THE RETAIL OMBUDSMAN

Response to Ofcom's ADR Review

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The Retail Ombudsman ("TRO") launched in January 2015 and quickly made a significant impact. TRO was founded in recognition of the following:

1. There was a need for an alternative dispute resolution ("ADR") scheme in the retail and various other sectors; and

2. The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, which at the time were still to be implemented.

In setting up TRO it was recognised that ADR would not be compulsory, outside of financial, energy and communications and therefore that businesses (such as retailers and traders) would need to be convinced to use ADR and that if no ADR scheme was able to do this there would be considerable consumer detriment. In this respect TRO recognised that 'pricing' was a principal factor in promoting the use of ADR and encouraging companies to allow consumers to seek alternative redress when a dispute cannot be resolved directly.

We are delighted to provide a response to Ofcom's regulatory review of ADR. Our contribution is to bring a consumer perspective to the discussion and ask how the ADR regime is balancing the task of protecting competitive processes in markets whilst ensuring good consumer outcomes are being delivered.

TRO believes that competition and choice for consumers is a good thing, however, we also believe choice for the industry is too. We know that a competitive market can deliver really good outcomes for consumers – when they work well. But they do not always work well and the knock on effect not only impacts the consumer but also the industry.

The current ADR landscape in the communications sector appears to be a vicious repetitive circle, with a significant imbalance between cost efficiency and time resulting in a restrictive and prohibitive approach to the benefits and use of ADR which is levied on both consumers and the industry.

The challenge is to strike the right balance between protecting the competitive process in markets in the belief that competition will deliver the best outcomes for both consumers and the industry; and the need to understand the consumer outcomes experienced.

It is right that regulators should not seek to control or set outcomes. And it is right that regulators focus on market mechanisms, and on making competition work well. But when markets are not delivering, or are not delivering quickly enough, consumer bodies and the industry will rightly call for change.

At present Ofcom requires that all communications providers who operate within parameters set out in the Communications Act 2003 (the Act) and general condition 14.5 (providing landline, broadband and mobile telephony services to domestic or micro-businesses) become members of an ADR scheme. The schemes are free for consumers to access and designed to supplement (not replace) a company's own internal complaints procedure, although they are only accessible after a customer's dispute has gone unresolved for 8 weeks.

Ofcom may wish to consider expanding the provision for mandatory ADR above the microbusiness criteria and aspects of voluntary jurisdiction to ensure consumer detriment in these areas are met as our scheme has demonstrated that if the ADR model is efficiently designed and costed correctly there is also an appetite for the industry to engage with ADR for matters that do not fall within the regulated criteria.

Currently Ofcom have approved two ADR providers – CISAS and Ombudsman Services. The latter recently claimed that UK people made 55 million complaints during 2016 and 13% were telecoms related.

Ofcom is obliged to regularly assess the approved ADR schemes, and as such they are now carrying out a review of performance.

It is with this review it has called for input and asked that not only is performance considered but other areas that may have an effect on the delivery of ADR services within the regulated communications marketplace.

Generally speaking, the ADR system does a good job for consumers, although many companies remain very unhappy with it because they can be forced to pay large ADR fees, even when a customer's dispute is rejected by a scheme.

This can be a particularly difficult issue for smaller communications providers as they are unable to rely on the economies of scale that larger providers enjoy, although that being said it can be argued that smaller companies usually focus more effort and resources on the quality of their service to help keep such complaints to a minimum.

On top of that Ofcom's new automatic compensation scheme (ACS) will also allow consumers to take companies through an ADR process over related complaints, which could add further costs and complications to companies and may ultimately push up prices within the industry, which are at some point passed onto the consumer in way of pricing for goods or services.

At this stage, Ofcom has not proposed any specific changes, although it could remove or add new ADR providers to the scheme and impose stricter standards if desired. The regulator hopes to publish its conclusions by autumn 2017.

We agree that ADR schemes act as an important protective measure for the consumer and can work to their benefit by enabling a consumer to resolve a dispute without having to undertake a possibly lengthy, time-consuming, costly court case. For an ADR scheme to function effectively it must be accessible, transparent and efficient. Further, the processes of an ADR scheme must be clear and easy to follow. It is vital that the ADR schemes are swift, fair and effective for all parties that engage in the process.

In the modern era of technology there are concerns that current schemes still have a very limited ability to accept a complaint directly online, despite in 2012 both schemes stating they would continue to develop on-line accessibility to improve convenience. However, both schemes have very limited features for consumers of a digital era to have total visibility of their disputes and the progress of their case online or via a mobile device.

