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ITSPA Response to Ofcom Review of Alternative Dispute Resolution Schemes

Dear Ms Roberts,

I am writing on behalf of the Internet Telephony Services Providers Association, (ITSPA), the trade association for the next generation communications industry which represents over 90 communications providers from large multinationals to new start-ups offering VoIP and other "over-the-top" services. This letter responds to Ofcom's call for inputs concerning the review of the two currently approved ADR schemes.

Please note that certain aspects of this letter may not be supported by all ITSPA members. Individual members may respond separately to this consultation where a position differs. However, the ITSPA Council is confident that this response reflects the views of the overwhelming majority of ITSPA members.

Firstly, let us say that there is no doubt that the power dynamic in a relationship between an average consumer (or small office/home office user¹) and an average Public Electronic Communications Service ("PECS") is such that an uneven amount of power rests with the PECS and there is less countervailing power resting with the consumer, other than to exercise their right to switch (if their terms and conditions at the material time allow).

To that end, to address this pressure, there does need to be some form of independent and effective redress to this power balance, and Alternative Dispute Resolution ("ADR"), in theory, is one means by which it can be done.

However, there are a number of areas in which the current implementation of an ADR regime is problematic.

The power for the ADR schemes in telecommunications is derived in no small part from the Communications Act 2003, which provides ADR for both domestic consumers and also small businesses by reference to an arbitrary threshold of fewer than or equal to 10 "employees". Of course, we know that employees can be volunteers in the construction of the Act, so my local hospice with 15 volunteers has less protection than a boutique law firm of 5 solicitors. This cannot be correct and if Ofcom are seriously considering reviewing the ADR schemes, this must go to the heart of it.

¹ It is usually common ground that the average SOHO user, e.g. window cleaner, plumber etc., is commensurate with a domestic residential customer.

Gamma has jurisdictional disputes with its customers on a regular basis over their classification in terms of a Small Business for the Act. Is it the number of "employees" they had when they signed the order? Is it the number when they made a complaint? Is it the number when the ADR scheme investigates it? Can they magically gain more rights by making their 11th member of staff redundant?

It cannot be that hard to give the industry and its customers some certainty over this; surely Ofcom must know how it would rule this jurisdictional question if presented with it, so why can't Ofcom publish some guidance so we all know where we stand? Otherwise, if there is any hint that an entity seeking ADR does not qualify, then it is difficult to criticise the industry for treating the ADR scheme as a "kangaroo court" in that regard.

As we believe Gamma outlined in its recent response to a consultation on the General Conditions of Entitlement, there is some ambiguity in terms of the ADR scheme. If a customer has already accepted a settlement, they should have no ability to seek further recourse from an ADR scheme. This by its very nature would be vexatious, but in my experience, ADR schemes are very reluctant to rule a complaint is vexatious.

Additionally, if a decision is manifestly wrong in law, there must be recourse for the PECS that has been censured. We would suggest, for the sake of consumers (and small businesses if still in scope) that the decision in relation to that consumer should stand; however, the ADR scheme should not be able to levy any fees and should reimburse the PECS for any direct losses that ADR scheme caused (noting the materiality of the fees and potential award for a small new entrant). This economic incentive would materially increase the quality of decision making too and Ofcom certainly has the experience and knowledge to be able to rule if a decision was manifestly wrong. Likewise, the Independent Reviewer/Assessor at each respective ADR scheme may well be in a similar situation.

After all, if Ofcom makes a decision that is manifestly wrong, there are few cases where the alleged injured party cannot seek the redress of the courts; a right which is upheld explicitly in domestic and European law. Furthermore, Ofcom are suggesting that consumers should have such recourse; it is immoral for Ofcom to deny those paying for the schemes and being bound by their unilateral decision not to have such recourse either².

In that regard, speaking as both a consumer and an industry stakeholder, I would suggest that a delayed correct decision is preferable to a quick, incorrect decision and Ofcom should think about its logic at §13 of the Consultation. PECS are not going to admit they think there is going to be a sudden increase in complaints volumes; they aren't going to "schedule" an outage, or a systematic billing failure conveniently so that an ADR scheme can resource up. Whilst they may know a price increase may cause disagreement over "material detriment" and can forewarn on that, it is unlikely that the factors driving complaints are wholly in their control. Equally, saying a PECS should pay higher fees for exceeding a forecast provides the PECS with a regulatory-backed incentive to delay deadlock letters etc. to manipulate submissions.

That said, there are times when the ADR schemes can be seen to be working on both sides.

I have had experience of them making a lesser award than was offered prior to the complaint, and rejecting a complaint where the complainant had no regard for the terms of their contract. Whilst noting the inherent bias in my pleasure with those circumstances, I would say that any

² §8, fourth bullet point, of the Consultation.

reasonable observer would agree that in both cases the outcome was just and demonstrates that the ADR system we currently have isn't without merit. Equally, I have seen awards given against intransient PECS justifiably too.

However, my experience of the evolution of both CISAS and Ombudsman Services and their responsiveness and effectiveness is that it correlates (and may well have a causal link) to certain individuals. We would therefore suggest that "consistency" is an explicit metric that Ofcom should consider. That would apply both in terms of similar complaints resulting in similar outcomes (and there is nothing stopping Ofcom mystery shopping the ADR schemes with the co-operation of a PECS or two) and similarity in performance between ADR schemes over time too.

Representatives of ITSPA would be more than happy to meet to discuss the issues raised above in more detail if required.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Farmer', written in a cursive style.

Peter Farmer

Deputy Chair, ITSPA