



Review of Alternative Dispute Resolution Schemes

Consultation

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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 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. 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 Ofcom is obliged to keep our approval of ADR Schemes under review and in October 2010 we began a review ('the Review') by publishing a Call for Inputs. We have undertaken the Review to establish whether it is appropriate to allow CISAS and OS to continue to be the approved ADR Schemes.
- 1.4 We have tested the Schemes against criteria established under the Act. The criteria require in summary that the Schemes are Accessible; Independent; Fair; Efficient; Transparent; Effective and Accountable. We have also assessed the extent to which the different approaches adopted by each Scheme led to any material inconsistencies between the Schemes.
- 1.5 In most respects, we are satisfied that both Schemes continue to meet the approval criteria. Since the Review began, both Schemes have introduced a number of improvements to their operations – notably improving the accessibility of their services to consumers and the efficiency of their processes. These have already started to deliver benefits to consumers and CPs.
- 1.6 The Review has identified some issues of consistency between the Schemes. 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.
- 1.7 Our analysis to date suggests that these inconsistencies may be caused by the absence of formal guidelines on how certain cases should be assessed and what level of compensation should be awarded to consumers.

What is Ofcom proposing?

- 1.8 We are proposing to modify the conditions of our approval of the Schemes as allowed by the Act. This would involve the introduction of a new condition requiring the Schemes to adopt a set of Decision Making Principles ('the Principles').

- 1.9 The Principles are a set of high level guidelines that will be referred to by decision makers at both Schemes. They include guidelines to ensure that, in achieving a fair and reasonable outcome for both parties, the Schemes:
- demonstrate that they have treated the CP and consumer equally so that neither is disadvantaged;
 - recognise that both parties should provide evidence in their possession relevant to the matters in dispute;
 - give equal consideration to the word of the consumer and the word of the CP; and
 - make assessments based on the balance of probabilities in the absence of conclusive evidence.
- 1.10 In terms of compensation, the Principles state that the Schemes should express clearly the reasoning for the award and develop a common compensation matrix with Ofcom based on current practice. The matrix is intended as an aid to decision-makers who will retain discretion in making awards.
- 1.11 We consider that the Principles will reduce the likelihood of inconsistent outcomes for consumers when accessing ADR services and provide greater clarity and certainty for the Schemes, consumers and CPs on how decisions will be made. We are seeking views on the details and potential impact of the Principles through this consultation by 29 June.

Section 2

Introduction

Why is it important to have appropriate and effective regulation of Alternative Dispute Resolution (“ADR”) 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 dispute resolution 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. In this document we refer to these jointly as “the Schemes”. All CPs are free to choose which of the Schemes they wish to belong to.

Why are we doing this Review?

- 2.3 Ofcom is obliged to keep its approval of ADR schemes under review and 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.
- 2.4 This consultation document will set out how we have reviewed the Schemes, the findings of our analysis, the changes that the Schemes have already agreed or implemented in response to our Review and our proposals on how to conclude the Review.

What is the legal and regulatory framework?

The Act

- 2.5 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.
- 2.6 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.

¹ Section 52

² <http://stakeholders.ofcom.org.uk/consultations/alternative-dispute-resolution/?a=0>

- 2.7 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;
 - the opinions of consumers in relevant markets and of members of the public generally.
- 2.8 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.
- 2.9 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

- 2.10 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.
- 2.11 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:
- 2.12 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)).
- 2.13 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.
- 2.14 Under section 54(2) of the Act, to approve dispute procedures Ofcom needs to be satisfied that the arrangements:
- 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.
- 2.15 The rest of section 54 sets out further relevant provisions. 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.
- 2.16 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)).
- 2.17 Under sections 54(6) and (7) of the Act, in approving dispute procedures or exercising the powers above, Ofcom must have regard to the following:
- 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.

The structure of this document

- 2.18 In section 3, we set out how we have reviewed the Schemes against our review criteria (discussed below) set in light of the statutory provisions referred to above. This includes a discussion of our main concerns with existing practices at the Schemes, and what has been done to address the concerns which we have identified.
- 2.19 In section 4, we explore in detail one of the more substantial concerns that emerged during the Review. This was the risk, considered in the light of the provisions of section 54(7)(b) previously referred to, and that different processes used at each Scheme might result in different outcomes for consumers. The section sets out how we investigated this issue further, and considers proposals on how the problem could be rectified.

Criteria for Assessment

2.20 In our May 2009 statement on the Consumer Complaints Review³, and then again in the October 2010 Call for Inputs, we set out the criteria that we intended to apply to our review of the Schemes. These were devised taking into account the relevant statutory provisions. The objective of the current Review was to assess whether the Schemes were performing satisfactorily against the criteria below:

- **Accessibility** - ensuring that consumers 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**⁴ - not discriminating against or indeed in favour of consumers or CPs in making decisions.

2.21 In addition to these criteria, section 54(2) of the Act requires that there is **consistency** between the Schemes. Having 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 that the number of approved Schemes is kept to a minimum.

³ Paragraph 4.6 http://stakeholders.ofcom.org.uk/binaries/consultations/alt_dis_res/statement/statement.pdf#

⁴ This criterion was not included in the original call for inputs but was added to section 54(2)(b) when the Communications Act was amended in 2010.

The Assessment

- 2.22 As well as taking into account the views of the Schemes we have:
- audited the internal operations of the Schemes;
 - measured performance against KPIs; and
 - compared the Terms of Reference of both Schemes.
- 2.23 In addition, we have 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.
- 2.24 The Mott reports (the first study completed in May 2011, the second in December 2011) are published alongside this consultation.
- 2.25 Section 3 assesses the Schemes against the criteria set out above.

