



ADR Scheme Decisions

Outcomes Agreement

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Ofcom

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Outcomes Agreement



Ofcom

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1. Introduction

1.1 Introduction

This document focuses specifically on a revised version of an Outcomes Agreement¹, produced following consultation with Ombudsman Service (OS) and CISAS, designed to serve as an aid to greater consistency in decision-making across the two ADR schemes.

The production of a revised Outcomes Agreement represents the culmination of a programme of work conducted for Ofcom by Mott MacDonald in 2011. The specific focus of this work has been to review Decisions made on cases by OS and CISAS. This review was conducted in order to understand how any differences identified in decision-making on cases (e.g. the production of case outcomes) were affecting the proportion of outcomes made in favour of consumers. This review of differences in decision-making has been conducted aside from consideration of organisational, process and membership differences, which also have a potential impact on outcomes.

In producing this revised version, Mott MacDonald has not made detailed reference to the research and analysis which has shaped the development of this Outcomes Agreement prior to this latest revision. Further information on this research and analysis can be found in two previous deliverables:

- Analysis of ADR Adjudications (Mott MacDonald, May 2011)
- Draft Decision Charter (Mott MacDonald, December 2011).

The Draft Decision Charter presented the first provisional version of what is now called the Outcomes Agreement. In producing this revised version, three other pieces of work were also key:

- A written response received from CISAS, "Initial thoughts on Mott MacDonald draft decision paper."
- A written response received from OS, "Response from Ombudsman Services"
- A workshop held with representatives of the two schemes, Ofcom, and Mott MacDonald at Ofcom's premises on December 15th.

The most important element of this current document is the Outcomes Agreement itself, which has been included in Appendix A so that it can be separated from the rest of the document if required.

Prior to Appendix A, this document has two supporting sections:

- Section 2: Comments on Outcomes Agreement
- Section 3: Next Steps.

¹ In its previous iteration, this was known as the "Decision Charter". The schemes suggested this should be changed.

2. Comments on Outcomes Agreement

2.1 Objective of the Schemes

The schemes were keen to embrace a simple overall objective, consisting of a single sentence:

“To resolve disputes between consumers and communications providers.”

The schemes indicated that it should be clarified that the term “consumers”, in this context, includes small businesses.

2.2 Guiding Principles

Mott MacDonald had originally included the stipulation that decisions be taken with complete independence, integrity and impartiality – three key principles stated by CISAS and embraced by OS also.

However, OS was keen to emphasise that The British and Irish Ombudsman’s Association (BIOA) requires its members to meet five criteria, and also indicated that the DG Sanco consultation on consumer ADR had identified 10 commandments for ADR schemes. The schemes suggested that the Outcomes Agreement should state a respect for these criteria under the heading “Guiding Principles”. Whilst a simple reference to these criteria was mooted at first, the schemes felt that it would be better to spell out the principles taken from these sources so that they were easily visible to all, including those unfamiliar with them.

It should be noted that the principal aim of this Outcomes Agreement is to ensure greater consistency in the Decisions reached by the schemes – and in achieving this its emphasis is mainly on the decision-making process, rather than broader operational aspects of the schemes. Mott MacDonald has thus focussed the list slightly, to produce ten guiding principles, expressed in the Outcomes Agreement as follows:

“In doing so, the schemes should consider Outcomes in accordance with the following guiding principles:

- **Independence**
- **Fairness**
- **Impartiality**
- **Openness**
- **Transparency**
- **Effectiveness**
- **Accessibility**
- **Measured performance**
- **Official Approval**
- **Accountability.”**

2.3 Decision Guidelines

Having set out the objectives and guiding principles with regard to making Decisions, the Outcomes Agreement next lists a set of guidelines to help steer more consistent decision-making across (and within) the schemes.

2.3.1 Introductory statement

The guidelines are prefaced by an introductory statement. Originally this stated, “To achieve a fair and reasonable outcome, the Decision should...” Following discussions at the workshop, the schemes suggested:

“In achieving a fair and reasonable outcome for both parties, the Outcome should...”

The schemes felt it was important to add “for both parties” to emphasise the importance of impartiality.

