



Review of Alternative Dispute Resolution Schemes

Statement

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Statement

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Section 1

Executive Summary

- 1.1 Fair and effective complaints-handling processes protect consumers and empower them in their relationship with communications providers ('CPs'). Alternative Dispute Resolution ('ADR') schemes play an important role in complaints handling arrangements. They are operated by independent bodies which examine and make judgements about cases referred to them by consumers. The schemes can improve the outcome for consumers whose complaints might otherwise be unduly lengthy or remain unresolved.
- 1.2 The Communications Act 2003 ('the Act') places a duty on Ofcom to secure the availability of ADR procedures for domestic and small business customers. Through General Condition 14.5 we have required all CPs to be a member of an approved ADR Scheme. We currently approve two such schemes: Ombudsman Services: Communications ('OS') and the Communications and Internet Services Adjudication Scheme ('CISAS') ('the Schemes').
- 1.3 In May 2012, Ofcom published a consultation ('the May Consultation') to seek out stakeholders' views on a set of options proposed to help conclude our review of ADR Schemes ('the Review'). The Review had sought to assess whether the Schemes still met the approval criteria set out in the Act, which include the requirement that there should be consistent outcomes for consumers and small businesses, and CPs who used the Schemes.
- 1.4 In the May Consultation, we set out our view, based on the evidence available, that the Schemes met most aspects of the approval criteria. In particular, we noted significant improvements in accessibility and efficiency made by the Schemes during the course of the Review. The Review also indicated that reasonable decisions were being reached in over 90% of cases considered by the Schemes.
- 1.5 However, we identified that some aspects of decision making at the Schemes were leading to inconsistent outcomes for consumers in some circumstances, in particular in cases where evidence was lacking and where small awards of compensation might be considered appropriate for poor customer service.
- 1.6 We presented four options to address this issue. These were:
 - Option 1:** Continue our approval of the Schemes.
 - Option 2:** Modify the conditions of our approval. This would involve the introduction of a new condition of the approval requiring the Schemes to adopt a set of 'Decision Making Principles' including the development of guidelines on awarding compensation.
 - Option 3:** Ofcom could invite the Schemes to agree between themselves a set of measures to meet the consistency objective.
 - Option 4:** Withdraw our approval.
- 1.7 Our preferred option was Option 2.

- 1.8 The responses received from stakeholders were broadly supportive of the preferred option set out in the May Consultation.
- 1.9 Some stakeholders raised concerns about some of the detail and potential costs of the proposals, including the potential impact on compensation levels.
- 1.10 We consider that the impact of the proposals on costs and compensation levels will be limited. The Decision Making Principles are aimed at addressing some inconsistencies in decision making in a relatively small proportion of cases and we do not expect them to lead to significant additional costs or changes in compensation levels overall.
- 1.11 In addition to our proposals on the Principles, we received comments on our analysis of the Schemes against the existing criteria. In particular, some stakeholders expressed concern about CISAS's approach of limiting compensation awards to the amount requested by the consumer. CISAS has provided a list of circumstances where it will now consider awards beyond the amount requested. We believe this addresses concerns raised by stakeholders, and when implemented, will ensure that there is no constraint on the making of appropriate compensation awards at CISAS.
- 1.12 Having considered all responses, we have concluded that Option 2 - the introduction of a new condition to the approval requiring the Schemes to adopt a set of 'Decision Making Principles' including the development of guidelines on compensation - is the most appropriate way to addressing the issues we have identified in the Review.
- 1.13 The Schemes have confirmed their acceptance of the new condition. On this basis and given the findings of the Review that the Schemes meet the criteria set by the Act, we confirm the continued approval of OS and CISAS as ADR Schemes.

Section 2

Introduction

Why is it important to have appropriate and effective regulation of Alternative Dispute Resolution Schemes?

- 2.1 ADR is a well established and important mechanism for giving consumers access to justice where recourse to the court system may be impossible or impractical due to cost and resource restraints. It is an important way to redress the power imbalance between consumers and CPs who have greater resources, knowledge and control over the products and services which are in dispute.
- 2.2 Ofcom has a duty under the Act to secure the availability of appropriate procedures for the resolution of disputes between CPs and their domestic and small business customers¹. Through General Condition 14.5 we have required all CPs to be a member of an approved ADR scheme. We currently approve two such schemes: OS and CISAS. All CPs are free to choose which of the Schemes they wish to belong to.

Why did we conduct the Review?

- 2.3 Ofcom is obliged by the Act to keep its approval of ADR schemes under review. We consider that such a review is important to ensuring that the Schemes continue to meet the requirements of the Act and ensure that consumers continue to have confidence in using the approved Schemes.
- 2.4 In October 2010, we published a Call for Inputs to start a review of the performance of both OS and CISAS (including the operations, structure and rules of both organisations).
- 2.5 In May 2012, we published a consultation that set out how we had reviewed the Schemes, the findings of our analysis, the changes that the Schemes had already agreed or implemented in response to our Review and our proposals on how to conclude the Review.

Who responded to the May Consultation?

- 2.6 There were 14 responses in all, including one respondent who requested their response not to be published. These include 6 responses from CPs (BT, Sky, Three, 02, Cable and Wireless and one respondent preferring to remain anonymous) and 3 from consumer bodies (Citizens Advice, Which? and the Communications Consumer Panel).²
- 2.7 The Schemes themselves have contributed to the options that were presented in the May Consultation and in subsequent responses.

¹ Section 52 of the Act

² <http://stakeholders.ofcom.org.uk/consultations/adr-review-12/?showResponses=true>

What is the regulatory framework?

The Act

- 2.8 Section 3(1) of the Act states that our principal duty in carrying out our functions is to further the interests of:
- citizens in relation to communications matters; and
 - consumers in relevant markets, where appropriate by promoting competition.
- 2.9 In performing these duties, Ofcom must have regard to:
- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - any other principles appearing to Ofcom to represent the best regulatory practice.
- 2.10 Section 3(4) notes that in performing the duties under section 3(1), Ofcom must also have regard to:
- the desirability of promoting and facilitating the development and use of effective forms of self regulation; and
 - the opinions of consumers in relevant markets and of members of the public generally.
- 2.11 Under section 3(5), in furthering the interests of consumers, Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.
- 2.12 Section 4 of the Act requires that we act in accordance with the six European Community requirements for regulation which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive. Article 8(4)(b) of that Directive requires national regulatory authorities to ensure dispute resolution procedures are in place.

General Conditions

- 2.13 We have the power under section 45 of the Act to set “General Conditions”. These are conditions which apply to all CPs who provide an electronic communications network and/or electronic communications service in the United Kingdom.
- 2.14 Under section 52(1) we have a duty to set General Conditions that we think are appropriate for securing that CPs establish and maintain procedures with respect to certain matters.
- 2.15 Those matters are:
- the resolution of disputes between CPs and any of their domestic and small business customers (section 52(2)(b)); and
 - the provision of remedies and redress in respect of matters that form the subject matter of such disputes (section 52(2)(c)).