This results in repeat contacts, particularly from a consumer who wishes to know the status of their complaint with little or no idea of its progress via the scheme. The lack of visibility and interaction in a digital era, results in repeat contact and duplicate handling of enquiries, delays and additional costs, which is ultimately passed on to the company in way of case fees, but it can be argued that this cost is indirectly passed on to the consumer, which is simply down to inefficiencies in the way in which a scheme operates.

Whilst it is stated that both schemes are free to use for the consumer, it is fact that both are indeed funded by the industry in way of membership and case fee costs. As these costs must be accounted for and recovered by the industry, they are clearly taken from the revenues generated and therefore form part of the company's tariff, service or product pricing, to ensure it is able to fund its membership, allowing consumers access to independent redress, and meet its obligatory or mandatory requirements to permit such schemes to operate.

With this in mind along with the industries concerns of the rising costs due to Ofcom's ACS, there is further concern that this will contribute towards rising prices within the industry that ultimately are passed onto the consumer, which even in a competitive market, results in increasing the cost to the consumer of buying communications services.

Whilst the market will continue to be competitive, and attempt to lower costs to sway consumers to "swap", it may inevitably lead to a reduction in communication providers – with less choice and fewer switching options for the consumer - resulting in a tougher market for new entrants with only those companies with greater capital reserves being able to continue trading and competing.

Neither CISAS or OSC are government funded, and it is evident that many consumers still believe that these schemes are backed by government expenditure in way of tax payments. It can be noted on review sites that consumers begin to raise concerns about the impartiality and independence of the schemes once the consumer learns of a schemes funding model (particularly in those cases where the scheme has found in favour of the company).

We are in no doubt that both schemes continue to operate independently and without bias. However, we believe that Ofcom could do more to assist the schemes by raising consumer knowledge on how the operational model and funding permits the running of the schemes to promote access to redress. It is unreasonable for either scheme to be subject to such consumer scrutiny due to limited or lack of knowledge and understanding.

Part of the clarity and awareness may be provided if the schemes were able to demonstrate or justify their costing models to both Ofcom and the industry and what costs are associated at each stage of the ADR life cycle. This would provide the industry and Ofcom reassurance and peace of mind that the charges for ADR are justified by the schemes, and are operating as cost efficiently as possible. All stakeholders can then be satisfied that they are receiving value for their money.

Breakdowns based on time and associated costs at each stage of involvement including the operational costs for the staffing types such as an adjudicator or Ombudsman's time would help substantiate the current costing models are warranted. If prices need to be increased to enable greater efficiency, the industry can support this without reluctance or resistance.

It will also support the criteria that Ofcom set out in its review in 2012 - that prices will be transparent, justifying the costs are balanced and not excessive to guarantee accessibility, ensuring the schemes are efficiently operating and effective in their roles. Clarity around costs will also help the schemes demonstrate to stakeholders - particularly the consumer - how it remains independent whilst in receipt of funds from its industry members, and how these funds are used to shield the schemes from any influences of bias or partiality and is reflected in the schemes governance evidencing the companies do not exercise any financial control over the scheme.

Whilst it may be argued that some consumers may attempt to use such disclosure as leverage to back a company into submission to prevent a dispute reaching ADR, Ofcom may also wish to consider whether companies should consider how they become more efficient in resolving the disputes within eight weeks.

Whilst the industry has voiced concerns about pricing and time taken to reach resolution, it can take positive reassurance knowing there is competition in the communications industry when it comes to the choice of an ADR scheme, which helps reduce the costs of ADR and prevent monopolistic behaviours by a single ADR provider.

Although, the industry may consider that more cost efficient redress would allow it to invest in greater resources to enable it to be less reliant on ADR, (ADR schemes should be working towards helping the industry be more efficient in its service, and working with the companies in taking positive proactive steps to limiting and reducing the number of cases it has escalated to it), it may also see that it can offer consumers the option of ADR sooner, should it be permitted with more cost efficient ADR, promoting greater consumer satisfaction and enabling the use of ADR to encourage a swifter impartial remedy to help retain customer loyalty.

Currently it may be seen that companies five or six weeks in to negotiations with a consumer, whilst they have eight weeks to resolve a dispute, are less likely to reach a resolution in eight weeks so why not allow the case to be handled by ADR earlier on? We feel that the longer it takes to resolve an impasse, the less likely a consumer is to stay with the company, and will “think with their feet” and find an alternative provider. We have been able to demonstrate in the sectors that we operate, that companies when afforded cost effective ADR, are more likely to engage with a scheme sooner, permitting a consumer to seek redress faster and retain custom.