Impact Assessment

- 2.26 The analysis presented in this document represents an impact assessment, as defined in section 7 of the Act.
- 2.27 Impact assessments provide a valuable way of assessing different options for regulation and 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 website⁵.
- 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.

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.

⁵ <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment>

- 2.30 We have given careful consideration to whether or not our proposals 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 proposals contained in this consultation will have a detrimental impact on any particular group of people. Indeed, our proposals focus on furthering 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

Introduction

3.1 We undertook an analysis that considered how the Schemes performed against the criteria set out at para 2.20⁶. We also assessed whether there was consistency between the Schemes. This section considers the main issues that were identified during this analysis and explains what steps have been taken, where appropriate, to ensure that both Schemes can be considered for approval.

Accessibility

- 3.2 Section 54(2) of the Act requires that ADR procedures are easy to use, and under section 54(7)(a) Ofcom must secure that customers are readily able to comprehend dispute procedures.
- 3.3 Our criteria set out that consumers should have easy access to 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.
- 3.4 The Review identified a number of accessibility issues at both Schemes. For example, we had some concerns on the level of information available for consumers on the Schemes' websites and the ease with which consumers could apply to ADR online.
- 3.5 We have discussed these issues with the Schemes, and both CISAS and OS agreed to introduce a number of measures intended to improve the information available to consumers and provide better support for consumers in referring matters to ADR.
- 3.6 OS recently redesigned their website to improve navigation and to increase the level of information provided. The site includes on-line forms for consumers making complaints and for CPs wishing to register with the scheme. They have signalled that they are continuing to improve their website's usability to ensure that the form is easily accessible and easy for consumers to navigate. Font size and screen colour can already be adjusted to suit readers with vision impairments, and changes are being made to make the site compliant with accessibility standard WCAG 2.0⁷. A project is underway to examine how the website could help complainants to track the progress of their complaint.
- 3.7 CISAS have introduced a more user friendly website (including user guides and FAQs) and have formed an advice and assistance team to help consumers. As with OS, complaints are taken in writing, by email, online via their website, verbally over the telephone or by textphone. The advice and assistance team will complete all necessary paperwork on behalf of anyone who requests it.

⁶ These criteria were also noted in our May 2009 statement on the Consumer Complaints Review and in the Call for Inputs.

⁷ Web Content Accessibility Guidelines (WCAG) are part of a series of Web accessibility guidelines published by the W3C's Web Accessibility Initiative. The World Wide Web Consortium (W3C) is the main international standards organisation for the World Wide Web (abbreviated WWW or W3).

- 3.8 We are satisfied that both Schemes have sought to address the concerns that we highlighted to them on accessibility. The number of cases accepted by both Schemes increased significantly during 2011. We will continue to monitor the accessibility of the Schemes and work with them to ensure that where appropriate, further improvements are introduced.

Independence

- 3.9 We were keen to ensure individuals at the Schemes, who were responsible for making decisions about cases, could do so independently and without interference from member CPs.
- 3.10 The CISAS company structure means that only the adjudicators are involved in making decisions. These adjudicators do not have direct contact with either complainants or member companies (though can request further information from both). The management of CISAS are never involved with the decision making process relating to the outcome of disputes at all.
- 3.11 At OS, the Chief Ombudsman is also the Chief Executive. However, there are Governance arrangements in place at OS that seek to ensure that the Chief Ombudsman is free from undue interference from CPs. For example, the Chief Ombudsman is responsible to, and appointed by, an independent Board who also set remuneration. The Board members are completely independent from any participating CPs.
- 3.12 OS' internal structure also includes the role of an Independent Assessor (IA), who is appointed by the independent Board. If complainants are not satisfied with the way in which their case has been processed, and cannot subsequently resolve the dispute with the Ombudsman, they can complain to the IA. The IA will consider evidence used in the case and decide if the complaint against the Ombudsman is justified. If these complaints are upheld, they are included in a report and published on the website.
- 3.13 CISAS had also provided access to an IA. However, following the retirement of the individual occupying the post, the role passed over to the Managing Director. Ofcom considers that these responsibilities should reside outside of the CISAS management structure to ensure that it is clear that complaints are being considered independently. CISAS have now signalled that a new IA has been identified and an announcement regarding the appointment will be made shortly.
- 3.14 On the basis that CISAS have confirmed that they will reinstate IA arrangements, we are satisfied that CISAS and OS have structures and processes in place to provide a suitable environment for adjudicators and investigation staff to manage cases independent from interference or influence from member CPs.

Fairness

- 3.15 Our Review identified several potential impediments to the Scheme's ability to achieve fairness in all cases and we consider them in turn below. In assessing how well the Schemes perform in respect to fairness, we also considered how the Schemes approach the newly incorporated requirement to ensure that the procedures used are non-discriminatory.

Right of appeal

- 3.16 OS have traditionally provided a formal right of appeal on decisions with no such right at CISAS. OS have recently decided to streamline their processes so that most cases can be resolved through mediation with the right of appeal removed from their processes. This will mean that neither Scheme will include a right to formal appeal.
- 3.17 We have considered whether the lack of an appeals stage materially affects the Schemes' ability to meet the fairness criteria.
- 3.18 The Act does not stipulate that the Schemes must include an appeals stage. Moreover, evidence collected through the first Mott study⁸ suggests that the absence of a formal appeals process at CISAS did not materially affect the reasonableness of decisions and that the impact of having an appeals at OS did not materially add benefit to consumers.
- 3.19 Mott found most decisions at CISAS and OS to be reasonable and that, and in cases where 'unreasonable' verdicts were reached, other changes have been proposed to address them. These proposals are discussed in detail in section 4.
- 3.20 During Mott's review of OS cases, out of 80 cases, only 19 opted to appeal, and out of those, only 6 changed the outcome after an appeal. In those cases the changes were in general minor and did not materially affect the outcome.
- 3.21 The appeals process at OS meant that cases could potentially last 22 weeks, as opposed to a maximum of 6 weeks at CISAS where an appeals process did not exist.
- 3.22 Consumers do still have an opportunity to make their case and respond to arguments in the absence of a formal appeal. The CISAS process allows for the cross submission of evidence between consumer and CP, so that either party can consider and respond to the evidence under consideration. Under OS' processes the consumer has a right to argue their case during mediation.
- 3.23 In addition, as described under the Independence criteria above, both Schemes will provide the right to complain to the Independent Assessor, so consumers can challenge the 'processes' of complaint management.
- 3.24 Given the evidence provided by Mott which indicates the value of an appeals stage is limited, the absence of requirement in the Act and the other opportunities for the consumer to make challenges to the process, we have concluded that the absence of an appeals stage is not a factor to prevent approval. The addition of an appeals process would be likely to increase costs to the Schemes, CPs and ultimately consumers and to extend considerably the average length of time cases take to reach decision. Consumers can also pursue their complaint further in the courts if they wish to.