- 2.16 Section 52(3) requires that when setting these General Conditions, we must secure so far as we consider appropriate that:
- dispute resolution procedures are easy to use, transparent, non-discriminatory and effective; and
 - that domestic and small business consumers can access them free of charge.
- 2.17 Our duties under sections 52(1) and (3) of the Act, are to be performed, to such extent as we consider appropriate, by the setting of General Conditions requiring CPs —
- a) to establish and maintain procedures for resolving disputes; and
 - b) to secure that those procedures are, and continue to be, approved by OFCOM (section 52(5)).
- 2.18 To approve dispute procedures, Ofcom needs to be satisfied that the arrangements (section 54(2)):
- a) are administered by a person who is independent of both Ofcom and the CPs;
 - b) give effect to procedures that are easy to use, transparent, non-discriminatory and effective;
 - c) ensure the procedures are free of charge;
 - d) ensure that all information necessary for giving effect to the procedures is obtained;
 - e) ensure that disputes are effectively investigated;
 - f) confer powers to make awards of appropriate compensation; and
 - g) enable awards of compensation to be properly enforced.
- 2.19 Ofcom may approve dispute procedures subject to such conditions (including conditions as to the provision of information to Ofcom) as they may think fit (section 54(3)). Under section 54(4) it shall be the duty of Ofcom to keep under review the dispute procedures for the time being approved by them.
- 2.20 Ofcom may:
- modify the conditions of their approval of any dispute procedures at any time;
 - withdraw such an approval at any time; or
 - give notice that the modification of those conditions, or the withdrawal of such an approval, will take effect from another specified time (section 54(5)).
- 2.21 Under section 54(6) of the Act, in approving dispute procedures or exercising the powers above, Ofcom must have regard to the matters in section 54(7) which are:
- a) the need to secure that customers are able readily to comprehend dispute procedures;

- b) the need to secure that there is consistency between the different procedures for the time being approved by Ofcom; and
 - c) the need to secure that the number of different sets of procedures so approved is kept to a minimum.
- 2.22 Section 49 of the Act applies where a General Condition has effect by reference to an approval and the person who has given that approval is proposing to modify it so as to affect the operation of that General Condition.
- 2.23 Under section 49 (2), Ofcom must not modify the approval unless they are satisfied that to do so—
- does not discriminate unduly against particular persons or against a particular description of persons;
 - is proportionate to what it is intended to achieve; and
 - in relation to what it is intended to achieve, is transparent.

The structure of this document

- 2.24 In section 3, we set out the comments of stakeholders on how we have reviewed the Schemes against our review criteria set in light of the statutory provisions at paragraphs 2.18 and 2.21 above.
- 2.25 In section 4, we re-visit the options we presented in the May Consultation to address those concerns that emerged during the Review. We set out stakeholders' comments on these options and Ofcom's analysis and conclusions on those options.

Impact Assessment

- 2.26 The analysis presented in the May Consultation and in this document represents an impact assessment, as defined in section 7 of the Act³.
- 2.27 Impact assessments provide a valuable way of assessing different options for regulation and in showing why the preferred option was chosen. They form part of best practice policy-making. This reflects section 7 of the Act, which requires Ofcom to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the majority of its policy decisions. For further information about Ofcom's approach to impact assessments, see the guidelines "Better policy-making: Ofcom's approach to impact assessment" which are on Ofcom's website⁴.
- 2.28 Specifically, pursuant to section 7 of the Act, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by or in relation to proposals we make.

³ The May Consultation includes a more detailed impact assessment set out at Paragraphs 4.32 to 4.48

⁴ <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>

Equality Impact Assessment

- 2.29 Ofcom is also required to assess the potential impact of all our functions, policies, projects and practices on the equality of individuals to whom those policies will apply. Equality impact assessments ('EIAs') assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.30 We have given careful consideration to whether or not our decision set out in section 4 will have a particular impact on race, age, disability, gender, pregnancy and maternity, religion or sex equality. We do not envisage that the decision in this statement will have a detrimental impact on any particular group of people. Indeed, we consider this decision can further the interests of all consumers and these end-users stand to benefit from any changes to ADR services, which will aim to ensure consistency in consumer outcomes.

Section 3

Assessment of the Schemes

The Criteria for Assessment of the Schemes

3.1 The objective of the Review was to assess whether the Schemes were performing satisfactorily against the criteria below which were devised taking into account sections 52(3) and 54(2) of the Act and were set out in the May Consultation:

- **Accessibility** - ensuring that consumers and small businesses⁵ can easily access all relevant information, are given appropriate support when making a complaint, do not face barriers when trying to make an application to the Scheme, and that disabled consumers are not disadvantaged;
- **Independence** - ensuring that the Schemes have appropriate governance procedures in place and that their member companies do not unduly influence decision making;
- **Fairness** - ensuring adjudications are of a high quality, that there are appropriate points of review for cases, that staff are appropriately trained, that there are appropriate internal guidelines in place for how decisions should be reached in particular cases;
- **Efficiency** - the degree to which the Schemes deal with complaints in a timely manner, allocate their resources appropriately and are financially sustainable;
- **Transparency** - the extent to which decisions and the decision making process is clear to consumers and CPs;
- **Effectiveness** - ensuring the jurisdiction of the Schemes are closely aligned and that the Schemes have appropriate procedures in place to:
 - monitor the implementation of decisions;
 - ensure disputes are effectively investigated; and
 - ensure awards of compensation enforced.
- **Accountability** - reviewing KPIs to make sure they are appropriately targeted, examining the level of reporting against KPIs to Ofcom and the public, and aligning the recording and reporting systems of the Schemes to enable direct comparisons on issues being dealt with; and
- **Non – discriminatory** - not discriminating against or in favour of consumers and small businesses or CPs in making decisions.

3.2 In addition to these criteria, section 54(7) of the Act requires Ofcom to have regard to the need to secure that there is **consistency** between the Schemes. Having

⁵ GC 14.7 (e) “Domestic and Small Business Customer” means, in relation to a Communications Provider, a Customer of that Provider who is neither-
(i) himself a Communications Provider; nor
(ii) a person who is such a Customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise);

appropriate internal guidelines in place for how decisions should be reached in particular cases as noted under the fairness criteria also promotes this aim. The Act also requires Ofcom to have regard to the need to secure that the number of approved Schemes is kept to a minimum.