One existing scheme has experienced considerable delays and been unable to meet the KPI’s and SLA’s set by Ofcom. As a result of these delays, the issues have become compounded and once eventually resolved the probability of that consumer staying with the provider it was in dispute with is negligible. These delays are contributing towards the loss of custom for a company and also reflecting on its brand and reputation. However, as stated if companies had focused on resolving the dispute before it reached the need to use ADR, they would be far more likely to be able to retain the custom.

Currently with the present ADR landscape there is a continuous vicious circle of revolving systematic arguments that if a company did not have to spend so much on ADR it would be able to make greater investments into improving service and focus on better consumer journeys to increase satisfaction.

Continued and repeat failures by a scheme cannot be allowed to continue and must be addressed by Ofcom.

We recognise as stated earlier that a large area of difficulty has been down to the forecasting of complaint volumes, which both the scheme and industry must accept responsibility for. The schemes must no longer be reactive to any spike in volume and have a plan in place to enable it to operate with a surplus FTE, so that it is able to proactively adapt to a fluctuation or spike in numbers forecasted. This will improve efficiencies and reduce waiting times which have been to both the consumer and company’s detriment over recent months. One recommendation may be for Ofcom to instigate metrics for the industry to work on better forecasting to allow the schemes to be better equipped for the estimated volumes of disputes, with punitive measures imposed should the company’s forecasting be vastly out.

Whilst the schemes may operate with surplus reserve capital for such occasions, they may wish to devise a method of working with both the industry and Ofcom on forecasting models, with Ofcom holding companies responsible for significantly failing to have reasonable forecasting of its expected complaint volumes for the upcoming 12 months. This may help reduce the number of cases that are delayed and do not meet the KPI's agreed and set between Ofcom and the scheme (these KPIs have been largely unchanged since the inception of the schemes in 2003, and their value is questionable since the landscape has changed so greatly in that time).

Ofcom may also wish to consider reviewing the service complaints received by the schemes, in order to assess efficiencies, with respect to the time taken or the delays experienced by a consumer since escalating their dispute, including reviews on the average handling times. This data would also demonstrate the schemes expenditure for such disputes that is being paid out in way of recognition of the delays caused in handling disputes, which is also an inefficiency by the scheme that is covered by the industry, which is information that all stakeholders should be permitted to have visibility of.

We support competition in the industry, we do not believe that one scheme per sector is beneficial to either the consumer or the industry. Without the stimulus of competitive tension, it could be suggested that turnaround times, service levels, innovation and continuous improvement suffer and there is less incentive to keep costs in check and run the scheme efficiently. Monopolies typically result in lower service levels due to the absence of a credible alternative, a burgeoning bureaucracy, an inability to respond quickly and effectively to market changes and increased costs as a result of inefficiencies typically inherent in monopolies.

Ofcom's current approval of more than one scheme provides key advantages to the industry; that is, that they can 'vote with their feet' if they are dissatisfied with service levels as they can in other sectors such as property, furniture, retail and aviation. To the same extent that companies in other sectors can compare different schemes and 'shop', comparisons are made based on service levels, value and the ease of doing business – not bias to business or perceived laxity.

We appreciate the concerns about consumer confusion, but consider the benefits of competition by far outweigh this argument and this can be seen in the communications industry as well as others as referred to above, who operate with more than one scheme. Whilst there may be an argument for one scheme to avoid consumer confusion, it is evident that the industry has operated very successfully with very little consumer confusion and simple co-operation between schemes to signpost the odd contact who has approached the incorrect scheme. The key is to ensure the signposting is correct, and Ofcom publishes a table of companies on its website, stating which scheme it is a member of.

A single scheme is prone to be monopolistic in its behaviour – dictating terms, rather than being responsive to stakeholder concerns about performance. It may also be at risk of being substantially less flexible or capable of responding quickly to changes in the market. Current data demonstrates that whilst OS holds the significant proportion of market share for member companies, it has struggled to meet such demand, which has resulted in failures to meet obligations in way of KPI's and subjected both consumers and companies to delays which have no doubt caused inconvenience and detriment to the parties, seeking swifter accessible redress.