Request and remedy

- 3.25 The application process at CISAS requires that consumers state up front what they are seeking in terms of redress, e.g. compensation or an apology. CISAS have not awarded compensation to customers if they have not requested it at the start and impose a cap on awards based on what consumers stated at the outset. OS does not have such rules.

⁸ Para 2.11

- 3.26 This issue raised concerns around fairness and consistency - given that two different amounts could be awarded for identical cases. In addition, CISAS' arrangements meant that adjudicators did not have flexibility to provide a higher level of redress in certain cases where it may have been appropriate.
- 3.27 CISAS maintain that consumers should state if they are seeking compensation. They believe stating a claim at the outset assists the consumer and the CP to reach early settlement by making clear what redress the customer is seeking. CISAS also argue that there are only a small percentage of customers who do not state a claim for compensation, and many of these do not want compensation but rather an apology or reprimand from the company.
- 3.28 Following discussions with Ofcom, CISAS have agreed to modify their approach by changing their guidance to indicate that adjudicators would 'normally' not exceed the amount stated by the customer, allowing for discretion to apply in exceptional cases. CISAS are currently in consultation with their members regarding the necessary change to the rules to accommodate this amendment. They have also agreed to make changes to their application forms and guidance to make clear the need to state redress sought.
- 3.29 We welcome this change of approach at CISAS, and consider that it helps achieve more consistency at the Schemes. These changes should also provide some benefit to those consumers who may have underestimated the level of claim that they may actually be entitled to. On the basis that CISAS confirm this change, we are satisfied that these new arrangements meet the fairness criteria.

Decision making and compensation

- 3.30 The evidence collected by Mott suggests that, in certain cases where evidence is lacking, there is a potential for case handlers to exercise discretion when reaching verdicts that may not be in line with what would be expected from the Schemes' own objectives and rules. This may lead to some consumers receiving differing verdicts despite making complaints based on a similar set of circumstances.
- 3.31 This is an area of concern which we have discussed with the Schemes. It is relevant to the requirement to have non-discriminatory procedures under section 54(2)(b) of the Act and the broader requirement for the Schemes to act consistently under section 54(7)(b). We discuss how these issues have been addressed in section 4.

Efficiency

- 3.32 The Review identified concerns over the operational effectiveness of OS. In particular OS were unable in 2010 and 2011 to consistently meet its KPI to reach provisional conclusions for 90% of cases within 6 weeks. This has been reflected in low satisfaction levels of consumers who have sought redress from OS, with only 48% of consumers satisfied with the service in 2010 compared with 72% in 2009⁹.
- 3.33 OS has improved its operational effectiveness significantly over the period of the Review. In the past 18 months it has developed faster processes, such as a mutually acceptable settlement (MAS) process that allows it to resolve cases without the need for formal investigation. In addition, it has introduced short form reports that focus on the key elements of a complaint and the reasons for their decision on the case. As a consequence its record against its KPI targets has improved. OS is now more

⁹ <http://www.ombudsman-services.org/research-os.html>

consistently meeting its KPIs set by Ofcom¹⁰. It is of course important that the recent improvements in performance are maintained; Ofcom will continue to monitor OS's KPIs closely.

- 3.34 OS is currently developing a further change to its processes. It will see front-line enquiry officers working to resolve simple complaints quickly using telephone based resolution methods. It will now aim to resolve more complaints using its MAS process. This provides an opportunity for further, more in-depth investigation to be conducted on the most complicated and protracted complaints and allows the Ombudsman Team to be used throughout the business to improve efficiency.
- 3.35 Alongside operational improvements, OS have introduced measures to ensure the financial sustainability of their operations. They have adjusted their charging structure so a greater proportion of their revenue comes from subscription fees rather than case fees, which fluctuate depending on complaint volumes.
- 3.36 We have also considered the operational effectiveness at CISAS and not identified any evidence that concerns us in respect to this criterion. They have a consistent record of meeting the KPIs published on their website¹¹.
- 3.37 These improvements have provided us with confidence that both Schemes are well positioned to continue to provide efficient and effective ADR services for the foreseeable future.

Transparency

- 3.38 Section 54(1) (b) requires ADR Schemes to be transparent. In the Review Ofcom has sought to ensure that consumers and CPs were made fully aware of the outcome and process for any decisions made.
- 3.39 Both Schemes write to the consumer and the CP after a decision has been made. The letter contains a reasoned explanation for why a decision was made and, when appropriate, sets out what actions are required, e.g. detailed requirements on CPs to implement the award of compensation payments by specific timescales.
- 3.40 However, Mott's report identified a concern that many of the principles for decision making currently used by the Schemes are 'inferred' or 'implied' at present, or passed on verbally during training and case review¹² – but not formally laid down in one place.
- 3.41 In order to address this concern, we are proposing to introduce a set of Decision Making Principles which will set out some common guidelines for the way in which decisions are actually reached. This issue is considered in detail in section 4. We will ensure that the Schemes publish the contents of the Decision Making Principles on their respective websites so consumers have the ability to understand the Schemes' approach to making decisions.

