likely to have a material detriment on businesses' ability to investigate complaints. However, within the construction and utilities industries, disputes often involve technically detailed records and evidence often spanning several years, and having a reduced timeframe may have a negative impact on businesses' ability to effectively investigate and offer resolution for such complaints.

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

   6.1. In our view the majority of Competent Authorities work well. However, currently different Competent Authorities interpret the requirements of the ADR Regulations in their own way, while others add additional requirements that they see fit. CEDR considers that it would be beneficial if all Competent Authorities operated a unified competency framework for assessing the effectiveness of ADR providers, to ensure that there is a uniform standard across different sectors.

   6.2. CEDR welcomes the proposal to enhance the minimum service expectations set out in the ADR Regulations. The current service expectations represent a minimum level of competency, and CEDR would like to see the standard raised across the range of ADR providers operating within the consumer ADR space.

6.3. CEDR also considers that there should be an enshrining principle that as a starting point all dispute resolution entities are initially treated as equal by the Competent Authority. It may also be appropriate to give Competent Authorities the power to sanction ADR providers who do not deliver against minimum service standards and/or key performance indicators.

6.4. It is our understanding that when an ADR body does not meet their obligations set by a Competent Authority the only sanction available is to remove that body's approval. Given the impact of such a step on an ADR body and the consumers and businesses that use them, it is perhaps not surprising that such a sanction is seldom used, if at all. That being the case CEDR believes that the Competent Authorities should have a wider set of powers that enables them to hold underperforming ADR bodies to account and motivate them to improve rather than simply remove them from the sector or take no action at all.

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

7.1. As mentioned above, giving Competent Authorities the power to sanction underperforming ADR providers would increase confidence among both consumers and businesses, as greater trust could be placed in ADR providers' adherence to service standards.

7.2. The ADR Regulations could be made to specifically highlight that multiple ADR providers can operate within the same sector. While this is already the case in some sectors, there is a widespread perception that one ADR provider exists in each sector and a prevailing view with some influential stakeholder groups that such a practice is the right approach. CEDR respectfully disagrees and would point to the communications and property sectors where competition has led to higher levels of service for consumers and business and reduced costs which are ultimately paid by consumers via the prices paid for goods and services.

7.3. CEDR's view is that competition is healthy and the best way to drive innovation and value for money in ADR services provided the Regulations standards set a high bar.

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

8.1. CEDR does not have sufficient knowledge of the sectors to take a view on the magnitude of consumer detriment. We do, however, support the view expressed in the recent Which? Report on ADR that suggests that mandatory ADR is appropriate in sectors with significant issues of consumer detriment.

8.2. An important element of ensuring that ADR is conducted effectively is by obtaining engagement from business and making sure that the required resources are in place for business to participate in ADR. The challenge, as we see it, of adopting a per case approach to charges is that we find the business is

not always ready to participate when a case arises. This usually occurs if the business is able to select an ADR provider and signpost to them in contracts with customers without having to undertake any meaningful engagement with the ADR provider. We believe it is important to 'on-board' a business wishing to subscribe to our ADR services in order to ensure they are properly prepared to engage in ADR when the need arises.

8.3. We suggest the best approach to providing ADR in a mandatory sector would be to charge a subscription fee that covers an element of the fixed costs involved in providing ADR for an industry, with the majority of the cost of operation covered by per case fees. By adopting this approach, it is possible to effectively on-board the businesses, generate a source of base income for the fixed costs of the ADR provider, while also operating on the 'polluter pays' principle. This business model is already widely used by ADR bodies.

8.4. The polluter pays approach ensures high volume users of ADR cover the majority of the cost of a scheme whilst at the same time creating an incentive to improve complaint handling within the business and reduce the associated costs.

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

9.1. Provided that any nominal fee is low enough to prevent any suppression of take-up by consumers, it can be effective in ensuring that only those consumers who consider that they have a meritorious claim come through to ADR. CEDR has seen that, where a nominal fee is payable by the consumer, fewer of those claims are considered to be frivolous or vexatious. This indicates that consumers who are required to pay a nominal fee think carefully about the validity of their claim before submitting it.

9.2. CEDR operates schemes that are free to consumers and some that require the consumer to contribute a nominal fee that can be recovered from the business if their claim is successful as part of the decision. Perhaps mostly notably, CEDR currently conducts ADR in the aviation sector on which the customer is advised that CEDR may require the customer to pay a nominal fee if the claim is found to be entirely without merit. Despite this, and some significant negative press, over 25,000 applications for ADR under the scheme have been received since 2017 and the number of rejected claims is lower than our free to the consumer communications scheme.

