

Alternative Dispute Resolution for Consumers

Response to the consultation on
implementing the Alternative Dispute
Resolution Directive and the Online Dispute
Resolution Regulation

Response of the Competition and Markets Authority to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation

1. The Competition and Markets Authority (CMA) welcomes the opportunity to respond to the consultation¹ by the Department of Business, Innovation and Skills on its proposals for implementing the Alternative Dispute Resolution Directive (ADR) and the Online Dispute Resolution Regulation (ODR) into UK law.

UK ADR Landscape

1. 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.
2. In May 2010, the Office of Fair Trading (OFT), a predecessor to the Competition and Markets Authority (CMA), published a summary guide to dispute resolution systems *Mapping UK Consumer Redress*.² The guide highlighted that there are gaps in the UK's ADR landscape, including in sectors that receive high levels of consumer complaints and relating to typical consumer goods (eg mobile phones, televisions and clothing).
3. The CMA understands that other studies have drawn similar conclusions, such as the August 2008 report by the University of East Anglia for the Department for Business, Enterprise and Regulatory Reform, which stated:

‘the coverage of ADR schemes in the UK is patchy, and some markets do not have an ADR scheme at all (and this is true of some markets which display low levels of customer satisfaction) ... the UK's provision of ADR schemes is an area where further progress could be made if the UK is to be on a par with the best.’
4. In addition, the OFT has also published a number of market studies in specific sectors³ that highlighted within that particular market or sector either a lack of

¹ www.gov.uk/government/uploads/system/uploads/attachment_data/file/288199/bis-14-575-implementing-alternative-dispute-resolution-directive-and-online-dispute-resolution-regulation-consultation.pdf

² webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/general_policy/OFT1267.pdf

³ Homebuilding in the UK (2008)

webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft1020.pdf

Property Managers in Scotland (2009)

webarchive.nationalarchives.gov.uk/20140402142426/www.offt.gov.uk/shared_offt/reports/comp_policy/oft1046.pdf

Care homes for older people in the UK (2005)

webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft1780.pdf

suitable redress mechanisms or a lack of sufficient signposting of redress rights to consumers.

5. While it is important that gaps identified by the above studies (and other relevant studies) are addressed, the CMA considers it is not only the comprehensiveness of the provision of ADR that should be considered, but any changes to the landscape should ensure that schemes are of the appropriate quality. Poor quality ADR is not helpful to consumers or businesses and may reduce confidence in this mechanism as a way of resolving disputes.

ADR for every consumer dispute

2. 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?

6. Based on the OFT's research, we agree that the current provision is insufficient. We are however unaware of the capacity of existing schemes to expand sufficiently to meet the need to have ADR for all consumer disputes.

Residual ADR

3. 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?

7. We do not anticipate that all businesses would refer complaints on a voluntary basis. Where businesses are obliged to use an ADR scheme, consumers are guaranteed access to redress and businesses benefit by having access to a mechanism that enables them to resolve complaints. The OFT supported compulsory membership of ADR schemes when they were proposed for utilities, estate agents and letting agents for those reasons. There would be no such guarantee if use of a residual ADR scheme were voluntary. Although some businesses may use a voluntary scheme, it is likely to be difficult to persuade the

majority to use one without quantifiable incentives that there would be benefits to the business.

8. To encourage the use of ADR it could be beneficial to include an obligation for businesses to inform consumers, as part of their pre-contractual information, that there is an ADR scheme available and whether they intend to use it. A simple form of words would be sufficient, for example: 'You can complain to X ADR scheme where you have a problem with the goods / service(s) that we have provided and we are unable to resolve that problem between ourselves'.

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

9. As use of the scheme is voluntary we believe that the initial take up would be low and it will take time for businesses and consumers to develop confidence in the scheme. The level of publicity aimed at businesses to encourage them to use the scheme will also be a factor in determining the number of enquiries/disputes referred.

