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# Review of case acceptance by Alternative Dispute Resolution Schemes

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# 1. Overview

Alternative Dispute Resolution (ADR) offers important protection to consumers who have a complaint about their Communications Provider (CP). CPs offering services to individuals and small businesses (up to 10 employees) must be members of an Ofcom-approved ADR Scheme. The process allows people to escalate their complaint to an independent body, which will consider the case and reach a fair and impartial judgement.

Ofcom currently approves two ADR Schemes: Ombudsman Services: Communications (OS) and the Communications and Internet Services Adjudication Scheme (CISAS).

## Summary – in brief

- In our latest periodic [review of the performance of OS and CISAS](#), published in November 2017, we concluded that both Schemes continue to meet the approval criteria set by the Communications Act 2003 and the requirements of the ADR Regulations 2015.
- In the final statement to the 2017 review, we made a commitment to initiate a study into both Schemes' acceptance of cases as some CPs had raised concerns that the Schemes were accepting, and thereby adjudicating on complaints from consumers and small businesses, which fell outside the scope of their terms of reference.
- We felt such a study would be in the interest of consumers and would help ensure the Schemes are providing an efficient service and accepting cases which are within scope.
- We commissioned Mott MacDonald to undertake an independent review to assess whether it was, in fact, the case that Schemes were accepting cases that fell outside their terms of reference.
- Mott MacDonald found there was a high level of decision-making accuracy across both Schemes with regard to case acceptance or rejection.
- Mott MacDonald has, however, made three recommendations to improve the process of accepting and adjudicating ADR cases. Both Schemes should:
  - review and refine the classification of disputes;
  - refine processes around the validation of cases; and
  - ensure their terms of reference are clearly understood by communications providers.
- Mott MacDonald also recommended that CISAS should:
  - track and monitor rejected disputes.

While the independent study highlighted that both Schemes work well, we have carefully considered its recommendations and agree that further improvements can be made. We have set out next steps below.

## 2. Introduction

- 2.1 The Communications Act 2003 ('the Act') places a duty on Ofcom to secure the availability of ADR procedures for domestic and small business customers. Under powers in the Act, Ofcom currently approves two ADR Schemes: Ombudsman Services: Communications (OS), and the Communications and Internet Services Adjudication Scheme (CISAS). Both Schemes are also approved under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the 'ADR Regulations'). We are required to keep these approvals under review.
- 2.2 In our most recent review of the Schemes in 2017, we concluded that both Schemes continue to meet the approval criteria set by the Act and the requirements of the ADR Regulations.
- 2.3 Following the 2017 review, both Schemes agreed to make changes to further improve their performance and committed to take part in a study to assess their case acceptance decision-making.
- 2.4 During our 2017 review, a number of Communications Providers (CPs) raised concerns that the Schemes were accepting cases which they believed were out of scope for ADR. These included cases that they perceived to be vexatious or brought by businesses which should not have been using ADR (i.e. those with more than 10 employees). Some CPs expressed a belief that the financial models of the Schemes incentivised them to accept cases that were out of scope.
- 2.5 The ADR Regulations clearly stipulate the grounds by which a Scheme can refuse to accept a complaint. While some CPs provided anecdotal examples of cases they perceived to be out of scope of the Schemes' terms of reference, this limited evidence did not suggest a systemic issue. However, given the strength of feeling amongst industry stakeholders, Ofcom made a commitment to commission an external body to review a sample of cases that CPs challenged as being out of scope<sup>1</sup>. We felt such a study would be in the interest of consumers and would help ensure the Schemes are providing an efficient service and accepting cases which are within scope.
- 2.6 We appointed Mott MacDonald, an independent consultancy, to:
- review a sample of the Schemes' cases which CPs have disputed on the basis they are outside the terms of reference of the Schemes, and provide an independent view on whether each case looked at should have been in or out of scope for ADR;
  - identify trends and common factors in cases being accepted/rejected as in/out of scope; and
  - make proposals on how any issues identified could be addressed.