Effectiveness

- 3.42 Sections 54(2)(e),(f) and (g) of the Act require that Ofcom must be satisfied that ADR Schemes :

¹⁰ Performance Figures - <http://www.ombudsman-services.org/service-standards-os.html>

¹¹ http://www.cisas.org.uk/KeyPerformanceIndicators-17_e.html

¹² Mott Study – December para 2.5.2

- ensure that disputes are effectively investigated;
- have power to make awards of compensation; and
- enable such awards to be properly enforced.

Investigations and compensation

- 3.43 During the Review Ofcom sought to ensure that the Schemes have processes in place to ensure that investigations are effective and that CPs comply in full with a final decision, such as the award of compensation or the issuing of a letter of apology.
- 3.44 At OS, simple complaints are identified for informal resolution which can usually be resolved through phone calls between the parties. Less straightforward complaints are passed to the resolution team who look at the information provided by both sides. The Investigation Officer speaks to both parties and tries to agree an early resolution. If this is not possible, a report on the case is produced and sent to both parties to check for errors and ensure that key information was not missed. If both parties accept this, it becomes the final decision.
- 3.45 As with OS, adjudicators at CISAS have the ability to request further information from either party in order to help them to make a fair determination of the claim. Adjudicators apply legal principles to determine whether the consumer has proven, on the balance of probabilities, that the CP has breached the contract or its Code of Practice. However, consumers are provided with an opportunity to comment on the CP's response to their claim.
- 3.46 The first Mott study (looking at 80 cases at each Scheme) looked at the investigations processes at each Scheme in order to examine the quality of decision making. They concluded that despite process differences at the two Schemes, the evidence gathered from consumers was of an equivalent quality and 'the act of adjudication' was very similar at both CISAS and OS. According to Mott:
- 'Both organisations naturally value people capable of assessing complex data, making sound judgements upon it, and able to communicate those judgements effectively to consumers and CPs'.
- 3.47 However, Mott did identify some aspects of the investigations process that could be improved. For example, whether the Schemes should make greater efforts to gather evidence from CPs in certain cases where evidence appears to be lacking. We consider areas of improvement in more detail in section 4.

Enforcement of decisions

- 3.48 When CISAS issue a decision, the onus is on the CP to confirm compliance. CISAS provide a form for the CP to notify them. When they receive this notification, CISAS contact the customer to confirm.
- 3.49 If the deadline for compliance elapses without confirmation from the CP and the consumer, CISAS contact the CP in question and request an explanation. If the CP has not complied, CISAS raise a 'Stage 1' letter giving them 7 days to comply before the matter is escalated. If the 7 day deadline is reached and they still have not complied, the file is escalated to the Director of Service and Development to contact a senior person at the CP and a 'Stage 2' letter is raised. If a further 7 days elapses

and there has been no compliance or satisfactory response, the matter is escalated to the Managing Director (MD) at CISAS at 'Stage 3'. It is at this stage that the MD would contact Ofcom if appropriate.

- 3.50 OS have a slightly different approach. When a final decision is made, and the CP fails to implement the remedy, OS support the complainant to ensure that the remedy is put in place.
- 3.51 In both cases, Ofcom is alerted if problems like this arise and can consider the issue in the context of the General Condition 14 requirement on CPs to comply with any decision of an ADR scheme.
- 3.52 Although each Scheme has a slightly different approach to the act of adjudication and the implementation of remedies, we consider the structure and processes at both Schemes are sufficiently robust to ensure that decisions are made following examination of evidence, complied with by CPs, and remedies are properly enforced.

Accountability

- 3.53 Ofcom's objective is to ensure that KPIs are appropriately targeted:
- to ensure the efficient delivery of services;
 - to ensure the level of reporting against KPIs to Ofcom and the public maintains an appropriate level of accountability; and
 - to align the recording and reporting systems of the two Schemes to enable direct comparisons on the consumer issues that are being dealt with.
- 3.54 Both Schemes already have in place KPIs agreed with Ofcom to provide some measurement of performance¹³. We considered previously the introduction of an end-to-end KPI to allow for better comparisons of each Scheme's process time to further align KPIs. This would provide external parties with the ability to assess the relative performance of the Schemes going forward and provide an incentive for the Schemes to run operations in an efficient and effective manner.
- 3.55 As OS are in the process of adapting its procedures, we propose to put this issue on hold subject to further consideration with the Schemes in due course.
- 3.56 In the meantime, we consider that the absence of a comparable KPI at the Schemes is not a reason to withdraw approval of the Schemes.

Conclusion

- 3.57 The evidence we have collected during the Review identified a number of concerns. However, as explained above, Ofcom has worked with both Schemes to ensure that these have been addressed.
- 3.58 Concerns on consistency and the fairness and transparency criteria are discussed further in section 4.

¹³ These include metrics to record % of reports issued in under six weeks; % of reports issued over eight weeks and % of calls answered under than 5 minutes.

Section 4

Decision Making and Compensation

Consistency of outcomes for consumers

- 4.1 Ofcom has always been aware that OS and CISAS have contrasting 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.
- 4.2 The initial findings of the Review suggested there may also been 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 CISAS¹⁴. There was also a difference in the size of the awards made at each Scheme, £103 at OS and £173 at CISAS.
- 4.3 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 scheme¹⁵.

Mott MacDonald Study

- 4.4 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)¹⁶. Mott considered any of the process differences between the Schemes incidental to the act of reaching a decision.
- 4.5 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 lacking¹⁷.
 - 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")¹⁸.
- 4.6 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.