- 3.3 As well as taking into account the views of the Schemes we:
- audited the internal operations of the Schemes;
 - measured performance against KPIs; and
 - compared the Terms of Reference of both Schemes.
- 3.4 In addition, we commissioned two substantial consultancy projects by Mott MacDonald ('Mott') to:
- examine the quality of adjudications from each Scheme and to assess whether there were any systemic issues at the Schemes that could lead to differences in consumer outcomes;
 - develop a common framework to ensure that both Schemes have consistent approaches to certain aspects of decision making and awarding compensation.
- 3.5 The Mott reports (the first study completed in May 2011, the second in December 2011) were published alongside the May Consultation.
- 3.6 The May Consultation explained that we had undertaken an analysis that considered how the Schemes performed against the criteria above. We had also assessed whether there was consistency between the two schemes. The May Consultation considered the main issues that had been identified in the Review and explained what steps had been taken, where appropriate, to ensure that both Schemes met the requirements of the Act.
- 3.7 Our conclusions from this analysis, as detailed in the May Consultation⁶, were that in respect to accessibility, independence, efficiency and accountability, the Schemes had taken adequate steps to satisfy the requirements set out under the Act. Since the Review began, both Schemes had introduced a number of improvements to their operations – notably improving the accessibility of their services to consumers and the efficiency of their processes.
- 3.8 In the first study, Mott concluded that overall there were no systemic problems with the way in which cases were adjudicated at each scheme. Its analysis suggested that only a small percentage of verdicts in the cases reviewed might be considered 'unreasonable' (3% at OS and 1% at CISAS) or 'questionable' (5% at OS and 9% at CISAS). Mott considered that any of the process differences between the Schemes were incidental to the act of reaching a decision, and hence would not affect outcomes⁷.
- 3.9 In relation to transparency, fairness and effectiveness, we highlighted that there were some concerns that had not been entirely addressed.

⁶ Section 3 of the May Consultation

⁷ Paragraph 4.4 of the May Consultation

- 3.10 In respect of the Schemes' performance in meeting the fairness criteria, we expressed concerns that some consumers could potentially receive different verdicts and/or varying compensation awards even when the circumstances of the cases were identical. This observation was based on evidence collected during the Mott case analysis.
- 3.11 In respect to transparency, we expressed concern that many of the principles for decision making currently used by the Schemes were 'inferred' or 'implied', or passed on verbally during training and case review and not formally laid down in one place.
- 3.12 We also raised the issue of 'effective' investigations and whether decision makers at each Scheme could make more effort to gather evidence from CPs in instances when it would otherwise be lacking.
- 3.13 The May Consultation included proposals that were intended to address these issues. We discuss them in more detail in section 4.

Stakeholder Responses to the Assessment

Remedy and request

- 3.14 There was limited feedback on our assessment of the Schemes against the stated criteria, but it is useful to note that no responses included requests that either Scheme should not continue to be approved by Ofcom.
- 3.15 Some consumer stakeholders commented on the issue of 'remedy and request'. The term relates to the practice at CISAS where compensation is not awarded unless requested at the application stage and where a cap is imposed on awards based on what consumers state at that stage. As OS does not have such rules, it was suggested that there were issues around fairness and consistency that needed to be addressed.
- 3.16 We had signalled in the May Consultation that, shortly before publication, CISAS had changed this approach and would relax these rules in 'exceptional circumstances' though we did not provide details of what this may mean in practice.
- 3.17 OS and Which? expressed strong concerns about CISAS not allowing their adjudicators to exceed the compensation levels that a consumer initially seeks in 'normal' cases. They suggested that this rule is unfair on consumers and continues to lead to inconsistent outcomes.
- 3.18 The Communications Consumer Panel argued that such unequivocal requirements were likely to deter consumers from claiming, when justified, for the distress and inconvenience that has occurred as a result of the matter complained about.
- 3.19 As stated in the May Consultation, CISAS had argued for the maintenance of these rules as they consider that there is a greater chance of securing an early settlement if the CP has a clear understanding of what the consumer is seeking in terms of compensation.
- 3.20 Since the May Consultation was published, CISAS has provided some examples of instances of when they could award more than requested by the consumer. These relate to compensation (or 'goodwill' payments for example for inconvenience or poor customer service) and refunds (for example for overcharging). These would include, but are not limited to instances:

- i) Where the compensation requested is too low. For example, where the company accepts that it has overcharged the customer for a given time period and it has provided a refund only after a number of complaints, phone calls, correspondence etc throughout that time period. If the customer seeks compensation for stress and inconvenience caused by the overcharging, or bank charges, time spent complaining to no avail, or poor customer service etc over that time period which appears to the adjudicator to be too low, it would be fair and reasonable for the adjudicator to use their discretion to give more than the amount requested.
- ii) Where the customer has requested the wrong amount. If a customer makes a claim for a given amount of money as she/he believes that the company has overcharged her/him by that same sum but provides evidence that she/he was overcharged by a greater amount (as she/he has miscalculated the sum on the claim form), it would be fair and reasonable for an adjudicator to use their discretion to rectify a clear error and compensate appropriately.

CISAS also acknowledged that the adjudicator should be able to award compensation where no compensation has been requested, for example:

- iii) Where the customer has only asked for an explanation and the evidence indicates that the customer is due compensation as a result of the issue for which the customer has requested an explanation.
- iv) Where the customer has not claimed compensation on the CISAS application form, but it is clear from her/his submissions and evidence that compensation is being sought.
- v) Where the customer has not asked for a refund but it is clear from submissions and evidence that a refund is due.

3.21 In addition to these developments, CISAS has also confirmed their plan to introduce a number of improvements to their online application process that could also provide the consumer with an expectation of what they could get in certain types of cases when making the application. For example, when completing the online application form at CISAS, examples of award levels could be presented to consumers, for example X% of applicants have applied for an average of £Y and been awarded an average of £Z. This approach could assist consumers by providing a more reasonable expectation of a potential outcome and go some way to addressing the Communications Consumer Panel's concern that consumers may be deterred from making an application.

3.22 Ofcom accepts the value of encouraging consumers to consider and state the amount of compensation and refund they are seeking but we recognise the concerns expressed by consumer stakeholders about the cap on awards by CISAS. However, the set of circumstances where CISAS has now indicated that it would be able to go beyond the amount of compensation or refund claimed are wide ranging. In our view, this addresses the concerns raised and will ensure that CISAS can make appropriate awards and any differences with OS in this regard have been addressed.

3.23 Some stakeholders took the opportunity to raise a number of other points in relation to the wider issues around ADR.

3.24 Cable and Wireless expressed some concern that CPs had to pay for the case fees associated with ADR, regardless of whether the consumer won or not. This particular

issue was not within scope of the Review and we will not be considering it here. However, we would take the opportunity to point out that the Act requires that ADR services should be provided to consumers free of charge.