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<sup>1</sup> CPs can dispute an ADR Scheme's decision to accept a case if it feels the complaint is outside the scope of the Scheme's terms of reference. The ADR Scheme then reviews the dispute made by the CP and if the Scheme agrees the case will be rejected and not proceed to adjudication. If the Scheme disagrees the case will continue and carry on to adjudication.

- 2.7 Both Schemes are independent of Ofcom but agreed to act on any relevant recommendations arising from Mott MacDonald's findings.

## 3. Overview of case acceptance findings

- 3.1 In 2017, OS accepted 34,981 cases from consumers, of which 3,739 were disputed by CPs as being outside the terms of reference of the Scheme. CISAS accepted 4,051 cases in 2017, of which 158 were disputed by CPs as being outside the terms of reference of the Scheme. Disputed cases therefore represented just under 10% of the total number of cases accepted by the Schemes.
- 3.2 For the 2017 data period the case sample from OS was drawn from cases for BT, EE, O2, Sky and Vodafone. The case sample for CISAS was drawn from cases for Plusnet, TalkTalk and Virgin. During the data period, TalkTalk left OS and joined CISAS in October 2017 and Plusnet left CISAS and joined OS in November 2017. Following the period in which the data was collected, both Sky and Vodafone have left OS and joined CISAS.
- 3.3 CISAS system capabilities at the time meant that a CP's dispute was only logged if CISAS accepted it, and the complaint did not proceed to adjudication. Therefore, we expect that more than 158 of CISAS' 4,051 2017 caseload were disputed, but CISAS could not provide exact figures. CISAS were only able to provide three cases which proceeded to adjudication once a CP dispute was raised. Therefore, the vast majority of cases looked at from CISAS were where the CP dispute was accepted, and the complaint did not proceed to adjudication.

### Sample design

- 3.4 Mott MacDonald reviewed a sample of 340 cases<sup>2</sup> accepted by OS and CISAS in 2017, but which were subsequently disputed by CPs.
- a) 252 of the 340 cases were sampled from OS directly. Of these, 122 (48%) were cases in which the CP's dispute had been rejected by OS – i.e. they proceeded to adjudication as the case was deemed Inside the Terms of Reference (ITOR). In 130 cases (52%) the CP's dispute had been accepted – i.e. the cases did not proceed to adjudication as the case was deemed Outside the Terms of Reference (OTOR).
  - b) 60 of the 340 disputed cases were drawn directly from CISAS. Of these, 3 (5%) were deemed ITOR by CISAS and were adjudicated on (as noted above, CISAS did not routinely track such cases, hence the small sample). 57 (95%) of the 60 disputed cases were deemed OTOR by CISAS and did not proceed to adjudication.
  - c) 28 disputed cases were submitted directly by CPs.

### Analysis of cases in which the Schemes upheld the CP's dispute

- 3.5 Mott MacDonald's study found that in 20 out of the 130 cases (15%) where OS upheld the CP's dispute and rejected the complaint as OTOR, there were grounds for the Scheme to dismiss the CP's dispute and adjudicate on the complaint. For CISAS, Mott McDonald found

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<sup>2</sup> The 340 case sample represented 11% of the total cases identified as disputed by CPs in 2017 (3,897).

that in 22 out of the 57 cases (39%) where the CP's dispute was upheld, and the complaint rejected as OTOR, the Scheme had grounds to accept and adjudicate on the complaint. This was partly because these cases were often disputed on the grounds of incorrect or incomplete account information, rather than for being materially 'out-of-scope'. In Mott MacDonald's opinion, in many of these cases, there was already enough pertinent information contained within the case for it to have continued to adjudication without further validation. The percentage was also higher at CISAS because of a lack of information on some case files.

- 3.6 Mott MacDonald also found three cases where CISAS upheld the CP's dispute and rejected the case, because the complainants did not have the relevant authority to act on behalf of the vulnerable account holder, who had been unable to delegate authority.

#### **Analysis of cases in which the Schemes rejected the CP's dispute**

- 3.7 Mott MacDonald found that in three of the 122 ITOR cases (2%) sampled from OS where the CP's dispute was rejected, OS should have upheld the CP's dispute and not adjudicated on the complaint. Mott MacDonald was unable to do the same analysis of cases found ITOR at CISAS because of the small sample size as explained above.

