



Case Acceptance Review

Executive Summary

29 January 2019

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Issue and Revision Record

Revision	Date	Originator	Checker	Approver	Description
A	29 th January 2019	Ed Siegle	Simon Davis	Simon Clayton- Mitchell	Executive Summary

Document reference: 395820 | 3 | A

Information class: Standard

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Executive summary

Background

Ofcom requires all Communications Providers (CPs) offering services to individuals and small businesses to belong to an approved Alternative Dispute Resolution (ADR) scheme. Under powers in the Communications Act 2003 (“the Act”), and the Alternative Dispute Resolution for Consumer Disputes Regulations 2015 (“the ADR Regulations”), Ofcom has approved two such schemes:

- Ombudsman Services (OS)
- The Communications and Internet Services Adjudication Scheme (CISAS).

Under certain circumstances, customers who wish to pursue a complaint against a CP can refer their complaint to an ADR scheme if the customer and CP cannot agree a resolution. The ADR scheme will then consider and, if appropriate, adjudicate and reach an impartial Decision upon the case. ADR schemes thus play an important role in complaint handling – as they provide a means for customers to receive a ruling on their case, when otherwise their complaint might remain unresolved.

Ofcom is required to review the ADR schemes periodically, to ensure that they meet statutory approval criteria. In its latest review, completed in 2017, Ofcom concluded that both schemes’ performance met the required criteria – and it therefore re-confirmed its approval of both OS and CISAS.

However, as a result of feedback received during the review, the schemes committed to make a number of changes to their processes and policies, to improve their performance and level of service. Under its review on the effectiveness of the schemes, Ofcom noted that a number of CPs believed that the schemes are accepting cases which fall outside the scope of their terms of reference, for example:

- Cases being accepted when deadlock has not been reached
- Cases being accepted from “large” businesses (i.e. those with more than 10 employees)
- Vexatious complaints.

There were also concerns that a lack of understanding of industry procedures could sometimes lead to the wrong CP being identified as at fault (e.g. the gaining provider versus losing provider in a switching case). Under its review on the Efficiency of the schemes, Ofcom also noted that two CPs mentioned that the schemes’ financial model – requiring a fee to be paid per case – could also incentivise the schemes to accept cases that were out of scope.

Ofcom went on to note that the limited evidence submitted did not suggest a systemic issue regarding cases being wrongly accepted. This finding was consistent with Mott MacDonald’s 2017 review of the quality of decision-making¹ – which found that case handling was generally good, with no systemic issues evident.

However, Ofcom encountered great strength of feeling amongst respondents regarding the issue of erroneous case acceptance, something the schemes also reported having experienced from their CP members. As a result, Ofcom pledged to undertake a review of ADR Case Acceptance.

Ofcom therefore asked Mott MacDonald to review a sample of cases from 2017 drawn from each ADR scheme, to analyse the issues surrounding case acceptance.

¹ *ADR Decision Review – Final Report* (Mott MacDonald, 23-11-17)

Context

Ombudsman Services' Terms of Reference² and an associated Annex for the Communications Sector³ outline the rules by which it is determined whether the scheme can accept a complaint for adjudication. The CISAS Rules (2017 edition)⁴ include similar stipulations on the criteria by which cases can be accepted by the scheme. In the case of both schemes, cases which are ineligible for adjudication include those in which:

- The complainant has not first attempted to contact or resolve their complaint with their CP
- The complaint has not been submitted within the prescribed timescales (for example, after a minimum of 8 weeks unless the case has reached deadlock)
- The issue is being dealt with by another ADR entity or a court
- The value of the claim does not fit the criteria of the scheme
- The case has been raised by a business with over 10 employees
- The dispute is frivolous or vexatious.

The ADR schemes received 39,032 complaints in 2017 from customers who felt they had been unable to resolve a complaint about the service they receive from their CP.

- OS accepted 34,981 cases from customers, of which 3,739 were disputed by CPs claiming they lay outside the terms of reference of the scheme (for reasons such as those above)
- CISAS accepted 4,051 cases from customers. CISAS was able to identify 158 of these cases as having been disputed by CPs – although the actual number of disputed cases will have been higher, as at the time CISAS did not track cases where the dispute was rejected.