- 3.25 BT requested that they would like to see Ofcom providing CPs with information on how both ADR Schemes were performing against Key Performance Indicators ('KPIs'). We would point out that both Schemes already publish KPI information on their respective websites⁸. In addition, and as signalled in the May Consultation, we would consider the introduction of a comparative end-to-end KPI for both Schemes but not until the planned changes to the processes at each Scheme had been completed and bedded down.
- 3.26 Which? suggested that there should be only one ADR scheme in the sector (like energy, finance etc). They argue that a system where only one Scheme exists would prevent competition between Schemes that may result in a 'race to the bottom' and offer a simple route to redress for consumers. Which? went on to argue that the two schemes will always compete for members, and as such there will always be inconsistencies in how they function – potentially to the detriment of some consumers.
- 3.27 Whilst we acknowledge Which?'s view on this issue, this is not a question that we are considering within this Review. The Act allows for more than one Scheme to operate and Ofcom's responsibility is to ensure that the number of schemes is kept to a minimum and that approved schemes are consistent and meet the specified criteria in the Act. As the two Schemes had applied to Ofcom for approval, and both Schemes met the criteria, it is entirely appropriate that there are two Schemes currently approved.
- 3.28 FCS, and [S<], suggested that the availability of two schemes had benefits in the form of increased competition and higher standards.
- 3.29 The rest of the comments received from stakeholders were made in reference to the proposals set out in the options section of the May Consultation. We will consider these in more detail in the next section.

⁸ [http://www.ombudsman-services.org/downloads/\(06\)%20Published%20KPIs%20-%20Jun12.xls](http://www.ombudsman-services.org/downloads/(06)%20Published%20KPIs%20-%20Jun12.xls)
http://www.cisas.org.uk/KeyPerformanceIndicators-17_e.html

Section 4

Decision Making and compensation

Ofcom's proposals on addressing issues identified during the Review

- 4.1 This section considers the responses that we have received from stakeholders in respect of the options proposed in the May Consultation for addressing inconsistencies at the Schemes.
- 4.2 Before considering the responses in detail, we will set out the background as to why we considered there to be a problem with consistency in some circumstances, and the options proposed in the May Consultation.

Consistency between the Schemes

- 4.3 Ofcom has always been aware that OS and CISAS have different approaches to dispute resolution. The Act does not prescribe in detail a uniform structure or process that approved Schemes should follow but does require that there is consistency between them.
- 4.4 The initial findings of the Review suggested there may also be differences in outcome. For example evidence collected in 2010 suggested that 88% of cases received by OS produced outcomes in favour of consumers versus 64% of cases received at CISAS. There was also a difference in the average size of the awards made at each Scheme, £103 at OS and £173 at CISAS.
- 4.5 We were aware that some of these differences may be accounted for by the different member base of each Scheme and the different mix of fixed line, broadband and mobile CPs in each base. However, in order to better understand if the process differences at each scheme were also responsible for driving differences in outcomes, we commissioned Mott to evaluate a sample of cases at each Scheme⁹.

Mott MacDonald Study

- 4.6 In a first study, Mott concluded that overall, there were no systemic problems with the way in which cases were adjudicated at each scheme. Its analysis suggested that only a small percentage of verdicts in the cases reviewed might be considered 'unreasonable' (3% at OS and 1% at CISAS) or 'questionable' (5% at OS and 9% at CISAS). Mott considered any of the process differences between the Schemes incidental to the act of reaching a decision.
- 4.7 However, in a further study, Mott identified two noticeable trends that appeared to account for different consumer outcomes in some cases, both between and within the Schemes:
 - First, an inconsistency in assessing the consumer's argument in those cases where evidence appears to be lacking¹⁰;

⁹ The relevant Mott Study can be found at <http://stakeholders.ofcom.org.uk/binaries/consultations/adr-review-12/annexes/mott-may-2011.pdf>

¹⁰ Paragraph 4.7, May Consultation

- Second, a difference in the approach at the Schemes to awarding compensation/goodwill payments at the lower end of the scale (where payments are closer to a proxy for a “bunch of flowers”)¹¹.

4.8 Mott argued that if both of these tendencies could be reduced, the number of verdicts produced in favour of consumers would become more equal across the Schemes. The two issues are covered in detail below.

Approach to consumer’s argument when evidence is lacking

4.9 Mott concluded that sound structures were in place at the Schemes to make accurate and consistent (within each scheme) decisions, underpinned by the skill and aptitude of the decision-makers, a culture of consultation and valuable supporting materials.

4.10 However, when evidence is lacking and decisions come down to a judgement between the word of the consumer and the CP, there appeared to be inconsistencies both between Schemes and within Schemes on how decisions were made.

4.11 These inconsistent patterns of decision making also had the potential to lead to decisions that might not reflect the stated objectives or principles of the Schemes. For example, there appeared to be a tendency at each Scheme to require that all the burden of proof be placed on the consumer when making their case. Whilst it is generally accepted that it is incumbent on the consumer to provide evidence to support their case, it is also the case that CPs are likely to have better records and access to evidence. In such cases, Ofcom considers that the CP should provide any evidence it may have which is relevant to the matter in dispute (even if this evidence is not in their favour). The tendency to favour CPs when evidence is apparently lacking would appear to be inconsistent with a stated objective of the Schemes to level the playing field.

4.12 Mott also presented other examples of the Schemes appearing to rely heavily on the CPs’ side, such as relying on CP’s normal patterns of behaviour where evidence is lacking. During Mott’s second study, almost all the interviewees from OS stated that, in the absence of compelling evidence from either side, one of the foremost considerations would be: what would that particular CP normally do? Several respondents emphasised a high level of familiarity with individual CP procedures, including in some cases knowledge of the scripts used by CP advisors, giving the decision-maker a means to establish what is most likely to have happened, and a possible bias towards normal CP behaviour.

4.13 Whilst these tendencies did not affect the majority of decisions made at each of the Schemes, Mott considered them sufficiently frequent to affect the consumer outcomes and therefore require intervention. Evidence from Mott’s case analysis suggests that a significant number of case verdicts they classify as ‘not reasonable’ are attributable to tendencies at each Scheme to favour the CP where evidence appears to be lacking.

4.14 Of the verdicts at CISAS that Mott considered ‘not reasonable’, 12 of 14 were cases decided in favour of the CP¹². There were instances of this also at OS with 6 of 13 ‘non-reasonable’ verdicts found for the CP¹³. Although this quantitative evidence from the first Mott study suggests a stronger pattern of these tendencies at CISAS, Mott’s

¹¹ Paragraph 4.12, May Consultation

¹² Paragraph 4.11, May Consultation

¹³ *ibid*

second study, which looked more closely at 'how' decisions were made, indicated that OS also had the potential to apply an inconsistent approach in cases where evidence is lacking.

Approaches to awarding compensation/goodwill at the schemes

- 4.15 The average compensation awarded in 2010 at OS was £103, compared to £173 at CISAS. Mott's analysis established that this difference was driven by OS's tendency to award a larger number of awards of compensation, the majority for relatively small payments of under £50. These awards were for relatively minor customer service failings – sometimes in cases where the verdict had been found principally in favour of the CP. CISAS awarded relatively few payments below £50.
- 4.16 Mott concluded in its second report that there is sufficient overlap in the policies of both schemes for a common approach to compensation to be possible. It is only at the bottom end of the scale that there existed a significant difference in practice.