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

10. We do not suggest that any specific model is more appropriate than others. The important criterion is that any model adopted should meet the requirements as set out in the ADR directive and follow best practice for ADR schemes.
11. However, we suggest that it may be useful for consumers first to have voluntary access to mediation or conciliation before moving to arbitration, while retaining the right to ask for their complaints to be examined by an ombudsman for a full consideration of the dispute. This would allow for disputes where the consumer is content with the outcome of mediation/conciliation to be resolved more speedily whilst still providing consumers with a guarantee of access to the full dispute resolution process. We would be concerned however if mediation/conciliation were offered as the only option for consumers, or if they were discouraged from seeking a fuller consideration of their dispute following the initial mediation/conciliation stage.

6. 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?

12. Whilst we understand the arguments that large claims could be handled and funded in the court system we do not consider it is necessary or desirable to set a maximum settlement value for ADR. We are aware, for example, that while the maximum settlement value for estate agents ADR schemes is £25,000, that amount has very rarely been awarded with the average awards being typically considerably lower than £25,000. It is also important that awards are not unnecessarily narrowed, for example, recommending them only in respect of 'aggravation' or 'inconvenience'. Such a narrowing of the award criteria leads to other consumer losses not being considered, quantified or compensated. It is therefore of greater benefit to consumers that potential breaches of the law and, in some cases, what might be considered more speculative losses (eg 'loss of a chance') are quantified and included in the settlement.
13. In our view, there should be no minimum settlement value, as long as ADR providers consider and reasonably quantify all factors and losses a consumer might have suffered – including aggravation and inconvenience – when deciding on an appropriate award. Additionally in some cases, a complainant will not be seeking financial redress but instead, for example, an apology, an explanation, or changes to be made to the business's procedures.

7. 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?

14. All business-funded ADR schemes (whether they are compulsory sector schemes or voluntary residual schemes) need to minimise burdens on businesses, while maintaining sufficient capacity to be able to operate effectively, which includes responding to peaks in demand for ADR.
15. It is therefore important to ensure that a residual ADR scheme has sufficient funding to carry out its functions, including where there are higher than previously, or higher than expected, volumes of complaints to be resolved.

16. Many compulsory ADR schemes, such as the Financial Ombudsman Service, rely on a combination of case fees and annual fees, which are tiered depending on the size of the business. Although such combined fee structures and funding models (reliant wholly or mainly on annual fees) provide the funding necessary to operate compulsory ADR schemes, other factors may need to be taken into consideration for a voluntary residual ADR scheme.
17. The charging of an annual fee may dissuade a business from using a voluntary scheme if it considers that there would be few consumer disputes requiring resolution. This would undermine the provision of the residual ADR scheme. However, without regular funding from annual fees, case fees may provide a less reliable or regular source of funding and be insufficient to support a residual ADR scheme, which could also jeopardise consumers' access to ADR.
18. We consider that fee structure will be relevant to the incentives that are created for businesses to participate in residual voluntary ADR. Another key relevant factor will be reputation. Even if strong incentives are created for participating in a voluntary scheme, we consider it likely that a voluntary scheme will have a more variable workload than a compulsory scheme.
19. Calculating fees according to the relative size of businesses might provide a fair way of raising funds and provide one way of spreading burdens created by the operation of the scheme in an efficient and fair way. Basing fees on the number of cases handled could act as a disincentive for businesses that are the subject of a relatively high number of complaints to remain covered by an ADR scheme, which is of particular relevance for voluntary ADR provision. We consider this may point towards taking a blended approach towards fees with a combination of membership and case fees. This may minimise the burden on business while also putting a voluntary scheme in a position where it can operate effectively, even at a point where there is peak demand. Membership fees may provide the necessary stability of revenue to fund a voluntary residual ADR scheme, even when demand for complaint resolution is higher. Businesses may be more incentivised, however, by a structure that allows for some case fees as well, so that a business which generates fewer complaints is not required to strongly subsidise a scheme that investigates complaints against other businesses.

8. 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?

20. A standard fee would have the benefit of simplicity although it would not reflect the complexity or seriousness of a complaint. However, in some circumstances it could be difficult to accurately predict the complexity of a complaint at the start

and a standard fee may therefore not be appropriate. It could also act as a disincentive to businesses if it is not set at the correct rate. For these reasons, and to provide more evidence, we think it would be beneficial to analyse the effectiveness of standard case fees in schemes which use them.

