Alternative dispute resolution for consumers: implementing the alternative dispute resolution directive and online dispute resolution regulation

Department for Business, Innovation & Skills

3 June 2014

The Financial Ombudsman Service welcomes the opportunity to respond to the current consultation.

about the Financial Ombudsman Service

The ombudsman service was set up by Parliament to sort out individual complaints that consumers and financial businesses aren't able to resolve themselves. It is an independent service for settling complaints fairly, reasonably, quickly and informally, which is free to consumers.The business must be given the chance to look into a problem first – and they have eight weeks to consider it. If the business does not respond within eight weeks, or does not respond to the consumer's satisfaction, the consumer can go to the ombudsman service.

our response

UK ADR landscape

Q1: Do you think there are any significant gaps in the provision of ADR in the UK? Please identify any sectors where you think the provision of ADR is insufficient.

The ADR directive focuses on businesses' (rather than consumers') access to ADR providers. In some sectors – such as our own – that access is mandated by statute or via regulation. In others, businesses can enter into their own arrangements with ADR providers, deciding for themselves the scope of a particular scheme for their customers. There are examples – for instance, in funerals or within the travel industry – of sectors offering ADR on a widespread basis on their own initiative through private providers. We can see no evidence that there are gaps in coverage for businesses that want to offer ADR services to their consumers.

However, there are clearly gaps for *consumers* in ADR coverage, since many industries have not decided to use the private sector to create schemes of their own. Therefore in the absence of regulatory intervention consumers cannot get (free) access to ADR on their own initiative. There are many such gaps. The retail sector has no wholesale coverage, for example, nor does aviation. Later in our response we refer to how you might encourage more businesses to use ADR, which could help bridge the gap.

ADR for every consumer dispute

Q2. Do you agree that the current provision of ADR in the UK is not enough to meet our obligation to have ADR available for all consumer disputes? If you disagree, can you advise which ADR schemes are suitable to handle all disputes, and whether there are limitations to the number of disputes or type of dispute that these schemes could handle? Would these schemes be able to process an increased volume of disputes within the 90 day deadline for concluding disputes set by the Directive?

Our reading of the current landscape is that a range of existing providers – from mediation schemes through to ombudsman schemes – have the skills and flexibility to cover all sectors where a business might want to offer ADR. Over time, with the appropriate funding mechanism, liberalisation of existing schemes, and the necessary assurance that they can meet the technical requirements of the Directive, there is no reason why these existing providers could not have the resources and capacity to cover the full range of the market.

Indeed, in terms of capacity and expertise, an existing scheme arguably has the upper hand over any newly created scheme in terms of providing a good quality service and coping with an increased volume of disputes from the start. Rather than creating a new entity with new staff, it would also be more efficient to build on existing schemes and to draw from their infrastructure and knowledge. That knowledge and expertise is readily transferable to a wide range of consumer disputes (as already evidenced by our own merger of insurance, investment, banking and consumer credit disputes) and need not be constrained to a particular sector.

Some of the bigger existing schemes can offer particular benefits in terms of their resilience – both in coping with fluctuations in caseload, including from mass single-issue disputes, but also in the nature of their established and tested governance arrangements, which protect their independence from industry and other outside influence.

Q3. Can we expect businesses not currently obliged to use an ADR scheme to refer complaints to a voluntary residual ADR scheme? What steps could Government and others take to encourage businesses to use a voluntary ADR scheme?

When considered alongside the alternatives – most obviously the expense, formality and complexity of the courts – we know ADR is appealing to businesses. There is scope for Government and ADR providers to use testimonials based on businesses' experience of ADR in sectors already covered to promote it in new sectors. Trade associations, consumer groups and sector regulators (where they exist) can also play an important role in highlighting the benefits of ADR and in helping assess consumer demand for these services. We are unsure how the creation of a residual voluntary ADR scheme would in itself generate additional interest and demand from businesses for ADR services.

Q4. What volume of enquiries and/or disputes could we expect a voluntary residual ADR scheme to receive?