Scope and Objectives

Mott MacDonald reviewed evidence from the ADR schemes relating to cases from 2017 which had been disputed by CPs for being ineligible for adjudication. A list of disputed cases from each scheme was systematically sampled to capture cases proportionately from the main providers, in addition to which some CPs chose to provide information directly – in response to an invitation to provide up to 10 examples to illustrate their viewpoint.

The data set analysed comprised:

- 252 cases from OS
 - 122 cases in which the CP's dispute had been rejected – i.e. adjudication proceeded as the case was deemed Inside the Terms of Reference (ITOR)
 - 130 cases in which the CP's dispute had been accepted – i.e. proceedings halted as the case was deemed Outside the Terms of Reference (OTOR).
- 60 cases from CISAS
 - 3 deemed ITOR by CISAS (as noted above, CISAS did not tend to track such cases, although Mott MacDonald understands it has now started to do so)
 - 57 deemed OTOR by CISAS.
- 28 cases suggested by CPs directly and via the Internet Service Providers' Association (ISPA).

The sample sizes from OS and CISAS differed, to reflect the different volume of complaints and disputed cases each scheme handles.

² <https://www.ombudsman-services.org/docs/default-source/miscellaneous-links/os-post-oct-tor.pdf?sfvrsn=2>

³ <https://www.ombudsman-services.org/docs/default-source/miscellaneous-links/communications-sector-tor-annex.pdf?sfvrsn=2>

⁴ <https://www.cedr.com/cisas/docslib/46-cisas-rules-2017.pdf?v=1509534282>

The principal objectives of Mott MacDonald's study were to:

- Review a sample of the schemes' cases which would provide an independent view on whether each case looked at should have been in or out of scope for ADR;
- Identify trends and common factors in cases being accepted/rejected as in/out of scope
- If relevant, make proposals on how those issues can be addressed.

Mott MacDonald's findings are summarised below.

Mott MacDonald's Findings

The degree to which cases should have been in or out of scope for ADR

OS Cases

Of the 252 disputed cases reviewed from OS, Mott MacDonald reviewed 122 in which the dispute had been rejected by OS – with the case therefore originally deemed to lie inside the terms of reference (ITOR). Mott MacDonald found that in only three of these 122 cases (2%) the CP's dispute ought in fact to have been accepted, meaning that the case shouldn't have gone forward to adjudication.

Mott MacDonald also reviewed 130 cases from OS in which the dispute had been accepted by OS – with the case therefore deemed to lie outside the terms of reference (OTOR). Mott MacDonald found that these cases fell into the following categories.

- Mott MacDonald found that 67 of the 130 cases (52%) were indeed materially outside the terms of the scheme (OTOR), and therefore OS was correct to exclude those cases from adjudication.
- It also appeared *technically* justifiable to exclude a further 15 cases (11% of the 130) which had been disputed for reasons of invalid account information – cases in which there was a discrepancy because the complainant was not the account holder (even though they were sometimes the spouse of the account holder living at the same address) or because the account number could not be verified, for example.
- A further 14 cases (11%) were closed (and often immediately re-opened) for having been mis-classified as a Consumer complaint instead of a Business complaint (or vice versa), although in all other respects they were valid complaints within the terms.
- Finally, Mott MacDonald found 20 cases (15%) which it believes OS ought to have considered ITOR for ADR and proceeded to adjudication⁵.

An overall conclusion is that there is certainly a proportion of disputed OS cases which ought to be withdrawn from adjudication. However, on balance Mott MacDonald found that OS is incorrectly accepting disputes (15% of the time) – and therefore not adjudicating cases – more than it is incorrectly rejecting disputes (2% of the time) – meaning that if anything it ought to be adjudicating more disputed cases, rather than fewer. According to Mott MacDonald's analysis, if taking a consolidated view across all disputed OS cases, (both those where the original dispute was originally rejected and accepted) 65% of CP disputes ought to have been rejected with the cases considered ITOR, and 20% of disputed cases fell materially outside the terms.

With regard to the patterns above, Mott MacDonald found it notable that a significant number of cases are being excluded from adjudication for reasons other than for being materially outside the terms. Many of the "invalid information" cases concerned legitimate disputes which were

⁵ It should be noted that 14 further cases fell into other categories – having been withdrawn by the customer or subject to Pre-Investigation Case Closure (PICC) for example.

excluded because of a lack of fairly basic information – sometimes in situations which somewhat defied logic (e.g. when the “unauthorised” complainant was a spouse with the same surname, living at the same address, who had previously been dealing with the complaint, and to whom the deadlock letter had been sent). Whilst most such cases did pass to adjudication once the details were confirmed, it is nevertheless arguable that such cases are inflating the number of disputed cases unnecessarily – and that they ought to be dealt with as a different kind of dispute (perhaps as a “query” or “validation request”?) The mis-classified consumer / business cases also seemed to represent something other than a “dispute”.