Mott's explanation for inconsistent tendencies at Schemes

- 4.17 In its further study, Mott attributed the examples of inconsistent decision making identified above to a lack of formal guidance available to decision makers at each scheme¹⁴. Specifically, they noted that:
- There is no single document at either organisation where all the objectives and rules of the scheme with regard to decision-making are laid down. In explaining verdicts to consumers and CPs such a reference point would be useful – as well as being valuable to securing consistency across the Schemes.
 - There appeared to be little written guidance on how to interpret cases where there is a lack of evidence, such as cases which turn on a consideration of the word of the consumer versus that of the CP.

The options presented in the consultation for concluding the Review

- 4.18 The May Consultation set out the following options to address the issues outlined above:
- Option 1: Continue our approval of the Schemes.
 - Option 2: Modify the conditions of our approval. This would involve the introduction of a new condition to the approval requiring the Schemes to adopt a set of 'Decision Making Principles'¹⁵.
 - Option 3: Invite the Schemes to agree between themselves a set of measures to meet the consistency objectives.
 - Option 4: Withdraw our approval of the Schemes.
- 4.19 Our preferred option was Option 2 as we believed this was the most proportionate and effective way of addressing the concerns identified in the Review.

¹⁴ Paragraph 4.14, May Consultation

¹⁵ These are set out in Annex 1

Stakeholders views on Option 1: Continue our approval of the Schemes without any changes to the Schemes

- 4.20 There were no responses from stakeholders that included requests for the continued approval of the Schemes without some form of change. Most industry and consumer stakeholders acknowledged the issues of consistency and thought that they ought to be addressed.
- 4.21 Ofcom shares this view and considers that it is not appropriate to continue the approval of the Schemes without the issues around consistency being addressed.
- 4.22 The inconsistent pattern of decision making identified in Mott's analysis, even if present in a minority of cases, could account for consumers receiving differing verdicts and awards when the circumstances and details of the case are similar. This is not an issue for one particular Scheme; the potential to deliver inconsistent outcomes has been identified at both as a result of their different approaches.
- 4.23 The Act requires that Ofcom must have regard to securing consistency and ensure that the Schemes have processes in place that are non-discriminatory. The potential for inconsistent outcomes for consumers is something which we consider should be addressed. Not only does this represent a potential failure on the part of the Schemes to meet the criteria of the Act, it could also undermine the credibility of ADR Schemes. This could impact negatively on consumers and CPs.
- 4.24 For example, if evidence emerges through cases going to ADR that consumers with similar cases are being treated differently, it may undermine trust in the Scheme and discourage consumers from exercising their right to seek redress via ADR. There is also the likelihood that compensation levels (at the lower end of the scale) will continue to be awarded to some consumers and not others even though the circumstances of their case were similar, which appears unfair. There may also be the possibility of consumers not being aware of these differences and receiving an outcome dependent on their choice of CP.
- 4.25 In respect to some smaller CPs, if it emerges over time that the Schemes take an inconsistent approach to handling certain cases, they may also lose confidence in either Scheme, particularly if, as the Mott Study suggests, some adjudicators reach verdicts on the basis of the 'usual' behaviour of some CPs. This could lead to more decisions being reached in favour of those CPs who have more frequent contacts with a particular ADR scheme when compared to those smaller CPs that have less contact with the Schemes.
- 4.26 A further impact on CPs is the possibility that they could be liable for awarding compensation to consumers, when it may not be reasonable to do so. Although Mott's study suggested that compensation arrangements at both Schemes are comparable, there was a greater tendency at OS to award small goodwill payments more frequently even in cases where the verdict around the main subject of the dispute was found for the CP. This represented a notable difference to the approach at CISAS, who did not award sums at this range so frequently. Regardless of which approach is more appropriate, the evidence collected by Mott suggests that CPs' liability to some goodwill payments could vary depending on which Scheme they belong to.

Stakeholder responses to option 2: Introduce a condition to the existing approval requiring the Schemes to adopt a set of ‘Decision Making Principles’.

- 4.27 The second option that we proposed in the May Consultation was for Ofcom to introduce a condition to its approval of the Schemes requiring the Schemes to adopt a set of Decision Making Principles covering their approach to making certain types of decision and compensation payments.
- 4.28 The aim of the Decision Making Principles was to:
- help define some common objectives and principles that underpin decision making on consumer complaints where evidence appears to be lacking; and
 - lay out a common approach to awarding compensation, specifically in respect to awards made at the lower end of the financial scale, through the development of a ‘compensation matrix’.
- 4.29 Under this option Ofcom would approve the Schemes with the condition in place that they adopt the Decision Making Principles.
- 4.30 The Decision Making Principles would not replace the Schemes’ existing rules and objectives (such as set out in their terms of reference) but instead would provide a framework on how decisions should be made and compensation awarded in certain cases. Nor would they lay down a prescription of how the Schemes should act in specific cases. For example, they would not necessarily insist that decisions in certain cases are dealt with one way or the other. They would not detail the awards that certain customers ought to receive in a given set of circumstances.
- 4.31 Stakeholders tended to focus most of their responses on considering option 2. We summarise the main issues identified from the responses below.

Risk of inflated consumer expectations

- 4.32 Some CPs, including H3G and [§<] but also OS, raised concerns that publishing the compensation matrix (when agreed) could heighten unrealistic expectations of compensation and introduce perverse incentives, e.g. consumers more likely than before to pursue ADR rather than early settlement.

Ofcom’s analysis

- 4.33 The primary purpose of the matrix is to reduce the risk of inconsistent outcomes between (and within) Schemes by decision makers having access to agreed and transparent guidelines. However, we also stated in the May Consultation that there is a benefit to consumers generally, in knowing that they are being awarded sums based on an agreed standard, rather than dependent on the Scheme their CP belongs to, or the case handler that happens to be responsible for managing their case.
- 4.34 We could consider limiting access to the compensation matrix to just the Schemes and CPs (although as highlighted at paragraph 3.21 CISAS are planning on sharing the potential levels of awards with consumers at an early stage anyway). However, it could be argued that if consumers have access to guidance on what level of award can be achieved by going to ADR on certain cases, they may be more likely to agree a settlement with the CP earlier, rather than waste their own time and effort in going through a process with an inflated and unrealistic expectation of award. This may

also benefit CPs who would not then be subject to a case fee (i.e. if settlement is achieved without ADR).

- 4.35 It should also be noted that the introduction of a matrix does not necessarily involve setting new compensation levels but making existing levels more transparent and so more consistent. It is not the intention that the matrix would change compensation levels and therefore consumer expectations.
- 4.36 One concern that we do have is the extent to which the compensation matrix is likely to be 'consumer friendly'. If the matrix is designed by the Schemes primarily for decision makers to use, it may not be so easy for consumers to understand and may serve only to confuse and potentially mislead.
- 4.37 OS raised a concern that a general reference to work by the Schemes and Ofcom to achieve consistency of compensation might be more appropriate than a reference to a single matrix. It may be that, instead of a single matrix, levels of compensation are agreed for different issues over a longer period of time and in response to new issues and changes in the market when they emerge.
- 4.38 We consider that this is a reasonable point. Rather than set an expectation that the Schemes will, at a specific point in time some, publish a single matrix document we have decided to require that the Schemes agree to the development of a 'common approach to compensation'. However, the overall principle and objective is for a consistent approach to award levels to be agreed and made available for decision makers to refer to when making awards.
- 4.39 Once any compensation approach has been developed, we will discuss with the Schemes and stakeholders the method of sharing it with consumers. Our aim will be to promote transparency but not to confuse consumers or create mis-leading expectations.