In our view, the answer to this question will vary not only from sector to sector, but also within sectors depending on a wide variety of influencing factors which will fluctuate over time. This makes it very hard to make any firm predictions, or recommend any formula. We publish (and are happy to talk through) information about our own case volumes and we would be happy to share our experiences when setting up new jurisdictions, but we are probably not best placed to offer the best guess about sectors other than our own.

Q5. Is there a specific operating model that a residual ADR scheme should adopt (e.g. mirror existing ombudsman models)?

In areas of the economy where businesses currently have discretion to offer ADR, the market offers a range of potential models to choose from. By maximising use of the UK's existing ADR infrastructure – including by removing restrictions on existing providers – residual ADR work can be undertaken by those most suited for it, rather than by a new standalone provider.

Otherwise, we believe that the ombudsman model is the most versatile for any residual scheme (should one be needed). The most appropriate way to resolve disputes will depend on a variety of factors, including the type of dispute, the sector and consumer behaviour. An ombudsman scheme can offer all the informality and flexibility of other types of ADR, but unlike those can also, where needed, provide closure and certainty in the form of a final decision.

Q6. Can you suggest what an appropriate maximum and minimum settlement value for a residual ADR scheme should be? How have you arrived at these figures?

This depends entirely on the sectors, and therefore the types of dispute, which fall into this category – our money award limit, for example, is £150,000, whereas the Pensions Ombudsman's is unlimited and the Legal Ombudsman's £50,000.

We would be happy to talk through our experiences of the range of disputes we handle, to assist in making this assessment, but we are unable to suggest what an appropriate award limit would be without knowing more about the sectors covered.

Q7. What funding model would be appropriate for a residual ADR scheme? Can an ADR provider operate effectively if it is reliant on case fees rather than annual fees?

Q8. Should a standard case fee be adopted? What would be an appropriate level? If not, how should the amount charged for each dispute be determined?

From our experience, there isn't a one-size-fits-all model for funding a scheme. We operate on a model which is mainly funded by case fees, underpinned by an annual levy (the exceptions are the eight highest-volume businesses which pay a set fee each quarter based on the forecast volume of cases we will receive, and the smallest businesses who do not pay case fees at all thanks to our 'first 25 cases free' rule).

Our experience is that in terms of case fees, a standard fee is the most appropriate approach, rather than varying fees based on case complexity. Complexity isn't the only factor which determines cost, and – in our sector at least – smaller businesses with a greater proportion of "complex" cases would be disproportionately affected.

If existing schemes are able to absorb the residual work, then one option is for each scheme to absorb new work using their existing approach, though they would in each case need to be flexible and open-minded about the possibility that case costs, and the nature of the businesses they are dealing with, would require some changes in the new sectors they were taking on.

Q9. Would it be better to have a single ADR body or several ADR bodies operating a residual ADR scheme? What would be the ideal number and what are the reasons for this?

We support the non-proliferation of ADR schemes, partly to minimise inefficiencies but also to avoid further complicating the already complex ADR landscape for businesses and, in particular, consumers. As stated throughout, we believe that the existing infrastructure can and should be used to cover any residual areas of dispute resolution work.

We would suggest that the need is to cover residual work, rather than a need to create a residual scheme, so on that basis residual work could be divided between existing schemes. Otherwise, the residual work could go to a single existing scheme, if there is one which can show it is capable of managing the scale and diversity of the relevant disputes.

Better signposting for consumers – a complaints "helpdesk"

Q10. In light of the other requirements in the ADR Directive which are intended to assist consumers, would a consumer-facing complaints helpdesk be beneficial?

A consumer helpdesk could provide a helpful service and boost overall awareness of, and access to, ADR services. However, any proposed service must add value beyond existing web-search and directory enquiry services. Importantly, it must also be sufficiently 'frictionless' that it doesn't become – or become perceived as – an additional obstacle between the consumer and access to the service they need.