9.3. Our view is that consumers should not be encouraged to submit claims that are without merit and business. In our experience requiring the payment of a nominal fee in appropriate sectors encourages consumers to take a moment to reflect and reality test whether the dispute is appropriate for ADR.

9.4. We also believe that business should not be put in the position of defending large numbers of claims that are without merit. The costs of doing so, both in terms of the ADR and internal resource cost are ultimately covered by consumers in the prices they pay for goods and services.

9.5. If Consumer ADR is the alternative to the Small Claims Court, then it is reasonable not to have a lower limit to a claim, as not all disputes are about money. Not all consumers in dispute with businesses are seeking a monetary sum as their desired remedy. For some consumers, having a business acknowledge and apologise for a problem is all that they are seeking, and those consumers should not be barred from accessing ADR unless they request a sum of money. CEDR provides ADR for funeral services and private healthcare where disputes often do not focus on a claim for financial redress.

9.6. There is a challenge when providing ADR for claims in voluntary sectors where the claim is small as the cost of process can be significantly higher than the claim. Large organisations may take the view that it is simply a cost of doing business but for SME's it could be considered as a barrier to engagement with ADR.

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

10.1. Ideally businesses should be encouraged to embrace ADR with a compelling value proposition. If it can be demonstrated that ADR is good for the consumer and also good for business and represents a 'win win' then it should be easier to improve take up of ADR in sectors where it is not mandatory.

10.2. It may be worth considering a 'kitemark' scheme where businesses that subscribe to an ADR solution (that has government support) can advertise the fact to consumers as a value add. The National Association of Funeral Directors, for example, has and ADR Scheme (Operated in collaboration with CEDR) called NAFD Resolve. Membership of the scheme and the associated Code of Conduct is mandatory for all NAFD Members and NAFD Resolve marketing material is distributed to members for display to consumers as an indication that the business is committed to a high level of customer service, and ADR.

11. Further support

11.1. CEDR would be happy to support BEIS further and invite BEIS to contact [redacted] of Dispute Resolution Services, as required.

Submitted 1st October 2021

Appendix 1 – Examples of services currently operated by CEDR

Sector	Subscriber examples	Type of service	Competent Authority or Approval Body
Aviation	British Airways, Gatwick, Heathrow, Stansted	Adjudication	CAA
Cavity wall insulation	Cavity insulation Guarantee Agency	Arbitration	CTSi
Digital commerce	Amazon, Apple, Google	Mediation	N/A
Education	Department of Education, Ofsted	Complaint review	DfE
Financial services (SME)	Business Banking Resolution Service (BBRS)	Adjudication	BBRS
Funeral Services	Co-op Funerals care, National Association of Funeral Directors	Arbitration	CTSi
Gas appliances	Gas Safe	Adjudication	Capita
Gambling	The National Lottery	Adjudication	Gambling Commission
Glazing	Anglian, Crystal, SEHBAC	Arbitration	CTSi
Healthcare (Public)	NHS	Mediation	NHS Litigation Authority
Newspapers	The Guardian, Daily Mail, The Sun, Daily Telegraph, The Times	Arbitration	IPSO
New Homes	Bovis, Kier, NHBC, Persimmon, Premier Guarantee	Adjudication	CTSi
Postal services	Royal Mail	Adjudication	Ofcom
Private Healthcare	BMI, BUPA, HCA, Nuffield Health, Priory Group, Spire Healthcare	Adjudication	CQC
Property maintenance	Norfolk Trading Standards	Adjudication	CTSi
Property Management	Association Residential Managing Agents	Adjudication	ARMA
Public Sector	Homes England, Regulator of Social Housing	Compliant Review	UK Government
Legal services	Solicitors Regulatory Authority	Complaint review	SRA
Legal services – Public Sector	Central London County Court, Court of Appeal	Mediation	HMCTS
Renewable energy	Renewable Energy Consumer Code	Arbitration	CTSi
Self-build new homes	National Custom & Self Build Association	Mediations	CTSi

Sector	Subscriber examples	Type of service	Competent Authority or Approval Body
Aviation	British Airways, Gatwick, Heathrow, Stansted	Adjudication	CAA
Subsidence	The Coal Authority	Arbitration	BEIS
Surveying	Royal Institution of Chartered Surveyors	Adjudication	CTSi
Telecoms	Now, Sky, Starlink, Talk, Virgin Media, Vodafone	Adjudication	Ofcom
Water & sewerage	Thames Water, United Utilities, Water UK, Yorkshire Water	Adjudication	Resolving Water Disputes