



Review of Alternative Dispute Resolution Schemes

Call for Inputs

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Section 1

Review of Alternative Dispute Resolution Schemes

Background

- 1.1 The Communications Act 2003 (the Act) places a duty on Ofcom to secure the availability of appropriate dispute resolution procedures.¹ Through General Condition 14.5 we have required all Communications Providers (CPs) to be a member of an approved ADR scheme. We currently approve two such schemes: the Office of the Telecommunications Ombudsman (Otelo) and the Communications and Internet Services Adjudication Scheme (CISAS). All CPs are free to choose which of the two ADR schemes they wish to belong to.
- 1.2 Ofcom is also obliged to keep its approval of ADR schemes under review² and we have started a review of the performance of both Otelo and CISAS (including the operations, structure and rules of both organisations). This Call for Inputs provides stakeholders with the opportunity to bring to Ofcom's attention any issues that should be considered as part of this review.
- 1.3 To help inform submissions a brief summary of both ADR schemes and their key differences is attached as Annex Two.

Scope of this Review

- 1.4 We consider that following this project, we are likely to have the following options open to us:
 - i. continue to approve both ADR schemes with no suggested changes (i.e. the status quo);
 - ii. continue to approve both ADR schemes but subject to either or both of them making changes to their rules and operations; or
 - iii. withdraw approval of one or both ADR scheme(s).
- 1.5 In relation to the third option highlighted above, the Communications Act 2003 explicitly envisages the possibility of having more than one ADR scheme, with Ofcom having a duty to secure consistency in standards between any schemes.³ Although we have the ability to remove approval of one or both of the schemes, at this point in time we would only do so if there are serious performance issues with one of the schemes or if the existence of two ADR schemes is leading to inconsistency of treatment and consumer detriment. Stakeholders will be able to express their views on this matter through this Call for Inputs and to provide any relevant evidence.
- 1.6 To make sure we are aware of all possible issues and any potential areas of concern, we are publishing this Call for Inputs seeking stakeholders' views on the performance of the schemes.

¹ Section 52 of the Communications Act 2003

² Section 54(4) of the Communications Act 2003

³ Section 54(7) of the Communications Act 2003

- 1.7 Following the close of the Call for Inputs we will examine stakeholders' views and conduct our own analysis of the schemes' performance. If we have identified areas of concern we will submit recommendations to the ADR schemes on areas where we would like them to make improvements to their operations/structure/rules.
- 1.8 Following any discussions with the ADR schemes we will be in a position to decide whether to conclude the review. If this is the case, we will let stakeholders know by publishing an up-date in early 2011. Alternatively, depending on the nature of any possible changes and the views of the ADR schemes, we may choose to consult on whether to mandate changes to the schemes and/or withdraw our approval of one or both of the schemes. Any such consultation is likely to take place in early 2011.

Views sought from stakeholders

- 1.9 In May 2009, following a period of consultation, we set out the key criteria that we intended to apply to our review of the ADR schemes.⁴ We would particularly welcome stakeholders' views on whether the ADR schemes were satisfactorily performing against those criteria, being:
- a) **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);
 - b) **Independence** (ensuring that the schemes have appropriate governance procedures in place and that their member companies do not unduly influence decision making);
 - c) **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 places for how decisions should be reached in particular cases, and that there is consistency between the schemes in how they resolve complaints);
 - d) **Efficiency** (the degree to which the schemes deal with complaints in a timely manner, allocate their resources appropriately and are financially sustainable);
 - e) **Transparency** (the extent to which decisions and the decision making process is clear to consumers and CPs);
 - f) **Effectiveness** (ensuring the jurisdiction of the two schemes are closely aligned and that the schemes have appropriate procedures in place to monitor the implementation of decisions and compliance with rules); and
 - g) **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 two schemes to enable direct comparisons on issues being dealt with).
- 1.10 We would also welcome any insights stakeholders may have on other areas of performance as well as any issues of consistency between the two schemes. We have included in Annex Two a summary of some of the issues that we intend to examine over the next few months.