This proves the market is big enough for more than one provider, as OS has shown it is not capable of handling the volume encountered whilst having the majority of the market share. A further example of this can be demonstrated in the performance statistics and data by the use of a single scheme for redress within the energy sector. The energy redress scheme has failed regularly to meet its KPI's, but unfortunately the companies within the energy industry are tied to a single scheme and unable to "vote with their feet". The costs of redress in the energy sector are also greater than those currently in the communications industry. We support the approval of two schemes and would encourage Ofcom to consider the prospect of new ADR providers, if they can demonstrate the capability to handle volumes along with the expertise and knowledge specific to the communications industry to ensure fair and reasonable redress.

CISAS appears to have very little market share, and predominantly whilst it has a number of smaller companies as members it maintains only one of the larger communication providers. It could be mooted that due to this, CISAS remains to be seen as a viable alternative option to OS for the industry to consider when it comes to ADR schemes. On this basis it would be expected for CISAS to meet its KPI's much more stringently, with greater ease than OS and any comparison between the two in this respect would be unreasonable and limiting towards the merit of OS's capabilities and performance, which we consider to be unjust for OS to receive such scrutiny.

Remedy implementation and non-conformity concerns in the communications industry must be considered. Whilst companies should be permitted to choose a scheme, Ofcom must ensure that stricter measures are put in place to enforce remedy times and even consider reducing the timescales that a company is permitted to implement any remedial action proposed. Without consideration of this, it appears that the schemes are limited in their abilities to hold communications companies accountable for their actions. Although a scheme can accept a further case due to such failure to implement resolutions, it leaves consumers reluctant to escalate a further case as previously the scheme has been unable to enforce the proposed actions. It also prohibits the purpose of redress, if companies are not held accountable.

By Ofcom taking more punitive measures in this aspect of the ADR process, it will distil and promote consumer confidence that access to ADR is both purposeful and meaningful, rather than a consumer's reliance to have any decision enforced in Court should a company fail to implement the recommendations. We would urge that remedy implementation processes do not encourage the increase of case volumes, as this simply adds to the cost of redress and will prohibit companies from making investments to implement change for improvements in service, to minimise the need for utilising ADR.

When Ofcom publishes its findings it would be beneficial for all stakeholders to see documented details of what recommendations have been implemented by the schemes and what has not and why, since the last review in 2012 and the findings by Mott McDonald.

We acknowledge that a concern in the Mott McDonald 2012 report was about the level playing field, and disparity in decisions being possibly detrimental on the consumer depending on what scheme the company was a member of. It was recommended that the schemes work in co-operation to share best practice and develop a working method to ensure a consistency in decisions. It would be interesting for the market to understand the extent to which the schemes have worked together during this period, which has seen significant migration of companies from one to the other.

Since this report the launch of the EU ADR directive requires schemes to work and share best practice. The disparity in decisions does not justify that there should only be one scheme. A memorandum of understanding (MOU) should be entered in to by the approved schemes to facilitate regular working groups or meetings including an industry panel and Ofcom's Consumer Protection Panel (CPP). This would focus on promoting collaboration and consistency to avoid the schemes being subjected to further criticism about their abilities to reach effective determinations - which result in questioning the integrity of a scheme favouring a company or consumer in attempt to increase membership.

Ofcom may wish to consider fixing ADR prices. This is an approach it may take so that a company is not incentivised by price but by service levels and efficiencies of the scheme to be effective in its handling times and ability to provide fair and reasonable swifter redress. By fixing prices, Ofcom would ensure there is a greater focus on the schemes ability to respond quickly and effectively to market changes, promoting greater empathises on the quality and level of service delivered.

We note that in previous reviews of the schemes there has been a reluctance and objection against the publication of a goodwill matrix due to concerns that both parties will focus more on the monetary terms than dealing with the inherent issues and handling the root cause of a dispute. We would argue that the publication of goodwill matrix is simply a guidance that both the consumer and company can utilise to determine whether proceeding to ADR is more beneficial than to reach an amicable or palatable resolution.

By doing so it affords swifter acceptable resolutions, as if an impasse cannot be resolved the consumer is still within their rights to escalate to a scheme and companies are eligible to issue a deadlock letter if it believes that its actions are fair and reasonable. The true independence of ADR can still be utilised to deem what a company has offered based on the circumstances of the case is truly fair and reasonable.