It would be important to find a practical model that works for all schemes, of all sizes, as well as meeting consumer needs and Government's policy priorities. Any helpdesk would need to maintain the confidence of businesses and consumers that – like the ADR providers it serves – it is impartial and independent of industry and consumers alike.

Q.11 Do you have any comments on the type of service it should provide and the extent to which it should examine the enquiries it receives?

We can see the rationale for any number of helpdesk models. But we think it is important to remember that not all channels of communication are suitable for all consumers. Our experience is that telephone conversations can be particularly important to consumers who are first getting in touch about an issue. This can be particularly important for someone trying to take a complex problem through an unfamiliar system at what might be a time of unusual distress. We think any general ADR helpdesk would have to offer a phone contact option if it was to add any significant value beyond that already provided by internet search engines. A helpdesk should also be designed to be as 'frictionless' as possible – minimising the risk of deterring consumers by inserting additional time, process and people into their experience.

Any helpdesk would clearly need to have some level of experience and expertise to undertake a meaningful assessment of where best to direct each complaint, not least since the sometimes blurred lines between schemes can make this complicated. However, beyond that initial triage, any attempt at detailed examination would be likely to detract from the customer experience of the helpdesk, and would add considerable (potentially prohibitive) cost and complexity in service design, in terms of the technological interface and data management arrangements between the helpdesk and individual schemes. It would also require a particular depth of expertise and skill to make defensible judgements across a very broad range of issues.

Q12. Rather than attempt to create a new service, which existing service or body is best placed to provide this function?

ADR schemes like ours are already experienced at providing a high-volume, high-quality service to a diverse range of consumers. Our Customer Contact Division (CCD) already

provides a significant scale service of this type: last year, over two million consumers contacted CCD, of which only around half a million ended up submitting complaints to us formally. The others were given a wide range of information and advice, including signposting to other ADR schemes or other sources of help.

To expand such a service (and/or those run by similar schemes), and adapt it to cover the full range of ADR provision, could be a less onerous option than starting a new service from scratch. It also stands a better chance of providing an efficient high-quality service from the start, and doing so in a way which is consistent with the values of the ADR directive, i.e. impartiality and independence. We have begun exploring some of the operational, legal and financial implications of existing schemes providing this service. We would be happy to explore this further following the close of the current consultation.

Q13. How could a helpdesk be funded?

We believe the helpdesk could be funded by a levy on the member schemes, set in proportion to the number of consumers diverted to each scheme (or forecast to be diverted, with scope for an end-year adjustment to reflect actual traffic). A de minimis threshold should probably be explored, so that the smallest schemes with only a handful of referrals pay either no charge, or a small flat fee. In any scenario, the provider and funders of the service would have to accept – as already happens in our current arrangements – that some calls will end up being referred to destinations other than ADR providers, including advice services, or the business in question if a first stage complaint hasn't been made and could not be re-charged to any ADR scheme.

The apparent alternatives do not at first glance seem appealing. It is hard to see how any existing operation (and its funders) could be asked to accept the whole cost of a service that covers all the other sectors too.

Appointing a competent authority

Q14. Do you agree that regulators should act as competent authorities for the ADR schemes that operate in their sectors?

Relationships with regulators are vital to the success of ombudsman schemes. Our relationship with our own regulator – the Financial Conduct Authority – is built around a strong collaborative approach to addressing systemic issues in the financial services sector. That relationship is central to our successful operation.

We expect the competent authority to be focussed on quality – having a role in setting and maintaining baseline ADR standards that apply across all types of dispute management in all sectors (in line with the requirements of the Directive). With this in mind, we prefer an approach whereby a single competent authority is appointed to cover all consumer ADR providers. This will mean it can have an authoritative voice on quality across all these providers.