⁴ See http://stakeholders.ofcom.org.uk/binaries/consultations/alt_dis_res/statement/statement.pdf

Annex 1

Responding to this Call for Inputs

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 24 November 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/alternative-dispute-resolution/>, 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 (available on our website), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger responses - particularly those with supporting charts, tables or other data - please email ADRreview@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet (available at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>).
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the Call for Inputs.
- Jeff Loan
Consumer Affairs
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3333
- A1.5 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.
- A1.6 If you want to discuss the issues and questions raised in this Call for Inputs, or need advice on the appropriate form of response, please contact Jeff Loan on 020 7981 3761 or Alan Pridmore on 020 7981 3861.

Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by 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.
- A1.8 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.

A1.9 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/>

Annex 2

Considerations for Respondents

The two ADR schemes

- A2.1 The two ADR schemes both offer dispute resolution services to consumers who have been unable to resolve their complaint with their CP within eight weeks (or earlier if the CP consents).
- A2.2 Otelo is administered by Ombudsman Services, a not-for-profit private company that runs four national ADR schemes: Otelo, the Energy Ombudsman, Ombudsman Service: Property, and the PRS for Music Ombudsman. CISAS is part of IDRS Ltd (IDRS) a private company wholly owned by a registered charity. IDRS provides more than 100 services in the UK and internationally and also operates the ADR scheme for the postal sector.

	Otelo	CISAS
Membership	360 member companies	254 member companies
Employees	Parent company has 160 staff across its services	Parent company has 23 staff across its services
Enquiry Volumes (2009)	76,515 enquiries	5,143 enquiries
Applications (2009)	7,777 applications (10% 'conversion' of enquiries to cases)	1,651 applications (32% 'conversion' of enquiries to cases)

Source: Otelo and CISAS⁵

- A2.3 The two schemes are fundamentally different in their approach to dispute resolution: Otelo is an Ombudsman scheme whereas CISAS offers a consumer adjudication service.

Approach of Otelo

- A2.4 As an Ombudsman scheme Otelo provides a high degree of customer support. This includes helping consumers to fill out their application form and providing advice on any evidence that a consumer may wish to consider submitting. Applications are completed by Otelo staff and sent out to the consumer to sign – 89% of such applications are subsequently returned. Otelo considers that it is necessary to give consumers a high degree of support to redress the imbalance between what is often a large, well represented company and a less well-informed consumer.
- A2.5 Otelo has a dedicated investigations team that will examine the allegations and submissions from the CP and will contact either party to seek further information on any points. The process is an iterative one and each party has the opportunity to make submissions on the Provisional Conclusion before it is passed to the

⁵ Including http://www.otelo.org.uk/downloads/2010_annual_report_Otelo.pdf and http://www.cisas.org.uk/media/text/CISASAR2009FINAL_22SEPT2010.pdf

Ombudsman for a Final Decisions (if one or other party does not accept the Provisional Conclusion).

Approach of CISAS

- A2.6 As an adjudication scheme, CISAS places great weight on treating consumers and CPs equally. They will not help either party to put their case together and will not advise either of them what evidence they would need to support their case (they do publish a guidance pack including evidence checklists for enquirers and consumers). Consumers can complete applications online or can have blank application forms sent out to them. Of those requesting an application form, 35% return the completed form. On request CISAS staff will guide and assist applicants on completing their application; if a consumer wishes a CISAS staff member to complete the form for them that is done and the completed form is then sent to the consumer for confirmation of the content and signature.
- A2.7 CISAS does not investigate consumer complaints, but consumers are provided with an opportunity to comment on the CP's response to their claim. Adjudicators 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 their CP has breached the contract or their Code of Practice. Neither consumers nor CPs have a right of challenge to an adjudication.