9. 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?

21. We believe that having more than one residual ADR scheme provider will provide benefits in terms of choice for businesses and, if membership is voluntary, encourage them to sign up to the most appropriate scheme. Also, having a number of residual ADR schemes should help to ensure that there is continuity should any provider fail, or no longer meet the requirements of the directive and have its certification removed by the competent authority. Moreover, multiple providers should lead to competition between schemes which may also help drive up the quality of ADR provision. Operating more than one scheme may also help to ensure that ADR is available in all sectors.
22. However, we recognise there may be concerns that multiple schemes could lead to businesses basing their decision to join solely on costs and therefore leading to lower quality provision within schemes as they compete for business. The concern regarding loss of quality could be overcome by ensuring that consumers interests are embedded in the schemes' procedures, monitoring and recommended awards through some form of engagement which can capture the views of consumers.

Better signposting for consumers – a complaints 'helpdesk'

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

23. Given the likely number of ADR providers, a helpdesk would act as an initial point of contact for information, enabling consumers to navigate the different schemes available and find the one most suited to examining their dispute. It would also help to raise awareness of the availability of ADR.

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?

24. For a helpdesk to provide benefits to consumers, it must be effective and speedy for consumers to use. Any website or online database of ADR providers should be searchable by sector, type of complaint and, if possible, by business. It should also offer guidance on how to present a complaint, how to complete complaint forms and explain what supporting information would be needed by an ADR provider to consider a complaint fully. It is vital that consumers receive quick responses from a helpdesk and they are not delayed in progressing their complaints efficiently. A helpdesk and associated website could help ensure that cases that proceed to ADR are not based on misunderstandings or lack relevant information that consumers could have included if they had been signposted to the requirements.

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

25. We agree that it might be more efficient to expand the role of an existing consumer organisation, such as Citizens Advice or Which?. Consumers are already familiar with and trust those brands and are likely to contact them for advice in any case when they have a dispute with a business.

13. How could a helpdesk be funded?

26. Contributions from ADR providers could be used to support the start-up and ongoing costs of the helpdesk. The provision of information to potential complainants at an early stage may help to control costs for providers by ensuring that only appropriate cases proceed. It is also possible that expanding the role of an existing consumer organisation may result in economic efficiencies, which we think should be explored further.

Appointing a competent authority

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

27. In principle, we consider regulators could act as competent authorities for ADR schemes in the regulated sectors. In our view, any body or organisation (including a regulator) that is asked to act as a competent authority for ADR providers would need to demonstrate the following qualities in order to carry out the role effectively:

- The ability and resources to carry out a suitably robust certification process, including identifying clear criteria for the ADR provider to meet and assessing the quality of submissions for certification as an ADR provider.
- Adequate resources to be able to monitor the performance of the ADR provider effectively, including ongoing monitoring and formal reviews at appropriate time intervals. This includes empowering the competent authority to require changes to be made, where appropriate, as an alternative or precursor to withdrawing certification from an ADR provider.
- The ability to assess suitability to act as a residual ADR provider, which will require a provider to provide redress across a range of different sectors. This might include sector-specific considerations as well as those that apply universally.

15. 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?

28. We agree that calculating fees according to the relative size of ADR providers – either calculated on the basis of members or number of cases handled – would be fair. We consider this should provide a simple and efficient way to spread the burden of regulation.

29. We anticipate that the costs incurred by a competent authority in monitoring ADR schemes effectively may be relatively constant (in contrast to those incurred by a scheme operator that faces variable number of complaints).

Procedural rules for refusing disputes

16. 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?

