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Response to OFCOM Consultation on Review of Alternative Dispute Resolution Schemes

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I do not consider that the current arrangements are working for consumers or the market. Hence, this review is timely. The reasons I come to these conclusions emanate from consideration of a wider set of issues than are raised in the Call for Inputs document.

The critical point is that consumer ADR is now seen as a system that delivers a greater number of functions than ‘just’ dispute resolution. Indeed, ‘consumer dispute resolution’ (CDR) is now manifestly an integral part of the system of market regulation. Since that is so, a wider perspective is called for than one that just focuses on the dispute resolution aspects of CDR.

It is now recognized that the design of CDR systems is critical if they are to be able to deliver full functionality in support of consumers and markets.² The ideal range of functions comprises:

1. Consumer advice;
2. Dispute resolution;
3. Aggregation of data;
4. Publication of the aggregated data, as feedback to traders/sectors and information to consumers, competitions, regulators and investors;
5. Improving market behaviour. This may be achieved by publication, but it may also lead to regulatory action, or direct action by ADR body in changing a trader’s behaviour.
6. Consumer voice and advocacy.³

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² I have set out the academic and policy arguments at: C Hodges, ‘Consumer Ombudsmen: Better regulation and dispute resolution’ (2014) 15(4) *ERA Forum* 593-608; (2015) DOI: 10.1007/s12027-014-0366-8of; C Hodges, ‘The Consumer as Regulator’ in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford, Hart Publishing, 2016); C Hodges, ‘Consumer Redress: Implementing the Vision’ in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2017).

³ I have not included this function in previous writings but I see increasing evidence that consumer ombudsmen in various countries represent consumer views to companies, regulators, government and society. The ombudsmen are well placed to do this since they have direct involvement with what consumers think, and are able to back this up with solid data.

I explained the significance of these functions in a recent book as follows:⁴

... the achievement of these factors, and the delivery of efficient outcomes, has implications for the design of consumer ADR systems. The essential requirements are as follows. First, a very simple system is needed. Consumers and traders need to be able to easily identify the system and what they have to do (if a dispute arises, first talk to the trader, and then talk to the ombudsman). Consumers and traders should not be confused by the existence of multiple different CDR schemes, with inexplicably differing processes and requirements. Second, the CDR system needs to be accessible and user-friendly. Much advice can be given on websites, supplemented by approachable and helpful individuals on telephones. Third, the system needs to provide full coverage of a market. All traders have to be included, at least those within a given sector.

Two important rationales underlie these design issues. First, many issues can be resolved by giving information, rather than only accepting every inquiry as a dispute, and artificially funneling it into a dispute resolution process. This means that triage, information and advice should be the initial stage of a CDR scheme. The cost of providing advice to consumers pays dividends in better consumer understanding and fewer disputes. Second, regulatory control over a market requires the maximisation of data on what is going on. The 2013 legislation therefore mandates close cooperation between CDR entities and regulators, including the exchange of information on business practices in sectors where consumers have repeatedly lodged complaints. The data need not be about disputes, and can be merely about the issues that are concerning or confusing consumers. Hence, it is important to capture all data from the advice and dispute stages. Neither in-trader or in-regulator complaint functions maximise consumer confidence or clarity in the relevant functions, or are capable of maximising the provision of consumer advice. Further, a fractured CDR system will not deliver aggregated data and hence effective regulation of market behaviour. These considerations point to conclusions that a CDR system should have a unified and not pluralist design. Treating CDR as a market and hence permitting multiple diffuse CDR entities is unlikely to attract maximal usage or data. If the five functions are to be delivered, CDR coverage should be provided by a restricted number of entities. The best current model is that of (some) Ombudsmen. There should ideally a unified Consumer Ombudsman. At the least, the EU regulatory regimes in regulated sectors (financial services, energy, communications, utilities) should switch from requiring ADR to requiring Ombudsmen. But the primary need is for accessibility and joined-up communication, so a national website is required, such as BelMed in Belgium. Further, if market coverage is to be maximised, full coverage of traders may need to be compulsory.

The EU's CDR initiative has placed an incentive on many sectors to smarten up their act in responding to consumer complaints. Indeed, some regulators are imposing detailed requirements on traders on customer complaint functions, and scrutinising how they are operated. This is to be welcomed. It adds to the focus on the behaviour of traders, and opens further opportunities for improving market behaviour. Some complaints intermediaries have emerged, acting either as conduits for consumers to bring claims against traders or as firms' outsourced customer support functions. Models of intermediaries need to be carefully controlled by governments. There is extensive evidence about misleading advertising and consumer detriment caused by claims management companies whose business model is to charge consumers either a fee and/or a percentage of the sum recovered. Where the business model provides a free service to consumers and generates income from firms by providing outsourced service or aggregated data, practice appears to be acceptable and useful.

The use of ombudsmen parallels wider developments in regulation and enforcement. A recent study of UK regulatory and enforcement policy has identified a general shift by many regulatory authorities from 'hard' enforcement (deterrence and economic rational acting) to support of compliance, performance and improvement based on a 'softer' and risk-based approach of advice, information and support for most firms. The latter approach includes the constant circulation of information on pre- and post-marketing actions and events, and hence requires ombudsman-style functions.

In other words, if the six benefits identified above are to be realized, the design of the CDR system has to be simple, and easily identifiable by consumers, so as to maximize the number of consumers who access the system, and hence maximize the data. It is

⁴ C Hodges, 'Consumer Redress: Implementing the Vision' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2017).

the data that then drives feedback and responses by firms, regulators and consumers. Achieving these effects is considerably impeded if there is a variety of CDR entities, each with their own websites and procedures.

The design issue is not just an issue for the number of CDR entities in a sector (such as communications); for consumers, it is relevant how many different CDR entities exist across *all sectors*. Ideally, there should be as few as possible. There should be a coordinated approach between regulators and across Government on this issue.

I have done extensive research into CDR and ombudsmen system in a number of other jurisdictions, and am firmly of the view that a system that has competing CDR entities can result in a race to the bottom in terms of quality and responsiveness to consumers' needs, as entities are driven solely by comparisons based largely just on cost.

Indeed, that problem was put to me last week in a discussion in relation to the consumer Ombudsmen in Belgium, which has similarities to the situation in the UK. The Belgian single national Consumer Ombudsman Service has single ombudsmen for communications, energy, post, trains, financial services, and insurance (four of whom are statutory and two are private not-for-profit). They collectively offer a national residual CDR service. There is clear concern there over the existence of 'competing' CDR entities in relation to issues of quality and the existence of a situation that inevitably creates competition between CDR entities that is risky.

I strongly urge OFCOM to take these wider issues into account in its review. The logic seems to me to argue inexorably for mandating only a single CDR entity for the sector, and to take into account the position in other sectors, so as to increase consumer identification of a simple system, which would generate increased data and hence greater feedback and consumer voice, whilst possibly enabling economies of scale.