Areas where the ADR schemes may be diverging

- A2.8 Some differences between CISAS and Otelo are an inevitable by-product of having two schemes (and some are a direct result of differences in scale) and are not necessarily a matter of concern. However, where those differences mean that consumers will receive a lower standard of treatment depending on which ADR scheme their CP belongs to then Ofcom will need to take steps to ensure an appropriate degree of alignment. Any significant discrepancies between the two schemes could potentially create concern about whether the ADR schemes are meeting the needs of consumers and could also create incentives for the CPs to choose which ADR scheme to belong to on a perception as to whether adjudications are more likely to favour them.
- A2.9 The following is a non-exhaustive list of initial areas where Otelo and CISAS have adopted different approaches. We have not reached any view on the merits or otherwise of these considerations but have noted them to help inform stakeholder submissions.
- A2.10 **The Adjudication Process**
- Ability to challenge decisions: Otelo has a two-stage adjudication process and is introducing a three-stage process, where consumers and CPs have the option of accepting decisions or making further representations (submitting evidence not earlier provided, challenging findings of fact, or drawing attention to changes in circumstances). CISAS allows consumers to make cross-submissions on a CP's response to their claim, but neither party can challenge the adjudication. We note that the decisions of both schemes are not binding on consumers unless the consumer decides to accept it.
 - Use of early settlements: Both schemes have different forms of early settlement / mediation for cases, both of which offer a speedy resolution and frees up

resources for those cases that are not truly intractable. CISAS offers the CP the opportunity to resolve the dispute without further CISAS involvement and 54% of cases are successfully resolved through such a means. Otelo permits CPs to identify cases which it believes it can resolve in such a way, and this accounts for about 8% of cases, while a further 25% of cases are resolved by Otelo through informal resolution.

A2.11 Adjudications

- Consistency within schemes: All CISAS adjudicators (ten external and three internal adjudicators) are legally trained and qualified in consumer law. CISAS has written protocols for all their adjudicators to follow and requires them to circulate their decisions to all other CISAS adjudicators (with an annual meeting also held to promote consistency). Otelo has a dedicated investigations team that works in the same area, is able to discuss cases and receives internal training on specific telecommunications issues.
- Consistency between schemes: At present there is no agreement or discussions between the schemes, or with Ofcom, on how certain cases should be dealt with. There is therefore the potential for the two schemes to resolve the same case in a different way.
- Size of awards: In 2009, the average Otelo award made to consumers was £103.47, while the average CISAS award was £173⁶. Each organisation has internal guidelines on the level of awards, but there is no agreement or discussions between schemes on the approach to compensation.
- Complaints in favour of consumers: In 2009, 64% of CISAS adjudications were decided in the consumer's favour, while 88% of Otelo Final Decisions included a financial or non-financial award in the consumer's favour. By definition all early settlements can be viewed as being in favour of the consumer.
- Acceptance of Decisions: Otelo provides consumers with two months from the date of the Final Decision to accept the decision,⁷ while CISAS provides consumers with six weeks to accept the adjudication.⁸
- Enforcement of adjudications: We have been informed that around 10% of Otelo adjudications are not complied with by CPs after 28 days, with around 16% of CISAS adjudications not complied with promptly in 2009.

A2.12 Terms of Reference:

- Requirement for a consumer to use their CP's formal complaints procedures: Otelo accepts complaints eight weeks after the consumer gave their CP notice of the subject matter of the complaint,⁹ whereas consumers can only complain to CISAS eight weeks after 'they first put the complaint through the company's complaints procedure'¹⁰. Ofcom has previously made it clear that there should be no obligation for a consumer to request that their complaint is treated through

⁶ http://www.otelo.org.uk/downloads/2010_annual_report_Otelo.pdf and http://www.cisas.org.uk/media/text/CISASAR2009FINAL_22SEPT2010.pdf

⁷ Rule 9.9 of the Otelo Terms of Reference

⁸ Rule 2e of the CISAS Rules

⁹ Rule 11c of the Otelo Terms of Reference

¹⁰ Rule 3b of the CISAS Rules

formal procedures and we understand CISAS will change their Rules to reflect this.¹¹