Not only that but publishing the goodwill matrix will help schemes manage the expectations of both parties and help justify the reasoning behind any determination of any monetary awards proposed. It may also assist in reducing the number of unmerited challenges to any initial decision or proposals made, when simply the non-acceptance is due to the amount of "compensation" or goodwill proposed. It could also contribute towards reducing the number of cases received by a scheme, as the ability to increase the awareness of such awards means a consumer can make an informed decision on whether they consider it still remains more beneficial to have their dispute heard by an independent and impartial body or accept the proposal by the company.

Ofcom may wish to consider whether there has been any significant shift since 2012 to issue goodwill more readily by the schemes. We understand that with recent increases in complaint volumes, one scheme worked closely with a company to establish a "recovery plan" which permitted the scheme to work within set parameters and pre-approved levels of goodwill available without the need for the scheme to go back to the company to discuss or justify the merits of such awards.

Whilst we welcome the co-operation in attempt to provide swifter redress to consumers we are concerned that such measures on occasion may simply have resulted in the "buying" of a resolution rather than truly resolving the issues and ensuring the root cause of the systematic failure is dealt with – which is surely the ultimate role expected of an ombudsman. Agreeing a remit of monetary awards is disingenuous if the consumer has not been informed that the scheme is operating with this modus operandi, and leaves questions over the impartiality of the decisions reached, potentially to the consumer's detriment with such a project impeding on fairness as the parties should be notified of the outcome of the case including information on the grounds on which the outcome is based. Such methods also skew the perception of monetary awards proposed, increasing the value of the average awards made within the industry.

In 2012 it was suggested that Ofcom may wish to consider preventing companies from transferring between the two schemes, as there were concerns that companies would use its power of patronage to undermine the economic viability of a scheme. The current trend of service providers treating the ADR scheme as simply another service provider means the decision is made on a procurement basis, with the company setting the standards rather than Ofcom. If Ofcom believes that this maybe the case it is suggested that the setting of fixed fees for the approved schemes will remove this concern.

We acknowledge in Ofcom's calls for input to its announcement of it reviewing the current approved schemes and their performance, that during course of the last year, OS in particular has faced challenges in meeting some of these KPIs. It explains that OS has identified a large spike in complaints about one provider as the main cause for the failure to meet KPIs. This spike has coincided with a more general increase in complaint numbers which may in part be a result of CPs issuing more notifications to consumers about their rights to escalate to ADR when a case reaches deadlock or after eight weeks.

Whilst we accept that there is a more general awareness of ADR, and consumers are becoming more aware of their rights, we do not consider that OS can simply indicate this spike in the number of complaints made against one communication provider to be the predominant cause for its difficulties in meeting its KPI's. OS operates not only in the communication industry but also in energy and property. We wish to highlight that OS has experienced unprecedented spikes in case volumes due to systematic failures by member companies previously and used the same reasoning when it failed to achieve such KPI's when two other companies within the energy industry suffered from systematic failures with their billing systems. We would ask given OS has experienced this on at least two occasion previously, that Ofcom further reviews what lessons OS learnt from this and any actions it took to aid it in identifying spikes in volumes and how it has intended to handle such matters. It would be useful for all stakeholders if such findings were published in Ofcom's review findings.

We would expect given the scheme has had previous experience in handling such unexpected spikes, that it has took positive steps to make operational changes to assist it in reacting more proactively in such circumstances. It appears that despite it working under these conditions previously on at least two occasions that OS has failed to make effective operational change to enable it to better cope. Instead it appears that its failure to put in measures and effective operational change has resulted in OS contributing to the already existing consumer detriment caused by the company's failures and has then been further compounded by the delays and extended handling times for cases to progress through the scheme and redress be provided.

In these instances, it could be considered that OS has simply been an extension of the company's customer service department and failing to operate as a true ADR scheme, other than increasing resources reactively, resulting in delays due to training times and so on. We are unable to determine what OS is doing to consider these possibilities in the future and ask if Ofcom is aware of what changes to OS's operational model are being considered? These considerations should also be applied whilst reviewing CISAS, to how it would react should its members suddenly have a significant surge in volumes.

Given OS's experience in surge of complaint volumes with the energy industry prior to communications, it appears that other than its reliance on its dominant position in the market it has failed to implement changes and measures to prevent delays, when sudden spikes are received. This has no doubt been to the detriment of the consumer. However, we must also ask Ofcom if it considers that given a company has eight weeks to handle such issues it should be also be expected that the company should be communicating with the scheme to forewarn it of a possible increase in contacts and case volumes, and a company also must accept some responsibility for this?

We look forward to hearing from Ofcom with its findings of its review and hope our input enables the regulator to consider the schemes in respect to both the consumer and industry perspective.