¹⁴ http://www.otelo.org.uk/downloads/2010_annual_report_Otelo.pdf and http://www.cisas.org.uk/media/text/CISASAR2009FINAL_22SEPT2010.pdf

¹⁵ Mott reviewed 80 cases at each scheme, a total of 160 cases.

¹⁶ Mott Study (May) – Para 2.2

¹⁷ Mott Study (December) para 2.3.8.

¹⁸ Mott Study (December) para 2.4.7.

Approach to consumer's argument when evidence is lacking

- 4.7 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 materials¹⁹.
- 4.8 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.
- 4.9 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 proving their case²⁰. 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.
- 4.10 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 lacking²¹. 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.
- 4.11 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. Of the verdicts at CISAS that Mott considered 'not reasonable'²², 12 of 14 were cases decided in favour of the CP. There were instances of this also at OS with 6 of 13 'non-reasonable' verdicts found for the CP²³. Although this quantitative evidence from the first Mott study suggests a stronger pattern of these tendencies at CISAS, Mott's 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.

¹⁹ Mott Study (December) para 2.2.7.

²⁰ Mott Study (December) para 2.3.4

²¹ Mott Study (December) para 2.3.6

²² Mott used a typology of 'verdicts' when analysing case decisions in its first report. There are five different verdict ratings including 'very reasonable' and 'reasonable'. The other three could be described as 'non reasonable' as above. These include 'Average' (acceptable but a good argument could be made for a different verdict), 'Questionable' (questionable decision, important evidence ignored and a different outcome preferred), and 'Unreasonable' (incorrect decision, a different verdict ought to have been reached).

²³ Mott Study (December) para 2.2.7

Approaches to awarding compensation/goodwill at the schemes

- 4.12 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 £50²⁴. 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.
- 4.13 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 (an award equivalent to 'a bunch of flowers') that there existed a significant difference in practice.

Mott's explanation for inconsistent tendencies at Schemes

- 4.14 In its further study, Mott attributed the examples of inconsistent decision making identified above down to a lack of formal guidance available to decision makers at each scheme²⁵. 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 ensuring 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 for addressing instances of inconsistency

- 4.15 We are considering the following options at this stage. These are:

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'

Option 3: Ofcom to invite the Schemes to agree between themselves a set of measures to meet the consistency objectives

Option 4: Withdraw our approval

- 4.16 Our preferred option in this consultation is Option 2.

Option 1 - Continue our approval of the Schemes without any changes to the Schemes

- 4.17 The first option is to continue the approval of the Schemes.

²⁴ Mott Study (May) para 2.5.2

²⁵ Mott Study (December) para 2.2.7

- 4.18 The evidence from the Mott studies suggests that there is inconsistency in certain aspects of decision making at each Scheme. As discussed above, in a number of cases where evidence is lacking, there was a tendency for verdicts to be found in favour of CPs even when it might not be reasonable to do so. Mott also noted a different approach by the Schemes to the award of small amounts of compensation for poor customer service or inconvenience.
- 4.19 The absence of formal guidance on these points might mean different decision makers take different approaches e.g. some may seek out further evidence when others do not. This inconsistent pattern of reaching decisions, 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.
- 4.20 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 believe should therefore 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.
- 4.21 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.
- 4.22 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.
- 4.23 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 either Scheme 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.

Option 2 - Introduce a condition to the existing approval requiring the Schemes to adopt a set of 'Decision Making Principles'.

- 4.24 The second option we have considered is for Ofcom to introduce a condition to its approval of the Schemes requiring the Schemes to adopt a set of principles covering their approach to making certain types of decision and compensation payments.

- 4.25 We have worked with the Schemes and Mott to develop a set of 'Decision Making Principles' ('the Principles'). The objective we had in drawing up the Principles was to ensure greater consistency in decision making and compensation awards. The aim is that this would :
- 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.
- 4.26 These Principles are set out in draft in Annex 1. They include guidelines to ensure that, in achieving a fair and reasonable outcome for both parties, the Schemes:
- demonstrate a level playing field between the CP and consumer;
 - recognise that both parties must provide evidence in their possession relevant to the issues in dispute;
 - make assessments based on the balance of probabilities in the absence of conclusive evidence; and
 - give equal consideration to the word of the consumer and the word of the CP.
- 4.27 Under this option Ofcom would approve the Schemes with the condition in place that they adopt the Principles.
- 4.28 The 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.
- 4.29 Instead they would provide guidance for decision makers on cases. The adjudicators and case handlers would be able to refer to the Principles as more uniform guidance, rather than rely solely on individual decision making that at present has the potential to lead to inconsistent outcomes for consumers and CPs.
- 4.30 Ofcom would expect to work with the Schemes as they interpret and implement the Principles and apply them to cases in a rapidly changing market. We would expect these discussions to be with both Schemes at the same time so that a common understanding and interpretation applies over time.
- 4.31 Below we consider the impact of this option on consumers, CPs and the Schemes. We consider first the impact of the Principles on decision making generally and then specifically the impact of Principles on compensation awards.

Decision-making

The impact on consumers

- 4.32 The Principles are intended to lead to more consistent outcomes for consumers. If case handlers at either Scheme have access to an agreed set of standards (formal

written guidance) on how the verdicts of certain decisions should be determined, they are less likely to follow more individualistic patterns of decision-making that might not be consistent with verdicts made by their own colleagues or individuals at the other Scheme on similar cases.