- Time limit on complaints: Both Otelo¹² and CISAS¹³ require consumers to lodge an application within nine months of first complaining to their CP. However, Otelo also requires consumers to have complained to their CP within 12 months of first knowing of the subject matter of the complaint,¹⁴ while there is no such restriction imposed by CISAS. We also note that the Otelo Ombudsman has full discretion in deciding whether to accept a consumer's complaint, whereas CISAS is bound by the nine month time limit specified in its Rules.
- Deadlock letters: The requirement to wait eight weeks before making an application to an ADR scheme is waived if the CP issues a 'deadlock letter'. Otelo considers deadlock letters to remain valid for six months from when they are issued,¹⁵ while CISAS considers they are valid for the duration that the CP specifies in the letter (unless the consumer is within the nine month window).
- Ability to investigate in the absence of a contractual relationship:
 - a) Otelo has a slightly wider remit and has the ability to accept complaints if the subject matter of the complaint arose when the complainant had 'applied or been solicited' to be a customer of the CP,¹⁶ whereas CISAS requires consumers to be customers of the member CP.¹⁷
 - b) Similarly, there may be the benefits for both schemes to specify in their rules that they can investigate complaints against member companies if there is any assertion of a customer-supplier relationship (rather than whether a consumer is a 'customer'). Such a power would give certainty to the schemes' ability to investigate allegations of 'slamming', where harm is caused by CP who the consumer does not recognise as their supplier and with whom there may not be a formal contractual relationship.
- Ability to investigate complaints arising when the CP was not a member: We are conscious that the existence of two schemes could create the possibility that a consumer may not be able to pursue a remedy if at the time of the complaint their CP was not a member of either scheme (i.e. was unaware they had to join an ADR scheme, was in the process of moving between schemes or had just been expelled from one scheme and had yet to take steps to rejoin). While Ofcom can take enforcement action, this may not provide consumers with any remedy.
- Treatment of non-compliant CPs: At present when a CP refuses to comply with an ADR judgment or pay their relevant fees to the scheme, they are ultimately expelled from the scheme – and will be in breach of the General Conditions until they rejoin. The two schemes currently liaise with each other to make sure that

¹¹ http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/summary/adr_condoc.pdf, see paragraphs 10.1 - 10.3

¹² Rule 11c of the Otelo Terms of Reference

¹³ Rule 3b of the CISAS Rules

¹⁴ Rule 11.1a of the Otelo Terms of Reference

¹⁵ Rule 11c of the Otelo Terms of Reference

¹⁶ Rule 1.7b of the Otelo Terms of Reference

¹⁷ Rule 1c of the CISAS Terms of Reference

the non-compliant CP cannot join the other ADR scheme (and thereby avoid enforcement action) until they have complied with all outstanding adjudications.

A2.13 Performance against KPIs

- Speed of Decision Making: In 2009, 87% of all CISAS cases were fully completed within 6 weeks, while 52% of consumers received a Provisional Conclusion from Otelo within the same period (the first of two stages in the Otelo adjudication process).
- Lack of KPI on Final Decisions: We note that at present there is no reporting or visibility of Otelo's performance in issuing Final Decisions.

Consumer Satisfaction¹⁸

A2.14 According to independent research commissioned by the schemes, 67% of those who made enquiries of Otelo in 2009 were satisfied with their service, compared to 53% of those who made enquiries of CISAS.

A2.15 According to independent research commissioned by the schemes, 72% of those who made complaints to Otelo in 2009 were satisfied with their service, compared to 71% of those who made complaints to CISAS (we note that complainant satisfaction with Otelo has fallen from 72% in 2009 to 48% in 2010).

¹⁸ <http://www.otelo.org.uk/pages/88research.php> and <http://www.cisas.org.uk/media/text/CISAS-Customer-Service-Satisfact>