30. **Article 5(4)(a):** We have some concern with this requirement where, for example, a business does not inform its consumers that they must try to resolve the dispute directly before they are eligible to go to ADR, or if the consumer has not been given accurate information about how the business will deal with the complaint.
31. **Article 5(4)(b):** We consider that there needs to be clear guidance to ADR providers, businesses and consumers as to the reasons why a complaint may be rejected under the rule in Art 5(4)(b). It would be useful for such guidance also to set out what action a competent authority may take against an ADR provider that wrongly refuses to deal with a particular dispute. We recommend that there should be additional steps a competent authority could take (for example, imposing requirements on the ADR provider to change its approach) before removing the ADR provider's certification, as part of the regulatory tools available to the competent authority to deal effectively and proportionately with an ADR provider in this type of situation.
32. **Article 5(4)(d):** We would advise caution against establishing a minimum threshold for a claim's value. There is a strong argument that businesses and consumers should have access to ADR in respect of low-value claims. Consumers are unlikely to pursue claims for small amounts – such as 69p or 99p for a faulty digital download – through the courts but should nevertheless have access to a means to resolve their dispute.
33. **Article 5(4)(f):** This provision could be very wide in application. We consider that it should be included only if the provision – and the basis on which a dispute could be rejected under it – are fully explained and the risk of it operating unfairly against consumers is mitigated.

Information requirements

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

34. It would be helpful to consumers if businesses notified them at an early stage of their dealings about the availability of an ADR scheme in the event of a dispute. That information is likely to constitute 'material information' which should be provided to consumers to allow them to make informed transactional decisions. This potentially includes decisions that are made before entering a contract with a specific trader, for the purposes of the Consumer Protection from Unfair Trading Regulations 2008.
35. We consider that there should be a standard form of wording that businesses should use when referring to the fact that they use a particular ADR scheme. Such wording – see answer to question 3 – should be standard across all ADR sectors to ensure consumers receive consistent information about ADR and to prevent businesses referring to ADR in a way that could mislead or confuse consumers.

Online Dispute Resolution Contact Point

18. 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?

36. If the proposal for a consumer helpdesk is put in place, and it includes help for domestic online disputes, there may be no need for the ODR contact point to provide such help. However, if a consumer helpdesk does not provide that help it is essential, given the growth in online shopping and markets, that consumers have access to information about, and assistance for, online disputes between UK consumers and UK businesses. This assistance could be provided through the ODR contact point.

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

37. As with our response to question 18, this depends on the existence and effectiveness of a domestic consumer helpdesk. If a consumer helpdesk provides clear and effective advice and information to consumers about how to access ADR, it may not be necessary for the ODR contact point to assist with domestic complaints. We recommend that any decision on whether the UK ODR contact point provides such assistance should, to try and ensure consistency, be informed by what other Member States will do in equivalent circumstances.

Impact on limitation and prescription periods

20. 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.

38. We agree with the proposed extension, assuming eight weeks is found to be sufficient for the purposes of the Mediation Directive.

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

39. Apart from the limitation periods laid down in the Limitation Act 1980, which vary according to the legal basis relied on for the claim, we are not aware of any sector specific legislation which provides different time limits and would therefore also need to be amended.

Scope of ADR: in-house mediation

22. 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?

40. Independence is essential if consumers are to have confidence that the outcome will be fair. This includes 'perceived independence' where irrespective of the actual position, a consumer might struggle to be persuaded that an in-house ADR provider would be sufficiently independent of the trader to be able to produce a decision that is fair in all the circumstances.

Binding decisions

23. 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?

41. We consider that all decisions should be binding on the business in order for any ADR scheme to provide effective resolutions. If a business does not comply with a decision, the consumer will have wasted time and effort in pursuing the dispute through ADR and will have little choice but to initiate an action in the courts to access a remedy that the ADR provider was willing to provide. This ultimately has the potential to undermine ADR provision in general and consumer confidence in it. Further, if decisions are not binding, there would be an incentive for businesses to refer to their membership of an ADR scheme as part of their advertising and to encourage or induce consumers to buy goods or services from them while having no intention of complying with decisions made against them. That would be likely to mislead consumers and to limit their ability to make informed decisions about, for example, whether or not to enter into a contract at all and whether or not to use a particular trader.

Applying the ODR Regulation to disputes initiated by business

24. 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?