CISAS Cases

It was not possible to conduct the same depth of analysis with regard to CISAS cases as with cases from OS – because there was less case data to analyse, there was very little data on disputed cases which CISAS had deemed ITOR, and because the quality of information provided was inconsistent (with no information provided on why a dispute had been raised in a number of cases).

However, Mott MacDonald did analyse 57 disputed cases in which the disputes had been rejected and the cases deemed OTOR. Mott MacDonald found that 37% of these cases should have been considered OTOR, but that 39% of cases were suitable for adjudication and ought to have been deemed ITOR. As with OS, there were also several additional cases where the reason for accepting the dispute came down to invalid account information.

Mott MacDonald was only provided with three examples of rejected disputes at CISAS, because CISAS did not track these cases in the period analysed (although Mott MacDonald understands it has now started to do so). It was therefore not possible to draw any conclusions on cases which CISAS deemed ITOR despite the CP having raised an objection to them.

Cases identified directly by CPs

As noted above, CPs and ISPA provided information directly on 28 cases. With the exception of one provider, the CPs which responded to the request to provide cases were of the opinion that case acceptance is an issue and that the schemes are accepting cases they should not.

However, Mott MacDonald found that 61% of the cases identified by CPs lay inside the terms of reference of the ADR schemes, with only 21% of cases outside the terms – a pattern which is particularly interesting given the free reign CPs had to select any cases to illustrate their viewpoint. Mott MacDonald believes that this reflects a few tendencies sometimes found in CP thinking on case acceptance:

- A tendency to see the case from the CP's own perspective, rather than from the point-of-view of an independent arbitrator coming to the case fresh
- A tendency to focus on the content of the case, rather than whether it fits the terms of the scheme
- A tendency to confuse the potential outcome of a case with its right to be heard
- A tendency to believe that the burden of proof rests more heavily on the customer – whereas in fact there is an equal burden of proof.

Ultimately, if the customer and the CP disagree, there is uncertainty over any of the facts, and the customer has complied with the complaints process, then there is a right to ADR regardless of whether the customer or CP's argument is correct.

Conclusions

Overall Mott MacDonald found that there is certainly a degree to which CP case disputes are justified, and a proportion of disputed cases which are indeed OTOR and ought to be rejected.

However, with both OS and CISAS Mott MacDonald found that the schemes are wrongly accepting a proportion of disputes, meaning that on balance more cases ought to be passing to adjudication. It is also the case at both schemes that cases are being labelled as OTOR disputes and rejected for adjudication for reasons relating to lacking account information, rather than because they are materially OTOR – leading not only to genuine cases being excluded but to dispute numbers being inflated.

The degree to which the schemes' decisions are reasonable and consistent

Mott MacDonald found that on the whole OS is making good decisions about case acceptance. The consolidated view of case acceptance stated above suggests that only 20% of disputed cases fall materially outside the terms of reference of the scheme. If this is extrapolated across all the disputed cases listed for sampling by OS from 2017 (3,739 cases), this would represent c. 750 cases in 2017 – in other words 750 cases in which the CP raised a legitimate dispute which meant that the case was not suitable for adjudication. To put this in a broader context, Ofcom provided Mott MacDonald with information on cases accepted for adjudication by OS in 2017 relating to the five CPs analysed, which indicated that just under 25,000 cases were accepted by OS in 2017. 750 OTOR disputes from 25,000 cases is equal to 3% of cases. This would imply a high level of accuracy in decision-making regarding case acceptance

It was not possible to comment to the same degree on the quality or reasonableness of decision-making at CISAS. Mott MacDonald was provided with only three examples of rejected disputes at CISAS, because it did not track these cases in the period analysed (although Mott MacDonald understands it has now started to do so). Mott MacDonald cannot therefore comment on whether CISAS is accepting cases it ought not to. With regard to accepted disputes (OTOR cases), Mott MacDonald found that 39% of them ought to have been deemed ITOR, suggesting that, contrary to the concerns of CPs about case acceptance, there is a degree to which disputes are being accepted which ought not to be. From the case evidence provided, it was not clear why this was the case.