2.3.2 Guideline 1: Levelling the playing field

An important consideration identified by Mott MacDonald in its research with the schemes concerned the aspiration to level the playing field between the CP and the consumer – given the imbalance of power and resources that often exists between them. Mott MacDonald had originally suggested the following wording:

“Seek to level the playing field between the CP and the consumer by being mindful of the asymmetry that may exist in information, resources and the ability to communicate.”

The schemes suggested simplifying this a little, while making reference to the fact that the outcome should leave neither party disadvantaged, resulting in the following guideline, stating that the Outcome should:

“Demonstrate a level playing field between the CP and the consumer so that neither is disadvantaged.”

2.3.3 Guideline 2: Avoidance of Advocacy

Another important point made by the schemes in discussing their approach to decision-making had been to clarify that their role was not to serve as a Consumer advocate – or indeed as the advocate of either party. Mott MacDonald had originally expressed this principle through the statement:

“Not seek to advocate the position of the consumer nor the CP.”

The schemes made two principal points on this statement. Firstly, they thought it best to seek an alternative to “advocate”, a word which might not be understood by all (and in general the importance of using plain English was stressed.) Secondly, they thought the statement would read better as a positive rather than negative declaration. As result, the following is an amended version, stating that the Outcome should:

“Promote neither the position of the consumer nor the CP.”

2.3.4 Individual case specifics

In the interviews conducted during Mott MacDonald’s research, decision-makers at the schemes emphasised the importance of considering the specific evidence presented by the parties and the particular circumstances of the case. It is dangerous to assume that one case is like another, and nuances in the evidence and circumstances are sometimes critical to reaching a fair outcome.

Mott MacDonald suggested the following guideline to cover this point:

“Consider only the evidence presented by the individual parties in the specific circumstances.”

This was felt to be a little too restrictive because, in addition to the specific evidence and circumstances, it is important to also consider the relevant context or background to a case – particularly if making a ruling based on the balance of probabilities, as is often necessary. As a result the following guideline was produced, stating that the Outcome should:

“Consider the evidence presented by the parties, the specific circumstances, and other information directly relevant to the dispute.”

It should be noted that there was discussion as to whether the last part of this statement should read, “... and any other information relevant to the dispute.” Whilst the distinction is subtle, Mott MacDonald believes this is a little too general and prefers a version without the word “any” and with the word “directly” included, which gives the guideline a more focussed meaning.

2.3.5 Use of Precedent

Mott MacDonald wished to encapsulate the important observation, made by both schemes in interviews, that the schemes referred to guidance materials on past cases to aid them to produce consistent outcomes – but that this did not imply any formal sense of precedent. Each case is considered on its individual merits. Mott MacDonald’s

proposed guideline on this point was accepted in its original form, and states that the Outcome should:

“Be mindful of, but not bound by, past rulings in similar cases.”

2.3.6 The legal and regulatory framework

Another important aspect identified when it comes to producing fair and reasonable outcomes is due consideration of the prevailing law and regulations. Mott MacDonald proposed the following statement in relation to this element:

“Recognise the prevailing regulations, law and terms and conditions.”

The schemes commented that they would prefer “have regard to” rather than “recognise”. Mott MacDonald also feels that the word “prevailing” may not constitute “plain English” and would suggest “relevant” instead. These changes result in the following guideline, stating that the Outcome should:

“Have regard to the relevant regulations, law and terms and conditions.”

2.3.7 Equal responsibility for producing evidence

Mott MacDonald’s original statement in this area was that the Decision should, “place the same burden of proof on both parties.” This statement had been formulated to address Mott MacDonald’s slight concern that the schemes were a little quick to place the burden of proof on the consumer in situations where evidence was lacking.

CISAS initially proposed an alternative including the statement that, “he who asserts must prove” – indicating that the consumer must provide evidence to support their claim and the CP to support their defence. In discussion it was suggested this could be further simplified, and the following statement was the result, stating that the Outcome should:

“Recognise that both parties must provide evidence to support their position.”