Risk of 'fettered discretion'

- 4.40 A concern raised by BT, Sky, Three and [3<] is that the Decision Making Principles could become a rigid policy and impede the authority of appropriate decision makers to reach verdicts based on the merits of the individual case.

Ofcom's analysis

- 4.41 These responses appear to have been the result of a misunderstanding of our intention behind the introduction of these proposals. It is not the intention (or likely outcome) of the proposed Decision Making Principles to displace the role of the decision maker or due consideration of the facts and merits of each individual case. The Decision Making Principles are intended to guide decision makers, and not to dictate the outcome of a case even before the facts have been considered. The draft Decision Making Principles, included in the May Consultation, make this clear as they state:

'It should be noted that this framework is intended to serve as an aid to the decision-maker, through creating common reference points. The precise sums awarded should always be left to the discretion of the decision-maker.'

- 4.42 The need we have identified is for certain aspects of cases to be 'managed' in a more consistent way, i.e. what appropriate steps should be taken in order to reach a fair, effective and consistent decision. This should involve the consideration of

additional evidence if it exists and not placing too much weight on the typical behaviour of CPs.

- 4.43 Neither OS nor CISAS raised any concerns over the risk that their discretion may be fettered. They would be likely to express concern if they thought that the introduction of these Decision Making Principles would undermine the ability of the decision makers to consider cases on an individual basis. We would highlight that both Schemes did provide input into the formulation of these proposals and will therefore be very conscious of any potential impacts.

Concerns about Ofcom's Impact Assessment

- 4.44 Ofcom's Impact Assessment, as set out in the May Consultation¹⁶, suggested that any detrimental effects of introducing the Decision Making Principles and compensation matrix would be minimal. H3G, Sky and [X], questioned whether Ofcom had properly anticipated the costs generated from the introduction of the Decision Making Principles and the common compensation matrix. In particular, there were concerns that there could be additional costs to Scheme members, directly through additional requests for evidence but also indirectly, through increased bureaucracy imposed on the Schemes (that would be funded by members). Three recommended that, once the compensation matrix had been agreed, Scheme members should be consulted further.
- 4.45 These views differed to the feedback provided by other stakeholders. For example, both OS and CISAS suggested that the additional costs on the running of the Schemes following the introduction of the preferred proposals would be minimal.
- 4.46 O2, agreed with our assessment that costs to their organisation from introducing the Decision Making Principles are likely to be minimal and that any such costs are likely to be outweighed by a more efficient and consistent ADR service. Cable and Wireless noted that they have so few complaints that go via ADR that they did not foresee any financial impact as a result of the Principles being introduced.
- 4.47 BT recognised that there may be extra costs in providing additional data and recommended the Decision Making Principles be reviewed from time to time to make sure only relevant data is requested and processes and requests are not becoming too onerous and costly for the CP. BT also expressed concerns about Ofcom agreeing minimum goodwill payments with CPs.
- 4.48 CISAS added that their adjudicators already have authority, and use that authority, to request further information when it is required. This is useful to note though the Mott Studies might suggest that adjudicators might not always request evidence in certain circumstances when it was in their gift to do so.

Ofcom's analysis

- 4.49 Ofcom is satisfied that there will not be any significant additional costs incurred by the Schemes (and so indirectly to their members) as a result of implementing these proposals. We base this on the views formally presented by the Schemes themselves in response to the May Consultation questions.

¹⁶ Paragraphs 4.32 to 4.48 of the May Consultation

- 4.50 OS suggest that any additional costs are likely to be marginal. They advise that there could be significant training costs but in their view, such training would be done anyway and built into their existing staff development programme.
- 4.51 CISAS suggest there would be some additional compliance and training costs but do not see these costs being excessive. They too explain that their staff are trained on a regular basis anyway.
- 4.52 In respect of the potential direct cost implications for CPs, we appreciate there may be two specific impacts to consider. Firstly, any additional operational resource costs (additional information requests etc) and secondly, changes in the frequency and level of compensation awards.
- 4.53 In the May Consultation we asked CPs to provide an estimate of any costs from introducing the Decision Making Principles. No CPs were able to provide quantitative cost estimates. [36], suggested there could be two operational costs to it directly;
- i) The impact on their customer relationship management strategies and implementation; and
 - ii) Costs incurred in customers delaying resolution with them and waiting for ADR.
- 4.54 In relation to the latter point, the CP did not present any additional evidence to suggest that the proposals would result in more customers going to ADR.
- 4.55 In the May Consultation, we did signal that there could be more instances where the Schemes could seek out evidence collected and retained by CPs and the latter could see more requests for evidence. This could result in some increased costs for CPs, for example though extra staff time to find and provide the evidence requested by the Schemes. However, we still anticipate that any extra costs would be small because of the small number of cases involved and the fact that CPs are under existing obligations under the General Conditions to retain records so new record keeping systems would not need to be implemented.
- 4.56 In relation to the impact on compensation awards, again we have not been presented with any evidence since publishing the May Consultation to alter our view that any changes to compensation levels are likely to be minimal. It is not the intention of Ofcom to agree or set new 'upward' levels of goodwill payments, as mentioned by BT, but instead for the Schemes to agree what these levels should be for certain cases and set them down in guidelines. Although the Schemes have yet to develop a common approach to compensation, we maintain that if there are changes to award levels, up or down, they are likely to be minimal as, referring back to Mott MacDonald's analysis, only those awards at the lower end of the scale should be affected, if at all. On the basis of this analysis, we consider that any additional costs to CPs from these proposals are not likely to be significant.
- 4.57 To address concerns expressed by CPs on the impact of any changes to levels of compensation, we will review the implementation of the Principles after a period of time – e.g. 12-18 months – to see how the aggregate compensation compares before and after the common approach to compensation has been settled. Indeed, BT, Which? and FCS all requested that the impact of these proposals is monitored on an ongoing basis. We plan to discuss with the Schemes if the level of compensation changes significantly and whether any adjustments are appropriate. Monitoring the impact on an ongoing basis using actual data avoids the need for hypothetical assumptions at this stage.

Compensation at the lower end of the award scale

- 4.58 H3G suggested that the common compensation matrix should only apply to compensation levels at the lower end of the scale, as this was the area where Mott's analysis suggested differences occurred.
- 4.59 The available evidence suggests that any inconsistencies in the compensation awards exist at the lower end of the scale, so we would intend for any agreements on the approach to compensation to focus on payments at the lower level.