There are a few other considerations:

- It's important that standards are applied consistently. Having more than one competent authority could risk the development, over time, of inconsistent standards, inconsistently enforced from sector to sector, making it harder for consumers to understand and navigate the landscape and to calibrate their expectations from provider to provider.
- It's important that the system is as stream-lined and frictionless as possible. We believe the model proposed risks creating avoidable duplication and inefficiency, with hand-offs

between different competent authorities and the single competent authority that would maintain the link to the Commission.
- In the scenario where one ADR provider caters to several sectors, the simple sector-regulator-as-competent-authority model also poses difficulties. This situation exists already with several providers, and is likely to be even more common as we move towards the shared aim of an increasingly simplified landscape. It doesn't appear efficient or reasonable to ask a provider to work with more than one authority if this can be avoided.

We therefore recommend creating a single competent authority for all sectors, which also acts as the point of contact for the Commission. We would naturally expect the authority to work with all relevant regulators, and to have close links to consumer groups and to the Ombudsman Association, which represents ombudsman schemes and other complaint handlers and of which we are a proud member.

It is worth stressing, however, that we would oppose any encroachment by the new authority on our current relationship with our own regulator, for example through a major shift of responsibilities from the FCA to the competent authority: as stated above, we believe that our relationship with the FCA is core to our success.

Q15. How should the fees paid by ADR providers to a competent authority be determined? Should the size of the fee depend on the size of the ADR provider (for example turnover or number of cases dealt with) or based on other factors?

We would expect the function to be funded through a small share of the levies and/or case fees charged by ADR providers to participating businesses, and each provider's contribution would depend on its size based on turnover.

Procedural rules for refusing disputes

Q16. Do you agree that the Government should allow UK ADR providers to use all of the procedural rules listed in Article 5(4) of the ADR Directive to reject inappropriate disputes? If not, please explain your reasons.

Provided Government does not intend this list to be prescriptive, thus limiting or restricting ADR providers from having a broader list of reasons (such as those defined, for our purposes, in DISP 3.3.4), then we think it sensible that Government should allow providers to use all the rules proposed by the Directive.

Information requirements

Q17. Would some suggested wording and guidance be useful in helping businesses meet these requirements? What kind of wording would be helpful?

The arrangements for our own jurisdiction are already covered in the 'DISP' rules set by the Financial Conduct Authority, which requires businesses to inform consumers of their right to refer a complaint to our service. We find this a useful and important element of our rules in our sector, but are not in a position to comment on whether this or any other requirement would be universally appropriate in other sectors.

Online Dispute Resolution Contact Point

Q18. Do you agree that the ODR contact point should only be required to assist with cross border disputes involving a UK consumer or UK business?

We agree that the ODR contact point should only be required to assist with cross border disputes, as the volume of potential domestic disputes would require a far greater resource and – if the helpdesk proposal is realised – would in any case duplicate part of that service.

It will of course be important to consider the development and marketing of the ODR contact point and proposed helpdesk in a joined-up way, given the clear overlap between the two.

Q19. Should the ODR contact point be allowed to assist with domestic complaints on a case-by-case basis?

Without clear evidence to support this proposition, our view is that the ODR contact point should not get involved with domestic complaints. This would risk confusing consumers as to what the ODR contact point can and cannot deal with, and it is hard to foresee circumstances where the ODR contact point is better placed to handle a domestic complaint than the appropriate ADR scheme, which will be much more experienced and probably better resourced. Such an approach could also complicate the funding regime for the contact point.

Impact on limitation and prescription periods

Q20. Do you agree that, where applicable, we should extend the six year time limit for bringing disputes to court by eight weeks, and mirror the amendment made to implement the Mediation Directive? If not, please explain why a different extension period is preferable.

Currently, the time limits set out in the Limitation Acts for bringing a case in court continue to run while we investigate a complaint; there is no suspension while we investigate. If it looks like there could be a Limitation Act issue for a consumer, we will occasionally tell the consumer that they should be aware of this as an issue, and have suggested they take their own legal advice on the point, but this is rare and tends to occur in only our most complicated cases, where often the consumer already has legal or other professional representation. We do not think that an eight-week extension of the six year limit will have a great impact, but nor do we oppose such a move.

Q21. Are you aware of any sector specific legislation which contains time limits for bringing cases to court which we may also have to amend?