2.3.8 Reliance on the balance of probabilities

Both schemes had been keen to emphasise that it is necessary for judgements in this context to be made on the balance of probabilities – given that in some cases there is no absolute certainty regarding the events and viewpoints being considered. Whilst CISAS initially mooted a slight amendment, in discussions at the workshop the schemes settled on the original statement on this issue, which states that the Outcome should:

“Be based on the balance of probabilities in the absence of conclusive evidence.”

2.3.9 The influence of “usual” behaviour

Mott MacDonald inferred from interviews that there was an occasional but pronounced tendency for decision-makers to consider the *usual* behaviour of CPs and consumers, in reaching outcomes, rather than behaviour demonstrated by the evidence relating to the case in hand. Mott MacDonald felt that this tendency conflicted with the stated aims of levelling the playing field and giving equal weight to the evidence of the consumer and CP. (For further insight on this issue, see Draft Decision Charter, section 2.3.6).

As a result, Mott MacDonald proposed the statement that the Decision should, “Exclude assumptions about the usual behaviour or practices of either the CP or consumer.”

The schemes felt the use of the word “exclude” was too strong – arguing that it is in fact legitimate to *consider* the usual behaviour of CPs and Consumers in making a ruling on the balance of probabilities – although decision-makers should take care not to rely on such assumptions too heavily in producing outcomes. As a result, the following statement was proposed, stating that the Outcome should:

“Take account of, but not rely on, the usual behaviour or practices of either the CP or consumer.”

The schemes also pointed out that the degree to which one can justify a decision based on the usual behaviour of a CP depends on the particular technical or service issue in question. In some cases it is possible to be almost 100% confident that a CP will have taken a certain action (eg the sending of a text message). In others, Mott MacDonald would argue human involvement in the process lowers the degree of certainty (eg a sales rep adhering to a script). This is therefore a good example of a situation in which the existence of common reference materials illustrating typical and testing examples would help a guideline to be interpreted consistently.

2.3.10 Credence given to the word of both parties

Related to the above was a separate concern that at times the schemes displayed a tendency not to give enough credence to the word of the consumer, particularly in situations where evidence was lacking. Mott MacDonald considered it important to underline that the word of the consumer and CP should be given equal consideration. The original statement proposed, which was accepted by the schemes, was as follows, stating that the Outcome should:

“Give equal credence to the word of the consumer and the word of the CP.”

2.4 Ensuring consistency through collaboration

In its Draft Decision Charter report Mott MacDonald also proposed that the schemes should initiate a process of collaboration, in order to ensure that there is common thinking in future in the way that outcomes are produced for typical and testing cases. At the workshop, Mott MacDonald was pleased to note that the Chief Executives of both organisations had recently met and that both expressed willingness to collaborate.

Mott MacDonald has therefore included the following statement in the Outcomes Agreement.

“The schemes will aid the consistent application of these Decision Guidelines by sharing common reference materials relating to a range of typical and testing cases.”

The precise documents to be shared or new resources to be created remain to be defined (noted in a footnote in the Outcomes Agreement), and in this regard it is good news that both schemes expressed willingness in principle to collaborate further – subject to the approval of members and regard for competitive considerations.

2.5 Compensation Guidelines

2.5.1 Types of award

In its past reports Mott MacDonald has commented extensively on the differences in policy between the schemes with regard to the awarding of compensation and goodwill. Whilst there are many areas of common thinking, OS shows a distinct tendency to award small sums of “goodwill” (under £50), typically for relatively minor customer service breaches.

In order to try to create a framework from which both schemes could operate consistently, Mott MacDonald proposed a system based on three types of compensation. The names allocated to these compensation types were not appropriate, but the types were intended to distinguish:

- a. Compensation for actual loss
- b. Compensation for service and customer service failings
- c. Compensation for relatively minor failings in complaints handling and customer service

In order to distinguish b) from c) Mott MacDonald proposed [REDACTED], incorporating a model similar to that used in [REDACTED]

the POSTRS scheme, whereby the rules of the scheme identify a specific form of compensation payable for complaints handling breaches with a maximum award of £50.

Neither scheme was keen to embrace this idea. Their suggestion was that – rather than create a new framework to formalise a consistent approach to this significant difference in policy – greater consistency could instead be achieved through collaboration.

Mott MacDonald has thus removed reference to these compensation types.