Detailed comments on the draft Decision Making Principles

- 4.60 OS requested that A1.3 (i) is reworded to reflect the position that they treat both parties fairly or impartially – rather than equally. We consider this to be a reasonable request. Arguably, the key objectives of the Principles are fairness, non-discrimination and the effective investigation of complaints. The term 'fairness' does seem a much more appropriate term here as it places a requirement on the decision maker not to take the side of either party.
- 4.61 Citizens Advice requested that A1.3 (vii) be amended to include the additional words in italics: "Where appropriate, take account of, but not rely on, the usual behaviour or practices of either the CP or consumer *if it is raised as evidence.*" They suggest that the use of the word "appropriate" in this guideline could otherwise be rather subjective.
- 4.62 We consider that this request should not be accepted. It should be noted that, for any given individual case, a CP could 'raise evidence' of what their usual practice or behaviour might be however it is difficult to see how a consumer could 'raise' evidence of how other consumers usually behave.
- 4.63 Citizens Advice requested that A1.3 (viii) be amended to include the following words in italics: "Have regard to the relevant regulations, law and terms and conditions *and principles of fairness.*" We agree that fairness should be a key consideration. However, given that the term 'fairness' is already explicitly referred to in the guiding principles and also added to A1.3 (i) following comments made by OS, it does not seem necessary that there is an additional reference here.
- 4.64 [X] suggested that A1.3 (v) be amended so that equal consideration is given to the word of the consumer and the word of the CP *subject to evidence and credibility.*
- 4.65 We have considered this suggestion. We consider that these points are adequately covered in the existing drafting, and we do not think it is appropriate to add an explicit reference to credibility (we take this to mean the reliability of evidence, witnesses etc). The consideration of such factors is already included under A1.3 (iii) as referred to below:
- "iii) Consider the evidence presented by the parties, the specific circumstances, and other information directly relevant to the dispute and shall consider whether to request further information from either party."
- 4.66 Cable and Wireless expressed concerns that by introducing Principle A1.3 (ix), the Schemes may feel the need to counteract a lack of evidence from a consumer by ignoring some of the evidence of the CP. They requested further guidance on this.

- 4.67 We have considered this. Given that principle A1.3 (iii) requires that decision makers ‘*consider the evidence presented by the parties*’ we do not consider that the Decision Making Principles provide scope for decision makers to ‘ignore’ evidence.
- 4.68 Cable and Wireless suggested that the Decision Making Principles should include the requirement to consider what has already been offered to the customer when a decision is being made.
- 4.69 We do not consider this request is necessary as it is already captured by A1.3 (iii) (see italics):
- “iii) Consider the evidence presented by the parties, the specific circumstances, *and other information directly relevant to the dispute* and shall consider whether to request further information from either party.”
- 4.70 [3<] suggested that Principle A1.3 (viii) include additional words to not only have regard to the relevant regulations, law and terms of conditions but *also implement the law, regulations and terms of conditions*.
- 4.71 We have considered this point, and do not agree with the respondent. The purpose of ADR is to settle disputes between a CP and a consumer when they are unable to reach agreement by themselves, not to implement laws as such. The Scheme will, when considering the case in question, revisit the facts of the case (based on available evidence) and have regard to the legal context in which two parties had previously engaged i.e. contractual arrangements etc. The Scheme has the function of coming to a decision on how the dispute should be settled and that decision is given effect by Ofcom (and relevant laws / regulations). The Scheme does not as such ‘implement’ the law, regulations and terms of conditions but instead, implementation occurs outside of the Schemes either by CPs complying with Ofcom’s regulations by implementing and complying with the decisions of the Scheme (as they are obliged to do under General Condition 14.5) or by the courts if that is required, or even by the parties themselves by implementing the terms and conditions of a contract.

Other issues

- 4.72 OS suggested that in order to encourage co-operation between the Schemes, and eliminate any concerns about sharing information during the discussions about the Decision Making Principles, Ofcom should prevent CPs from transferring between Schemes. This is not something we are considering as part of this Review.
- 4.73 OS recommended that Ofcom considers the imposition of penalties for CPs who do not respond to requests from Schemes.
- 4.74 We consider that the terms of General Condition 14.5 are sufficient to require that CPs comply with the requirements set by the Schemes.¹⁷
- 4.75 OS raised the question of how Ofcom would deal with a situation where members of CISAS object to the Decision Making Principles. We consider this is a matter for CISAS to manage with their own members (as it would be for OS). Ultimately, if

¹⁷ 14.5 The Communications Provider shall implement and comply with a Dispute Resolution Scheme, including any final decision of the Dispute Resolution Body made in accordance with that Scheme, for the resolution of disputes between the Communications Provider and its Domestic and Small Business Customers in relation to the provision of Public Electronic Communications Services.

CISAS were to introduce changes to the Scheme and a CP disagreed, they may consider leaving. However, all CPs have to be a member of an ADR scheme and the Decision Making Principles would apply equally to all approved Schemes.

- 4.76 OS also suggested that use of the word 'breach' in the context of A1.5 might not be suitable. They suggested that reference to the word 'breach' is normally a term used in relation to Ofcom's activities rather than the Schemes. We consider this to be a reasonable suggestion and have amended the Principles.
- 4.77 In reviewing the Decision Making Principles, there were two further revisions that we considered appropriate. Firstly, adding the word 'unduly' at A1.3 (i). This addition recognises that, in reaching a decision on cases, some degree of disadvantage to one of the parties is likely to occur, for example a CP is expected to pay compensation etc. However, the intention should be that they will not be disadvantaged without good reason.
- 4.78 Second, we have removed the words 'to support their case' from the end of A1.3 (iv). A key objective in introducing these principles is that decision makers should request and consider evidence held by CPs that might be relevant to reaching a fair judgement. It is expected that CPs should provide *all* of the evidence relevant to reaching a fair decision, not just the evidence that *supports their case*.

Stakeholder views on the proposal of options 3 and 4

- 4.79 The stakeholder responses did not provide any specific feedback on options 3 and 4.
- 4.80 None of the stakeholders appeared to express any desire for the Schemes to take the initiative and agree between themselves a set of measures to address inconsistency ("Option 3").
- 4.81 Likewise, we did not receive any requests for approval to be withdrawn from either Scheme ("Option 4").

Ofcom's view on stakeholders' responses to the consultation and our decision

- 4.82 In summary, the evidence that has been presented during the Review leads us to conclude that the process of decision making at the Schemes can lead to inconsistent outcomes in some instances for consumers. Specifically, we have identified:
- a difference in the approach at the Schemes to awarding small amounts of compensation or goodwill payments; and
 - some inconsistencies between and within the Schemes when assessing the arguments in those cases where evidence appears to be lacking.
- 4.83 In considering whether to approve dispute resolution procedures or in reviewing the procedures or modifying the conditions of the approval, Ofcom must have regard to the need to secure that there is consistency between the different procedures which have been approved. Therefore it is appropriate for Ofcom to intervene and ensure that these issues are adequately addressed.