4.33 In addition, we anticipate that the Principles will encourage the Schemes to manage cases in line with their stated objectives to establish a level playing field between CPs and consumers. As identified by Mott, the Schemes displayed a tendency to favour the CP's word in cases where evidence was lacking. For example, certain case handlers placed a significant reliance on the 'usual' behaviour of CPs, rather than the individual circumstances of the case. In addition, respondents from the Schemes appeared unwilling to take advantage of evidence which might have been captured by the CP, for example call recordings; case notes etc that could help confirm facts of any given case. The following examples taken from the Mott report illustrate this point.

- *A case in which a consumer's mis-selling claim is rejected as she cannot provide evidence of the original telephone sale or "substantive" evidence of customer service failings – despite providing a fairly credible account of both. The mis-selling claim related to being given a contract for £20 a month, when £18 had been promised and, given the customer went on to agree a more expensive contract with the CP subsequently, it seemed unlikely they would have fabricated the mis-selling claim over such a small amount.*
- *Two cases in which a consumer's case is failed for not being able to prove something promised in shop sale situation*
- *A further case being rejected for not being able to prove a verbal sale, with the adjudicator awarding nothing despite the fact that the CP had originally offered compensation.*

4.34 These tendencies appeared inconsistent with the Schemes' stated objective of 'levelling the playing field' between consumer and CP. The introduction of the Principles could lead to the formalisation of certain processes at each Scheme that enable decision makers to achieve the Schemes' stated principles of fairness (level playing fields etc). In certain cases where evidence is lacking, and where CPs are likely to hold certain types of evidence (because of their existing record keeping obligations under General Conditions 23 and 24), case handlers should, as a matter of standard practice, request this information for consideration before reaching a final judgement and this is reflected in the Principles.

4.35 We do not expect the introduction of the Principles to change how the majority of decisions are made or what the level of compensation is awarded across all scales. Looking at the analysis of complaint cases completed by Mott, 8-10% of cases across both Schemes were described by Mott as reaching 'unreasonable' or 'questionable' verdicts. Although it is not possible to be certain that the impact of the Principles will be to address those cases exactly, it is unlikely that they will materially affect cases (the large majority) seen by Mott as 'very reasonable', 'reasonable' or 'average'.

Impact on Communications Providers

4.36 The CPs who belong to these Schemes may see several impacts. Firstly, there could be a greater degree of scrutiny of the evidence that they hold. If, as Mott suggest, there are instances where the Schemes could seek out evidence collected and

retained by CPs, the latter could see more requests for evidence. This could result in some increased costs for CPs, for example through extra staff time to find and provide the evidence requested by the Scheme. However we anticipate that any extra costs would be small because of the small number of cases involved and CPs are under existing obligations under the General Conditions to retain records so new record keeping systems would not need to be implemented.

- 4.37 The Schemes' consideration of additional evidence may not necessarily lead to different verdicts in the types of cases highlighted by Mott (where evidence is otherwise lacking). Indeed the provision of additional evidence by the CP may even help validate the CPs case. The important point is that case handlers may, as a matter of course, seek out additional evidence where it might exist, rather than rely too heavily on CPs' usual behaviour, or fall back too easily on balance of probability arguments in cases where existing levels of evidence are apparently limited.
- 4.38 The adoption of a more 'proactive' approach to gathering evidence may, in the long run, encourage customer facing staff to raise their overall approach to customer service if there is the likelihood that contacts with customers could be scrutinised at some future point.
- 4.39 A key objective is that decision making is more evidence based and fair.

Impact on the Schemes

- 4.40 We consider that the introduction of the Principles will provide each Scheme with the means to meet with the requirements of fairness and effectiveness in relation to decision making and compensation, and consistency between the Schemes. In meeting the requirements of the Principles, we would expect the Schemes to invest resources into complying with these additional obligations. We would expect there to be some costs in the following areas:
- Management involvement in ongoing discussions (meetings, workshops etc) on the implementation of the Principles – we would expect meetings to be taking place every few months initially but perhaps less regularly as more issues are agreed.
 - Training costs – the Principles will need to be communicated and explained to staff working on cases. We would expect such training to form part of existing training programmes.
 - Additional compliance costs on the Schemes in terms of additional scrutiny of cases where evidence is lacking and possibly additional time needed to manage certain cases.
- 4.41 We have considered whether there may be an impact on competition between the Schemes. The Schemes compete for the business of CPs. That competition is based primarily on operational issues such as efficiency and costs. The Schemes should not compete on their approach to decision-making (which must produce consistent outcomes) so we do not consider that the Principles will have any impact on competition.

Compensation

- 4.42 The Principles would also include a requirement for both Schemes to agree and implement a common approach to compensation. This could provide greater

certainty and transparency to CPs, consumers and the Schemes. Although the Mott study suggests that, on the whole, the existing compensation arrangements at each Scheme are consistent, there appears to be divergence for payments at the lower end of the scale.

- 4.43 It is not possible to say whether the proposed introduction of a common approach to compensation will result in a variation in the aggregate level of compensation until a common compensation matrix is agreed by the Schemes. However, it would be unlikely that significant changes to the Schemes' approach to compensation would follow. Mott's analysis suggested that the Schemes appeared to be awarding broadly similar sums for the same things.²⁶ As mentioned above, it is only at the bottom end of the scale, where payments are closer to a proxy for a "bunch of flowers" that there is a significant difference in policy.
- 4.44 However, regardless of the impact of this settlement, there is benefit to consumers generally, in knowing that they are being awarded sums based on standard criteria, rather than dependent on the Scheme their CP belongs to, or the case handler that happens to be responsible for managing their case.
- 4.45 There should also be greater certainty for CPs. As the Schemes have the power to force CPs to award sums to consumers, there should be additional confidence that certain types of awards are made in a consistent way. This should also relieve any potential concerns that one Scheme is more likely than the other to award sums. Under a common approach to compensation, both Schemes would be subject to the same requirements.
- 4.46 The Schemes are aware of this divergence of compensation policy and the proposed introduction of the Principles is intended to provide the basis for more of a uniform approach to setting compensation awards at the lower end of the scale.
- 4.47 In order to ensure the proposed Principles are implemented, we consider that there needs to be a longer term process of information sharing, communication and cross comparison between the Schemes, using a selection of past decisions as reference points. Ofcom proposes to lead with these discussions primarily through a series of workshops to be held in due course.
- 4.48 We believe that these discussions have the potential to lead to a more unified approach to decision-making and compensation awards in those instances where there is currently potential for inconsistency.

