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.

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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.

***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.

***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.

***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.

***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).

***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.

***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*.

***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.

***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.

***Q9**: Do you have any other comments on the proposed Directive?*

Please see the section on the proposed ADR Directive in *Annex A*.

***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.