- 4.84 The responses received from stakeholders were broadly supportive of our preferred approach to tackling instances of inconsistency i.e. the introduction of Decision Making Principles.
- 4.85 Despite most stakeholders appearing to agree with the approach we have proposed, there were some concerns raised about the robustness of the Impact Assessment used in our the consultation, in particular that we had not adequately considered the incremental costs of the proposals. Through the consultation responses OS and CISAS have confirmed that they do not expect to incur significant costs as a result of the proposals. We have identified that CPs may incur some additional costs as a result of the proposals (see paragraphs 4.50- 4.55), but we expect these to be modest. Indeed, O2 noted that the costs are likely to be minimal.
- 4.86 There were also concerns raised about the potentially detrimental impact of some specific aspects of these proposals such as the publication of a common compensation matrix. Although transparency is a key requirement of the Act, it was not necessarily Ofcom's objective for a compensation matrix to be used as a guide for consumers. Indeed, as mentioned at paragraph 4.37, there might not even be a single document to publish as such but perhaps a framework composed of several documents that change over time. Its primary objective is to guide decision makers at the Schemes to make more consistent awards. We consider that it is appropriate to take a view on the publication of any agreed changes to compensation levels after discussions between the Schemes.
- 4.87 Also, with regard to the concern that our proposals would reduce or limit the role of the decision makers at the Schemes, it is not Ofcom's intention to limit the discretion of decision makers at either Scheme. We consider that it is entirely appropriate for decisions to be made on the basis of the merits of the specific case rather than any pre-determined policy.
- 4.88 Based on the evidence currently available, which suggests that decision making at the Schemes can lead to inconsistent outcomes for consumers, Ofcom considers that the most appropriate decision is to modify the conditions of our approval and introduce a new condition requiring the Schemes to adopt a set of Decision Making Principles.

Legal Tests

- 4.89 Pursuant to section 49(2) of the Act, we consider that modifying the approval of the Schemes to include the adoption of the Decision Making Principles would be:
- **not unduly discriminatory** because the aim of the Decision Making Principles (as reflected in the drafting) is to ensure that both the CP and the consumer are treated fairly and that neither are discriminated against or treated more favourably in making decisions;
 - **proportionate** because they do not lay down a prescription of how the Schemes should act in specific cases and do not detail the awards that certain customers ought to receive in a given set of circumstances. They provide guidance to decision makers in order to achieve more consistent outcomes for consumers and are specifically targeted to address how decisions should be made on complaints where evidence appears to be lacking and to develop a common approach to awarding compensation at the lower end of the financial scale;

- **transparent** because both Schemes will now follow a common approach in their decision making procedures and consumers will be able to understand the guidelines under which decisions are made. As stated above, we consider that it is appropriate to take a view on the publication of any agreed changes to compensation levels after discussions between the Schemes.

4.90 Therefore we consider that modifying the approval conditions of the Schemes satisfies the statutory criteria at section 49(2) of the Act.

4.91 Further as stated at above, we are satisfied that the Schemes meet the approval criteria at section 54(2) of the Act, and that with the modification to the approval conditions, the Schemes meet the requirement of consistency under section 52(7)(b) of the Act.

Next steps

4.92 In accordance with section 54(5)(a) of the Act, Ofcom modifies the conditions of the approval of OS and CISAS. It is a new condition of the approval of the Schemes that they adopt the Decision Making Principles as set out in Annex 1. This statement is a notification of the modification of the conditions of the approval for the purposes of section 54(5)(a) and section 49 of the Act. Copies of this notifying instrument have been sent to the Secretary of State in accordance with the requirements of the Act.

4.93 OS and CISAS have now both let us know in writing that they agree with this modification to their approval and we confirm that they can continue to be approved ADR schemes for the purposes of General Condition 14.

4.94 Although the Review is now concluded, Ofcom will be looking to ensure that the Decision Making Principles are embedded into the Scheme's processes in a structured and methodical way.

4.95 To achieve this, Ofcom suggests that the Schemes use the Decision Making Principles in training and internal procedures, publish the Decision Making Principles on their websites and implement a programme of activities to promote consistency which include:

- i) The appointment of a Champion at each scheme to lead the process;
- ii) A programme of work with Ofcom designed to produce a common approach to compensation;
- iii) Scheduling meetings between key individuals from the Schemes to assess:
 - o The effectiveness of the Decision Making Principles and any appropriate changes;
 - o Progress with activities to ensure consistency;
 - o Recent cases of note;
 - o Future actions.
- iv) Encouraging more regular ad-hoc communication on test cases and key issues.

4.96 Following the implementation of the Decision Making Principles, allowing for an appropriate time for them to take effect (12-18 months), Ofcom proposes review the performance of the Schemes to ensure they have had the intended effect and to consider whether there is a case for any further amendments to the Principles.

Annex 1

The Decision Making Principles

Objective of the Schemes

A1.1 To resolve disputes between consumers and communications providers (CPs).

Guiding principles

A1.2 In doing so, the Schemes should consider decisions in accordance with the following principles:

- Independence
- Fairness
- Impartiality
- Openness
- Transparency
- Effectiveness
- Accessibility
- Consistency
- Measured performance
- Official Approval
- Accountability.

Decision Guidelines

A1.3 In achieving a fair and reasonable outcome for both parties, the Scheme's decision-maker will:

- i) Be able to demonstrate that they have treated the CP and the consumer fairly so that neither is unduly disadvantaged.
- ii) Remain objective and shall promote neither the position of the consumer nor that of the CP.
- iii) Consider the evidence presented by the parties, the specific circumstances, and other information directly relevant to the dispute and shall consider whether to request further information from either party.
- iv) Recognise that both parties must, where it is in their possession, provide evidence relevant to the matters in dispute.

- v) Give equal consideration to the word of the consumer and the word of the CP.
- vi) Be mindful of, but not bound by, past rulings in similar cases.
- vii) Where appropriate take account of, but not rely on, the usual behaviour or practices of either the CP or consumer.
- viii) Have regard to the relevant regulations, law and terms and conditions.
- ix) Ensure that the outcome will be based on the balance of probabilities in the absence of conclusive evidence and give full reasons for any decision.

A1.4 The Schemes will aid the consistent application of these Decision Guidelines by working from time to time with Ofcom and one another on examples of typical and testing cases.

Compensation Guidelines

A1.5 Pre-requisites for making an award. With all types of compensation awarded the decision-maker should clearly express:

- i) What has triggered the award
- ii) Why this is sufficient to justify an award
- iii) Factors affecting the size of the award
- iv) The precise level of the award
- v) The reasoning for setting the award at this level.

Setting the level of an award

A1.6 The level of compensation awarded will be guided by a common approach to be used by the Schemes and developed by the Schemes and Ofcom based on current practice and principles.

It should be noted that these Decision Making Principles are intended to serve as an aid to the decision-maker, through creating common reference points. The precise sums awarded should always be left to the discretion of the decision-maker.