It should also be noted that Mott MacDonald did not observe any significant differences between OS and CISAS in the way the rules of each scheme are being applied – for example, rulings on deadlock or whether a complaint has been made. It was interesting to note, for example, that the cases categorised as “invalid information” occurred at both schemes, with similar characteristics (e.g. in terms of cases being dismissed for authorisation issues between spouses).

Mott MacDonald also found that there was a reasonably high degree of consistency internally – in other words the schemes each individually appeared to apply the rules consistently to similar types of cases.

Overall, therefore, Mott MacDonald felt that the schemes' decisions did represent a reasonable and consistent interpretation of the regulations – although the evidence for this was stronger at OS owing to the greater quality and quantity of data available, and the fact that it was possible to evaluate both OTOR and ITOR disputes.

Trends and common factors in case acceptance / rejection

136 of the 232 OS cases were disputed for being genuinely outside the terms (OTOR), and 91 cases disputed for reasons of invalid account information. Regarding the former, the most prevalent dispute reason (21 disputes) was that the case had not run for 8 weeks. There were only two examples of dispute being raised on ground of the complaint being vexatious.

29 of the 57 CISAS cases were disputed for being genuinely outside the terms (OTOR). The allegation that no complaint had been made was the predominant category of dispute raised (in nine cases – although Mott MacDonald only agreed this was true in two of them). Disputes about the complaint not having run for 8 weeks were also common again.

Recommendations

After consideration of the analysis and conclusions outlined above, Mott MacDonald makes the following recommendations:

1. Review / Revise the classification of Disputes

As indicated throughout its analysis, Mott MacDonald found two distinct types of dispute had been raised by CPs:

- Firstly, disputes made on the basis of matters which could be considered to be materially outside the scope of the schemes;
- Secondly, disputes raised on the basis of lacking or invalid account information, regarding cases which were otherwise entirely within the scope of the schemes.

Whilst Mott MacDonald acknowledges that technically the CPs had a right to challenge the latter cases – and that issues regarding identity, data protection and authorisation must be treated appropriately – nevertheless it was often the case that such disputes had been raised despite ample evidence about the identity and authorisation of the complainant.

A more pragmatic approach is arguably needed in dealing with such cases, but Mott MacDonald also feels that there is an argument for re-classifying such cases so that they are not considered a “dispute” but rather flagged as a “query” or “clarification request” for example. Classifying such cases separately (along with changes to procedures for dealing with them) would help dispute monitoring and prevention activities focus on genuine disputes and would have a beneficial effect on case dispute volumes, which are being artificially inflated by the inclusion of such cases.

2. Refine processes around the validation of cases

Whether or not invalid information cases are re-classified, there is scope for improvement to the processes in place regarding case acceptance, which would help to reduce the incidence and impact of such cases. Some suggestions to consider are:

- Allow the customer more time to provide data missing.
- Keep mis-classified but ITOR cases open, rather than closing and reopening them
- Adopt a more pragmatic and flexible attitude to information validation
- Ensure that cases involving vulnerable customers are escalated appropriately

3. Refresh understanding of the remit of the ADR schemes

Mott MacDonald believes that there is a lack of understanding on the part of some CPs with regard to the remit of the ADR schemes and the objectives of ADR. It was surprising that c. 60% of the cases provided directly by CPs – as examples of poor case acceptance decisions – were in fact legitimately ITOR.

Mott MacDonald believes that further dialogue and perhaps some form of information campaign or set of work-shops – run by the schemes or Ofcom – could help to close the gap in understanding. This could also include a refresher on the rules of the scheme and interpretation of cases (in line, for example, with the Decision Guidelines). There are still occasional instances

in which statements are made (by CPs and the schemes) about the burden of proof resting on the customer. It would be good to correct these and other misconceptions.

4. CISAS should start to track and monitor rejected disputes

Given the strength of feeling by CPs, and the impact on consumers of ruling incorrectly on case disputes, Mott MacDonald recommends that CISAS should start to record instances and information relating to rejected disputes. This will help CISAS and Ofcom to gain a better understanding of the nature of case acceptance regarding CISAS cases – which would ultimately be to the benefit of customers. Mott MacDonald understands that CISAS implemented a new case management system in October 2017, which enabled it to track rejected disputes from January 2018.