#### **Analysis of disputed cases submitted directly by the CP**

- 3.8 Of the 340 disputed cases examined, 28 (8%) were submitted directly by CPs to highlight their particular case acceptance concerns, as requested by Mott MacDonald. Of these 28 cases disputed by the CPs, Mott MacDonald found that 61% were within the Schemes' terms of reference and as such should proceed to adjudication. For some of the disputed cases provided by CPs, their challenge was incorrectly based on the merits of the case. The merits of a case, however, are for the ADR Schemes to rule on, not the CP.

#### **Conclusions**

- 3.9 Mott MacDonald's findings confirm that there is a high level of decision making accuracy across both Schemes with regard to case acceptance or rejection. No evidence was found to suggest that acceptance of cases was financially motivated, or that the Schemes were accepting vexatious cases.

#### **Recommendations made by the independent consultancy**

- 3.10 Following the study, Mott MacDonald made four recommendations to improve the process of accepting and adjudicating ADR cases. It considered that both Schemes should:

1) Refine/review the classification of disputes

- 3.11 Mott MacDonald found there were two key categories of disputes: those which were materially outside the terms of reference of the Schemes, and those which related to invalid and incomplete account information. Mott MacDonald considered it pragmatic to re-classify cases where a dispute is raised based on invalid account information; instead of being considered a "dispute" they should be flagged as a "query" or "clarification" request.

2) Refine processes around the validation of cases

3.12 In Mott MacDonald's opinion there should be a more flexible approach to information validation, especially in complaints involving vulnerable consumers. Mott also noted that consumers should be given adequate time to provide information, without their complaint closing.

3) Refresh communications providers' misconceptions about the remit of ADR Schemes

3.13 Because of the number of complaints challenged by CPs on the merits of the case rather than being outside the terms, Mott MacDonald considered it would be beneficial to have further dialogue with CPs to clarify any misconceptions or gaps in understanding on the remit of the ADR Schemes.

4) CISAS to track and monitor rejected disputes

3.14 Mott MacDonald was unable to carry out adequate analysis on cases where CISAS disagreed with a CP's dispute and the complaint, therefore, proceeded to adjudication. Mott MacDonald suggested that CISAS should better track these cases and their reasoning for rejecting CPs' disputes. CISAS began doing so from 23 January 2018.



## 4. Next steps

- 4.1 In our most recent review of the Schemes in 2017, we concluded that both Schemes continue to meet the approval criteria set by the Act and the requirements of the ADR Regulations.
- 4.2 Ofcom has carefully considered Mott MacDonald's recommendations in line with the Act, the ADR regulations and Ofcom's General Conditions.
- 4.3 Mott MacDonald's findings confirm that there is a high-level of decision-making accuracy across both Schemes with regard to case acceptance or rejection, and Ofcom is satisfied that both ADR Schemes are following the requirements set out in the ADR regulations and the Act.
- 4.4 However, we consider that there is an opportunity to improve the Schemes' operational effectiveness. The steps we have set out below, in response to Mott MacDonald's recommendations, will help ensure consumers have easy access to dispute resolution and that should they choose to access ADR, that legitimate complaints can proceed to adjudication.
- 4.5 We consider these measures may also help to free up some of the ADR Schemes' and CPs' resource that is currently taken up with disputed cases. Disputing a complaint, and then the subsequent investigation into the dispute, is resource intensive for both the provider and the ADR Scheme. The steps we have set out below, will aim to reduce the number of complaints being disputed by CPs and ensure more effective classification and monitoring of disputes so that trends can be more easily identified.

### Refine and review the classification of disputes

- 4.6 In Ofcom's view, there is merit to an approach that would see disputes related to incomplete or invalid account information, as separate to a dispute about whether the case itself is within terms. As Mott MacDonald's study shows, some disputes related to incomplete or invalid account information can be easily resolved (for example, where the disputed account holder can be matched from existing records, and someone whom the CP has already been dealing with).
- 4.7 While some cases disputed on the grounds of incomplete or inaccurate account information *are* eventually closed as the complainant is *not* the account holder, we still consider that a separation of dispute categories could help improve the Schemes' monitoring of cases.