Option 3: Ofcom to invite the Schemes to agree between themselves a set of measures to meet the consistency objectives

- 4.49 Under this option, we would invite the Schemes to address the issues themselves with limited input from Ofcom. So the Schemes could formulate and implement their own remedy to the issue of consistency (instead of the draft Principles).
- 4.50 Ofcom has a key role in ensuring that regulatory approaches adopted in the areas where we have duties are both effective and proportionate, and are in line with best regulatory practice. The Act sets out a number of specific duties and obligations for us in carrying out our regulatory activities, for example, in relation to promoting self-regulation and reducing regulatory burdens, so the consideration of options which propose a limited role for Ofcom may be appropriate.

²⁶ Mott Study (May) Para 2.5.3

- 4.51 To date, we have not invited the Schemes to propose a remedy of their own, and they have not, to date, presented any alternative options to us. However, we can consider the likelihood of the Schemes formulating their own remedy and likely impact that this approach might have on consumers, CPs and the Schemes themselves.
- 4.52 A key consideration under this option is the likelihood for two rival organisations to work together to formulate an effective solution to the problem of delivering consistency even if required by the existing approval criteria. As explained in section 2, the Act envisages a situation where more than one Scheme is approved but requires Ofcom to have regard to securing consistency between the Schemes. Although both Schemes have a shared goal in complying with the existing criteria, they compete with each other to attract industry members to sign up to their services. This may impact on the extent to which the Schemes are able to work together effectively to formulate, agree and implement an effective remedy that appears to depend on some form of co-operation.
- 4.53 Though both Schemes are to be commended on their cooperation with the Review to date, there may be natural reservations on both their parts to work together as closely, and as intensely as is perhaps required to meet the objectives in the criteria. For example, the Schemes have already expressed some concerns about the sharing of some materials with their competitor – which though reasonable may be an example of the obstacles (typical to competitive organisations) of working effectively together. As part of the process of developing the draft Principles, we explored the extent to which the Schemes were prepared to work together independently of Ofcom to address these issues. However they asked Ofcom to coordinate and lead the work on the Principles because of the competition and confidentiality issues set out above.
- 4.54 It is worth emphasising, in this connection that both Schemes have contributed to the proposed Principles. For example, they both openly agreed to contribute time and resources to input to both Mott Studies, and provided comments on the Decision Making Principles at a workshop organised by Ofcom in December 2011²⁷. So it is likely that the knowledge, industry insight and experience held by both Schemes has been captured in formulating existing detailed proposals. There could be a concern that providing the Schemes with a further opportunity to formulate proposals by themselves may simply lead to a similar set of proposals but agreed at a much later date which would seem to unnecessarily prolong the negative impacts of uncertainty on consumers and CPs. Such a prolonged process may also generate unnecessary costs on the Schemes who would have to invest time and resources into negotiations with the other Scheme.
- 4.55 Additionally under this option, we consider that it would not be possible to continue to approve the Schemes pending the outcome of the process. The evidence suggests that the Schemes are not fully meeting some requirements as explained in this document. This may require us to withdraw our approval until a satisfactory proposal to the problem was in place.
- 4.56 For these reasons and for those noted at paragraphs 4.25-4.29 which highlight the benefits of option 2, we do not propose to adopt this option.

²⁷ This workshop provided an opportunity to discuss and develop the Principles. While these discussions did not deliver a final version of the Principles, they did provide an opportunity for both parties to discuss and highlight the main issues relevant to them. This workshop forms the basis of Mott's third document published alongside the other reports.

Option 4: Withdraw our approval

- 4.57 Ofcom could consider withdrawing approval of either Scheme if we thought this necessary. At this stage, we consider that the concerns discussed in this document consistency apply to both Schemes, and so the option of withdrawing approval would most likely involve both existing Schemes. There could be a number of serious implications to this.
- 4.58 It would remove consumers' access to ADR services. Ofcom has not been able to quantify the precise impact of this option on consumers, however, given that we know approximately 10,000 consumers a year use this service, we can expect there to be significant detriment to these consumers if they are not able to access these services and seek resolution of their complaints.
- 4.59 Moreover the absence of any approved ADR Schemes would place all CPs, in clear breach of General Condition 14.5. This condition requires all relevant CPs to belong to an 'approved' body and if none existed, they would by default not be able to comply with this regulatory requirement. Ofcom would have to consider removing this General Condition and making an Order under section 55 of the Act to ensure that there are dispute resolution procedures in place to protect consumers. This would of course mean that there would be a significant period of time during which consumers were unprotected with great potential for consumer harm and detriment.
- 4.60 The option would also have a significant impact on the Schemes who would no longer be able to provide these services on the basis of Ofcom's approval.
- 4.61 Given that the evidence collected during the Review suggests that the Schemes meet most of the approval criteria, that the concerns that we have identified affect a relatively small number of cases and the availability of other options to address the problems identified, the option of withdrawing approval, with the significant implications for consumers and CPs' complaints handling, does not appear an appropriate or proportionate one, provided that our concerns are addressed by one of the means we have identified.