No.

Scope of ADR: in-house mediation

Q22. Do you agree that in-house ADR should not form part of the UK's implementation of the ADR Directive? If you disagree can you please explain why?

While our experience is of working in a sector whose statutory ADR framework does not allow for in-house provision, and where this issue therefore does not directly arise, we are very sceptical that in-house provision of ADR can meet the standards set out in the Directive. It is hard to see how such schemes could ever meet the fundamental requirement to be independent – and to be seen as independent – which is core to maintaining public confidence in the overall ADR landscape.

Binding decisions

Q23. Do you agree that the UK should allow certified ADR providers to make decisions that are binding? If you disagree can you please explain why?

Our experience is that the option of issuing binding decisions enhances the range of tools that a scheme has to resolve disputes, and creates firm approaches to common areas of dispute for businesses to learn from. It also provides closure for consumers. We find this approach works well in our sector where, because of the information asymmetries between consumers and businesses, ombudsman decisions are binding on businesses but not on consumers.

Applying the ODR Regulation to disputes initiated by business

Q24. Do you agree that the ODR Regulation should only apply to disputes initiated by a consumer, and should not apply to disputes initiated by a business? If not, can you please explain why?

We agree that it should not apply to disputes initiated by a business.

Call for evidence on simplifying the provision of ADR

Q25. Would the benefits of simplifying the ADR landscape over the longer-term outweigh the costs? Who would the costs and benefits fall to?

We can see the benefits of a simplified landscape. We believe that the long-term potential benefits for consumers and businesses of greater visibility and navigability (and hence take-up) would outweigh the short-term costs (to Government, regulators and providers) of administering the necessary changes.

As well as being easier to navigate, a smaller number of bigger schemes could benefit from economies of scale that would reduce costs for business, and give ADR providers increased versatility and resilience to peaks (and troughs) in demand – including those caused by mass complaints like PPI and changes in market or consumer behaviour, which can be hard to forecast. Bigger providers can also apply their learning and expertise across sectors and invest in outreach and insight, while adjusting more easily to changes in scope and jurisdiction.

Q26. What evidence is there that a simplified system would make a major difference to consumers? Are there other ways to achieve the aim of greater awareness and take-up of ADR?

We do know from our own casework that there are existing gaps and overlaps between schemes which can be confusing for consumers and businesses. And our service came about as a result of the merger of eight predecessor ADR schemes; it's hard to imagine that our current levels of visibility and impact would have been possible in the previously more fragmented landscape.

That said, our experienced team has a reasonably good record of addressing these gaps and overlaps, working in collaboration with other ombudsman schemes where necessary – last year we redirected around 10% of consumers who contacted us to other ombudsman schemes or relevant advice bodies.

Q27. Would simplifying the landscape in the longer term be compatible with the introduction of a residual ADR scheme by July 2015? Are there specific ways in which the creation of a residual scheme would need to be undertaken to enable the possibility of later simplification?

As expressed above, we think it would be a mistake to create one or more new schemes, which would also run counter to the simplification aim (which we share).

Q28. What are your views on making the use of ADR a compulsory or voluntary requirement if the landscape is simplified?

We believe it makes sense that ADR should be compulsory in those sectors – like ours – where there is significant structural asymmetry of information and/or power between consumers and businesses. These are the sectors in which consumers would most benefit from access to an ADR scheme and where there needs to be greatest protection. These tend to be the sectors which are most heavily regulated or in which consumer costs and detriment are high, and ADR is already compulsory in many of them; but we think it worth re-examining the landscape to ensure that each sector is in the correct category, and in particular to ensure that ADR is indeed compulsory in sectors where significant asymmetry exists.

Impact Assessment

Q29. Do you have any views on the impacts of the options as laid out in the impact assessment?

No.

Q30. Do you have any views on the key figures, assumptions and questions set out in Annex C?

No.

General points

Q31. Are there any other issues or areas on which you would like to comment? If so, we would welcome your views

No.

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