42. Although we accept that there could be some advantages to businesses being able to initiate disputes against consumers, we agree that the ODR Regulation should apply only to those initiated by consumers. It could be confusing for both consumers and businesses if ADR is binding only on businesses while the ODR Regulation could lead to decisions that bind both consumers and businesses. There would be clear disadvantages to consumers who may have decisions

made against them in disputes initiated not by them but by businesses. Even if a consumer would be bound by such a decision only where he/she accepts it, they may nevertheless be disadvantaged. The consumer may not be able to make a fully informed decision as to whether to accept or reject a decision if they do not fully understand the implications of doing so.

Call for evidence on simplifying the provision of ADR

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

43. We consider that there would be merits in simplifying the ADR landscape, as long as such simplification is not achieved at the expense of providing swift and effective access to ADR. Simplification should also not create unnecessary barriers to entry for new or innovative ADR schemes that can provide effective redress. It is important that there is competition among providers to ensure that ADR works well for businesses, consumers and the economy.
44. In our view, it is important to have better, clearer and more easily accessible information available to help businesses and consumers identify accurately which ADR provider or providers would be suitable for their needs and then easily and effectively compare the service offered by those providers so they can select one that is appropriate. This is not only achieved by reducing the number of ADR providers; if information is provided in clear and effective terms then consumers and businesses will be able to use it to make decisions, irrespective of whether there is one, or more than one, ADR provider in the sector, or generally. Having a number of ADR providers should encourage competition between firms, which may create a number of advantages, including enhancing the quality of ADR provision as well as allowing ADR services to be provided in an innovative (and potentially more cost-effective) way.
45. A consumer helpdesk may achieve the sought-after benefits of ensuring businesses and consumers can effectively navigate the ADR landscape.

26. 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?

46. It should be easier for consumers and businesses to access and navigate a simplified system, which would ensure more effective and efficient provision of

ADR. As mentioned in our response to question 25, simplification should not be to the detriment of allowing for strong competition among ADR providers, which can bring a number of benefits.

47. Simplification could be achieved through a consumer helpdesk that provides clear signposting to consumers and/or the establishment of an umbrella scheme, which consumers could refer to or contact as an initial step in pursuing their disputes. That would be especially helpful in sectors, such as selling or purchasing property, where different schemes cover different businesses at various stages of the process, ie estate agents, solicitors, and surveyors.
48. An umbrella scheme or, as a minimum, clear signposting as to which ADR provider a consumer should contact in respect of their particular dispute, would help to improve awareness of ADR in general. We consider that increased awareness of ADR is also a corollary of effective decision-making, as access to ADR is likely to increase where it has a strong reputation among consumers and businesses. There is therefore a strong argument that ADR providers should publicise the outcomes of disputes (suitably anonymised where necessary).
49. Also, we consider the above suggestions should help to reduce an asymmetry in information and knowledge between businesses and consumers, and make consumers more informed about their ADR rights. At present a lack of information may provide a barrier to consumers obtaining effective redress through ADR.

27. 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?

50. We consider that simplification of the landscape would be compatible with the introduction of a residual ADR scheme. However, while simplification would help businesses and consumers to navigate the ADR landscape, it would not necessarily ensure the decisions themselves will be effective, fair and reasonable. As above, it is desirable that there is effective competition among ADR providers to ensure there is a downward pressure on costs and upward pressure on quality, and to encourage innovation.
51. While it does not deal specifically with how a residual ADR scheme could be set up, you may find it helpful to consider the OFT Government in Markets publication which has been adopted by the CMA and is available at http://www.of.gov.uk/shared_of/business_leaflets/general/OFT1113.pdf

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

52. In our view, ADR should be a compulsory requirement if the landscape is simplified for the reasons given under question 3.

Impact Assessment

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

53. We consider that the impact assessment has identified what appear to be the main costs involved and the main benefits that may result.

54. We anticipate that the 'fees to residual ADR body as a result of additional ADR cases (from year 1)' cost may be towards the higher end of the range estimated, if annual rather than case fees end up being the main source of funding (which we can see may be necessary for a single ADR provider to retain sufficient capacity to meet any peaks in demand).

55. If a single voluntary residual ADR scheme is put in place but very low use of it is made by businesses, resulting in low levels of funding being recovered from membership and case fees, we anticipate that part of this cost may need to be met by Government in order to ensure the viability of the residual voluntary scheme.

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

56. We have no comments on Annex C.