Preferred option

- 4.62 We consider that the problem of inconsistency in the decision making procedures at the Schemes and the difference in the Scheme's approach to awarding compensation payments at the lower end of the scale can be addressed by a targeted and proportionate intervention by Ofcom.
- 4.63 We note the changes which have been adopted by the Schemes during the course of the Review to ensure that they continue to meet the statutory approval criteria in a number of relevant respects. However, the issue of consistency, which also affects our assessment of whether the Schemes are fair and transparent has not yet been addressed by changes to the Schemes.
- 4.64 In addition, under section 54(7) of the Act, we are specifically directed to consider consistency in connection with any modifications which may be made to our approval of the Schemes. That appears to us to indicate the fundamental importance of this requirement and to make it appropriate for the Principles to form a condition of our approval.
- 4.65 We consider that modifying the conditions of approval in this way furthers the interests of consumers under section 3(1) of the Act by providing the Schemes with

greater guidance on what is expected when making decisions and helping to develop a common approach to awarding levels of compensation, and is consistent with our duties under section 4(2) of the Act as sections 52 to 55 of the Act were implemented pursuant to Article 8 of the Framework Directive.

Q1 Do you agree Option 2 (Principles proposed by Ofcom) should be preferred? If not please explain your answer.

Q2 Are there other consequences following the introduction of the Principles that we have not included in our assessment? If so, please explain.

Q3 For communications providers and the Schemes: Can you provide an estimate of any costs to your organisation from either of introducing the Principles or as a consequence of the Principles proposed in Annex 1?

The Decision Making Principles

4.66 A draft of the Principles, aimed at addressing the issues of compensation and decision making is set out in Annex 1. The current draft has been formulated with input from the Schemes and both are, in principle, willing to agree to sign up to the Principles.

Q4 Do you have any comments on the scope and wording of the proposed Principles?

Next steps: embedding the proposed Principles

4.67 Ofcom is publishing this document in order to provide stakeholders with an opportunity to comment on the work we have undertaken during our Review. Once we have fully considered these responses, we aim to publish our decision on approval of the Schemes in a statement.

4.68 If Ofcom's eventual decision is to confirm the introduction of a condition requiring the adoption of the Principles by the Schemes, for the Principles to have a meaningful impact it is important to ensure that they are embedded into the Schemes' processes and cultures in a consistent way. To achieve this, Ofcom would propose the Schemes should use the Principles in training and internal procedures, publish the Principles on their websites and implement a programme of collaborative activities to include:

- i) Appointment of a Champion at each scheme to lead the collaboration process;
- ii) A programme of work with Ofcom designed to produce a common compensation matrix
- iii) Scheduling meetings between key individuals from the Schemes to assess:
 - o The effectiveness of the Principles and any appropriate changes;
 - o Progress with collaborative activities;
 - o Recent cases of note;
 - o Future actions.

- iv) Encouraging more regular ad-hoc communication on test cases and key issues.
- 4.69 After a period to allow the Principle to take effect, Ofcom intends to conduct a further cross-scheme review of outcomes, to identify progress and further amendments to the Principles.

Q5 *Do you have any views on methods to embed the Principles?*

Annex 1

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 Outcomes 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 equally so that neither is 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 to support their position.

- 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 breach has triggered the award
 - ii) Why this breach 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 compensation matrix for use across the schemes developed by the schemes and Ofcom based on current practice and principles.

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.

Annex 2

Responding to this consultation

How to respond

- A2.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 29 June 2012**.
- A2.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/adr-review-12/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 4), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A2.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email john.o'keefe@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A2.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

John O'Keefe
2.79 Consumer Group,

Ofcom, Riverside House
2A Southwark Bridge Road
London SE1 9HA

Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

- A2.5 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A2.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact John O'Keefe on 020 7981 3568

Confidentiality

- A2.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A2.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A2.10 Following the end of the consultation period, Ofcom intends to publish a statement concluding the Review.
- A2.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A2.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A2.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 3

Ofcom's consultation principles

A3.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A3.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A3.3 We will be clear about who we are consulting, why, on what questions and for how long.

A3.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A3.5 We will consult for up to 10 weeks depending on the potential impact of our proposals. We are consulting for a month on this occasion (a 'Category 3' consultation) as we are proposing only a limited amendment to existing policy or regulation and having a limited effect on the market. An additional three days has been included to allow for the June bank holidays.

A3.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A3.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A3.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 4

Consultation response cover sheet

- A4.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A4.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A4.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A4.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A4.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 5

Consultation question

Q1 Do you agree Option 2 (Principles proposed by Ofcom) should be preferred? If not please explain your answer.

Q2 Are there other consequences following the introduction of the Principles that we have not included in our assessment? If so, please explain.

Q3 For communications providers and the Schemes: Can you provide an estimate of any costs to your organisation from either of introducing the Principles or as a consequence of the Principles proposed in Annex 1?

Q4 Do you have any comments on the scope and wording of the proposed Principles?

Q5 Do you have any views on methods to embed the Principles?

Annex 6

Glossary

The Act	The Communications Act 2003
ADR	Alternative Dispute Resolution
ADR Scheme	A body which provides ADR
Adjudicator	The name for the person at CISAS who examines evidence provided and reaches a verdict on the outcome of a particular case.
CISAS	The Communications and Internet Services Adjudication
CP	A Communications Provider who provides an Electronic Communications Service, as defined in the Act.
Call for Inputs	A preliminary consultation that sought out stakeholder views on a particular set of issues and/or proposals
Decision Making Principles	A set of high level guidelines that will be referred to by decision makers at both Schemes when making decisions.
Domestic and Small Business Customers	Residential consumers and businesses with 10 or less employees (who are not a CP), as defined in the Act.
Investigations Officer	The person at OS who looks at the case in the first instance, who attempts to resolve the case before it goes to the Ombudsman.
KPIs	Key Performance Indicators
Review	Ofcom's current review of ADR Schemes
Terms of Reference	Rules and procedures set out by the Schemes