### Refine processes around the validation of cases

- 4.8 In Ofcom's view, the numbers of cases disputed on the grounds of invalid or incomplete account information is too high. There are many reasons why information may be missing; the customer may not know their account number or may have mistakenly entered a reference number as their account number. Some customers may have left the

information blank on the ADR form as they believe their CP already has the relevant information.

- 4.9 However, any missing or incorrect information can cause delays in a case being adjudicated on. In some cases, if the consumer does not respond with the missing information, the case will be closed, and a genuine complaint not investigated. Ofcom believes the number of disputes regarding account information can be reduced if CPs and Schemes work together to ensure that cases are disputed *only* where the customer cannot be matched from existing records.
- 4.10 Another way of reducing the number of disputes about whether the complainant is a customer of the CP could be through signposting. When a CP signposts the consumer to ADR, either with an 8 week or deadlock letter<sup>3</sup>, it contains relevant information that the customer needs to escalate their complaint to the relevant Scheme. We are aware that some CPs already provide the customer account number on the deadlock letter, but many CPs do not include a customer account number on the 8-week letter. In light of the results of the study, and the importance of the customer account number in matching the customer to the CP, we would strongly encourage all CPs to include the customer account number in both the deadlock and 8-week letters.
- 4.11 In some cases, it will still be necessary for the ADR Schemes to contact the consumer to ask for more information. Mott MacDonald highlighted that consumers were not always given adequate time to provide any missing information. OS allowed consumers 14 days to respond, whilst CISAS, in some cases, only allowed 5 working days. If the consumer did not respond within the given timeframe, the complaint could be closed. However, it is important to note that if the consumer came back within a reasonable time, the complaint would be reopened. Following the study, CISAS have committed to allowing consumers at least 10 working days to provide information.
- 4.12 Mott MacDonald also highlighted a concern around family members of vulnerable consumers being able to submit a complaint to ADR. The General Conditions state that there should be “adequate procedures in place which enable individuals other than the named account holder to make decisions on an account, subject to a verification process which requires those individuals to provide information that would only be available to an authorised decision maker.” Both Schemes include in their application form the opportunity for a complainant to designate a representative to handle their complaint. However, there are circumstances where the account holder may not have capacity to designate authority to someone, for example if they were suffering from illness or experiencing mental health issues. In situations like this, we would expect the CPs and ADR Schemes to consider the individual’s circumstances on a case-by-case basis and adopt a pragmatic approach to what evidence they require a representative to provide to prove

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<sup>3</sup> When a complaint is made to a CP, they have up to 8 weeks to resolve the complaint before the customer can access ADR. During this period, if the CP cannot resolve the complaint, they will issue a ‘deadlock letter’ which allows the consumer to access ADR. This letter can be issued at any point within the 8 weeks. If the complaint cannot be resolved or an outcome is not reached within 8 weeks, the CP is required to issue a letter advising the consumer of their right to go to ADR if they wish to. Both the deadlock letters and 8 week letters are referred to as ‘ADR letters’.

that they have the relevant authority, in accordance with data protection legislation. For example, they may have legal documentation which shows that they have authority to make certain decisions on behalf of the account holder.

- 4.13 There were also circumstances when a CP deemed a complainant as “unauthorised” when they were a spouse with the same surname, living at the same address, and had previously been dealing with the complaint before it went to ADR. In some cases, the deadlock letter had been sent to the complainant who was later deemed unauthorised. In these types of cases, we would similarly expect CPs to adopt a pragmatic approach to customer authentication, in accordance with data protection legislation.

### **Ensure the terms of reference of the Schemes are clearly understood by CPs**

- 4.14 Ofcom have discussed the findings with both OS and CISAS, who are supportive of the recommendations and will make changes as appropriate to strengthen their scheme. In addition, the Schemes will ensure their terms of reference are consistently and clearly understood and will implement appropriate changes.

### **CISAS to track and monitor rejected disputes**

- 4.15 Finally, as noted in Mott MacDonald’s report, it was unable to carry out the same analysis on CISAS cases as OS, due to how CISAS tracked cases previously. However, since 23 January 2018, CISAS are now able to track all disputed cases.