2.5.2 Pre-requisites for making an award

In its Analysis of ADR Adjudications report, Mott MacDonald had expressed some concern that occasionally goodwill awards were being made at OS in cases where the consumer had essentially lost the case, where there were no clear and justifiable grounds. OS has since acted to tighten its procedures in this regard, which is to be commended.

To cover this issue, and indeed to ensure that all awards made are justified, Mott MacDonald proposed as part of its original compensation framework that several key stipulations should be made as pre-requisites for the making of any award. No alterations were suggested by the schemes to these stipulations, although Mott MacDonald has altered the language a little to strengthen the requirement slightly, replacing “should be able to clearly express” with “should clearly express”:

“With all types of compensation awarded the decision-maker should clearly express:

- **What breach has triggered the award**
- **Why this breach is sufficient to justify an award**
- **The precise level of the award**
- **The reasoning for setting the award at this level.”**

2.5.3 Setting the level of an award

As mentioned above, the schemes did not embrace the idea of a three tier framework for compensation, preferring to achieve greater consistency through collaboration.

In its original proposals for a framework, Mott MacDonald suggested that a means to formalise this should be through the production of a common compensation framework to be developed by the schemes. This has been recorded in the Agreement as follows:

“The level of compensation awarded will be guided by a common compensation matrix for use across the schemes.”

Mott MacDonald recommends that this matrix should be produced through a process of information sharing, communication and cross-comparison between the schemes, using a selection of past decisions as reference points. Reference to this requirement for collaboration has been noted in a footnote to the Agreement.

It should be noted that Mott MacDonald believes there is a danger that a reliance on collaboration to ensure consistency regarding compensation could fail to address the significant difference in policy which exists between the schemes today with regard to the awarding of small sums as goodwill – itself a key driver of the fact that the schemes produce different outcomes in favour of consumers. For this collaboration to have a meaningful effect it needs to be undertaken as a concerted programme of work with the full commitment of both schemes and needs specifically to get to grips with this key policy difference.

In reference to the proposed use of a common compensation matrix, the schemes were also keen to stress that such a guide should not be too rigid or prescriptive, as it is vital to allow the individual decision-maker discretion to determine the optimum level of award in the circumstances. Mott MacDonald has therefore added the following statement:

“It should be noted that this framework is intended to serve as an aid to the decision-maker, through creating common reference points. The precise sums awarded should always be left to the discretion of the decision-maker.”

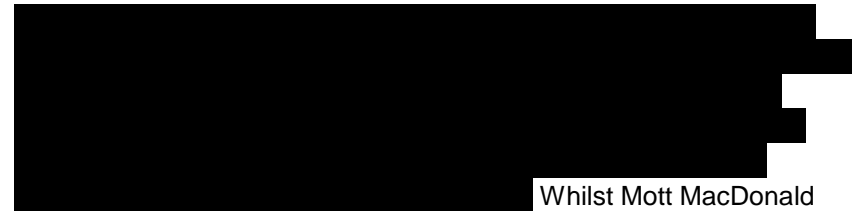
2.5.4 The link between remedy and request

The final area of focus in the compensation area concerns the link made between the request made by a consumer and the award. At CISAS the current rules dictate that a consumer cannot be awarded compensation where they have not directly asked for it, and that an award cannot be made for a sum greater than that requested.

The arguments for and against this approach are explored in the Draft Decision Charter document (section 2.4.4.), but Mott MacDonald believes there are circumstances in which this policy inhibits decision-makers from making fair and justifiable awards, and that this leads to a degree of inconsistency across the schemes. Mott MacDonald would therefore recommend that these restrictions should be removed. As a result, Mott MacDonald included the following statement in its original compensation framework:

“Whilst the schemes should seek to determine the level of compensation sought by a consumer, the specification of an amount should not be a pre-requisite for making an award and neither should

the amount requested serve as a cap on the figure awarded (save for the overall £5,000 limit on the schemes)."



Whilst Mott MacDonald believes there are good reasons for removing this restriction, in the interests of producing a workable Outcomes Agreement it proposes an amended version of the statement on this issue, as follows:

"Whilst the schemes should seek to determine the level of compensation sought by a consumer, the amount requested should not serve as a cap on the figure awarded (save for the overall £5,000 limit on the schemes)."

3. Next Steps

The Outcomes Agreement is a means to an end: that end being greater consistency in outcomes for consumers. In order for the Outcomes Agreement to have a meaningful impact, it needs to be kept alive and updated by regular communication and collaboration between the schemes. This communication and collaboration, with the Outcomes Agreement as a reference point, will help to reveal differences in thinking on key case decisions. Greater awareness of such differences at the schemes will help the schemes to address them. Over time, the schemes should therefore produce more consistent outcomes.

Mott MacDonald proposes the following next steps are undertaken:

- Schemes to review and suggest any edits to the Outcomes Agreement provided in Appendix A.
- Schemes to seek approval required internally and from members
- A final working version of the Outcomes Agreement should be accepted by the schemes²
- Enshrine use of the Outcomes Agreement in training and internal procedures
- Post the Outcomes Agreement on website
- Execute a programme of collaborative activities to include:
 1. Appointment of a Champion at each scheme to lead the collaboration process
 2. Definition of existing and / or new case study and guidance documents to be compiled / created as guide to consistent decision-making
 3. Execution of a formal programme of work designed to produce a common compensation matrix
 4. Agreement of a schedule of meetings between key individual from the schemes to assess
 - a. The effectiveness of the Outcomes Agreement and any appropriate changes
 - b. Progress with collaborative activities
 - c. Recent cases of note
 - d. Future actions
 5. Encouragement of more regular ad-hoc communication on test cases and key issues.
- Conduct an annual cross-scheme review of outcomes, to identify progress and further amendments to the Outcomes Agreement.

² NB: it is expected that the Outcomes Agreement will evolve over time, so by “final version” we mean a stable working version which the schemes can start to implement

Appendix A. ³Outcomes Agreement (v1.1)

A.1. Objective of the Schemes

To resolve disputes between consumers and communications providers⁴.

A.2. Guiding principles

In doing so, the schemes should consider Outcomes in accordance with the following principles:

- Independence
- Fairness
- Impartiality
- Openness
- Transparency
- Effectiveness
- Accessibility
- Measured performance
- Official Approval
- Accountability.

A.3. Decision Guidelines

In achieving a fair and reasonable outcome for both parties, the outcome will:

1. Demonstrate a level playing field between the CP and the consumer so that neither is disadvantaged
2. Promote neither the position of the consumer nor the CP
3. Consider the evidence presented by the parties, the specific circumstances, and other information directly relevant to the dispute
4. Be mindful of, but not bound by, past rulings in similar cases
5. Have regard to the relevant regulations, law and terms and conditions
6. Recognise that both parties must provide evidence to support their position

³ OFCOM EDITORIAL NOTE: This appendix is a draft of the Principles contained in the consultation document published alongside this report. Ofcom is not seeking views on this draft.

⁴ N.B. In this context the term "Consumers" includes small businesses of the nature covered by the schemes

7. Be based on the balance of probabilities in the absence of conclusive evidence
8. Take account of, but not rely on the usual behaviour or practices of either the CP or consumer
9. Give equal credence to the word of the consumer and the word of the CP

The schemes will aid the consistent application of these Decision Guidelines by sharing common reference materials relating to a range of typical and testing cases.⁵

A.4. Compensation Guidelines

1. Pre-requisites for making an award

With all types of compensation awarded the decision-maker should clearly express:

- What breach has triggered the award
- Why this breach is sufficient to justify an award
- The precise level of the award
- The reasoning for setting the award at this level.

2. Setting the level of an award

The level of compensation awarded will be guided by a common compensation matrix for use across the schemes.⁶

It should be noted that this framework is intended to serve as an aid to the decision-maker, through creating common reference points. The precise sums awarded should always be left to the discretion of the decision-maker.

3. The link between remedy and request

Whilst the schemes should seek to determine the level of compensation sought by a consumer, the amount requested should not serve as a cap on the figure awarded (save for the overall £5,000 limit on the schemes).

⁵ The precise reference documents to be shared are to be defined through collaboration between the schemes

⁶ This matrix should be created through collaboration between the schemes.