



Analysis of ADR Adjudications

Final Report

May 2011

Ofcom

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Executive Summary

Ofcom has been aware that Otelo and CISAS produce a different proportion of outcomes in favour of consumers. Considering all applications to the schemes in 2010, 88% of those sent to Otelo resulted in a positive outcome for the consumer, versus 64% at CISAS. Underlying these statistics are two trends:

- 1) CISAS settled a higher proportion of cases informally (and thereby provided the consumer with a positive outcome) in 45% of cases, versus 27% at Otelo.
- 2) Of the remaining cases which went to formal adjudication or investigation, in 84% of cases at Otelo produced outcomes in favour of consumers versus 35% at CISAS



In order to understand better the latter divergence, Ofcom asked for a comparison to be made between the decisions published by CISAS and Otelo regarding those cases going to formal adjudication or investigation. It required the study to identify likely reasons for the difference in the proportion of cases decided in favour of consumers versus communications providers (CPs). This meant commenting on the most noticeable differences in outcomes and identifying the most likely explanations for them.

Mott MacDonald analysed a sample of 80 cases from each ADR drawn from 2010. Its analysis indicated that there is not a systemic problem with the adjudication process at either scheme. Both Otelo and CISAS made verdicts adjudged by Mott MacDonald to be Reasonable or Very Reasonable in over 80% of cases.

In spite of process differences, the evidence from consumers was of an equal quality and the act of adjudication was similar at CISAS and Otelo. Different strands of evidence were weighed up with a similar objective of reaching a verdict based on the balance of probabilities. Differences in style or process did not translate into differences in analysis.

However, there were two principal respects in which the adjudications relating to the 160 cases analysed differed, which had a direct bearing on the number of cases decided in favour of consumers.

1. CISAS displayed an occasional tendency to be too dismissive of the consumer's argument.

This was demonstrated through failing to give the consumer sufficient benefit of the doubt when their word conflicted with that of the CP. This resulted in a high number of outcomes in entirely in favour of the CP (48% of the 80 cases). There were grounds to award a remedy to consumers in half of these cases.

2. Otelo displayed a tendency to be overly liberal with compensation / goodwill payments.

The number of compensation / goodwill payments made by Otelo far outweighed the number at CISAS, and the majority of payments were for relatively small amounts. Otelo made 23 awards for sums less than £50, whilst CISAS only made 4 awards in this range. Some of these awards by Otelo were for relatively minor infractions and a few were made in spite of the CP having effectively won the case.

Otelo and CISAS appear to have a slightly different guiding ethos. Therefore, although the decisions each makes can be considered reasonable, they produce different outcomes. In order to ensure consistency of outcomes, it is this difference in ethos that needs to be addressed. Otherwise, any practical changes made to elements of process will treat the symptoms, not the cause and different outcomes are likely to persist.



Mott MacDonald believes there are a number of actions which could help to ensure greater consistency in outcomes,.

1. Establish a single set of guiding principles through a programme of joint engagement
2. Develop a more formal compensation scale
3. Introduce a minimum compensation threshold
4. Introduce an appeals process at CISAS for cases where the CP fails to respond.

1. Introduction

1.1 Background

Ofcom requires all Communications Providers (CPs) to belong to an Ofcom-approved Alternative Dispute Resolution (ADR) scheme. It has approved two such schemes:

- the Office of the Telecommunications Ombudsman (Otelo)
- the Communications and Internet Services Adjudication Scheme (CISAS).



The ADR schemes are free to consumers and are independent of CPs and Ofcom. If a consumer's complaint has not been resolved by a CP within eight weeks (or the CP acknowledges the complaint is 'deadlocked'), a consumer can make an application to the relevant ADR scheme. The ADR scheme has the authority to examine the case and to make an appropriate judgment – which could potentially include a financial award and/or requiring the CP to take necessary action. While CPs are bound by the decisions of the ADR schemes, consumers still have the ability to pursue their dispute through the legal system if they remain unsatisfied with the outcome.

Ofcom is obliged under the Communications Act 2003 to periodically review its approval of ADR schemes and it has recently launched a review of both CISAS and Otelo. This review is considering the operations, structure and rules of both organisations. Ofcom has the power under the Act to modify the terms of its approval (i.e. mandate changes to either scheme's operations) or to withdraw approval of either scheme.

1.2 Differences between ADR schemes when resolving disputes

Ofcom has always been conscious that Otelo and CISAS have contrasting approaches to dispute resolution. Ofcom has described some of these differences in Appendix One of its Terms of Reference. A summary of the key characteristics of each scheme detailed there are shown in Table 1-1:

Table 1-1: Characteristics of ADR schemes

Characteristics	Otelo	CISAS
Number of in-remit cases in 2010	<ul style="list-style-type: none"> ▪ 8,867 – Of which 6,484 went through formal investigation process 	<ul style="list-style-type: none"> ▪ 1,237 cases in 2010 – Of which 667 went to a formal adjudication



Characteristics	Otelo	CISAS
Ethos	<ul style="list-style-type: none"> ■ High degree of customer support, to redress imbalance of power with CPs ■ Offers to complete applications for consumers and provides tailored advice 	<ul style="list-style-type: none"> ■ Places great weight on treating consumers and CPs equally ■ Will not help either party to put a case together ■ Consumers can complete applications online, or using a form sent out ■ Staff will guide consumers on completion of application – including filling in the form for them, for consumer to confirm and sign
Approach to case review	<ul style="list-style-type: none"> ■ Dedicated investigations team to examine allegations and submissions from CP ■ Iterative process, with each party able to make submissions on the Provisional Conclusion before passed to Ombudsman ■ Final Decision made by Ombudsman if either party doesn't accept Provisional Conclusion ■ New 3 stage process introduced in late October: <ul style="list-style-type: none"> i. Report ii. Decision (if report challenged) iii. Review (in case of significant error or new facts) 	<ul style="list-style-type: none"> ■ Does not investigate consumer complaints ■ First step in all cases is to send the case to the CP and allow CP 14 days to settle the case ■ If the consumer agrees, the CP is charged a fee for work completed which is less than a full case fee. ■ Consumers are provided with an opportunity to comment on the CP's response ■ Adjudicators have the ability to request further information from either party ■ Adjudicators apply legal principles to determine whether the consumer has proven case



Characteristics	Otelo	CISAS
		<ul style="list-style-type: none"> ■ Neither consumers nor CPs have right to challenge an adjudication¹

Source: Derived from Appendix One of Ofcom's TOR

1.3 Differences in Outcomes

Ofcom has recently become aware of evidence that suggests that the contrasting approaches of the two schemes might be resulting in material differences in outcomes for consumers. Statistics provided by each scheme show that in 2010:

- Of the applications to CISAS, 64% are likely to result in a positive outcome for the consumer:
 - 45% are settled informally between the CP and consumer
 - 55% go to adjudication, of which:
 - 65% are adjudicated in the CP's favour
 - 35% are likely to be in the consumer's favour (i.e. requires a remedy)
- Of the applications to Otelo, 88% are likely to result in a positive outcome for the consumer:
 - 27% are settled/mediated informally between the CP and consumer;
 - 73% go to a formal investigation, of which:
 - 16% are in the CP's favour; and
 - 84% are likely to be at least partially in the consumer's favour (i.e. requires a remedy)

¹ Though, as with Decisions made by OS, a consumer can reject the Decision and take further action through the courts

Ofcom is concerned about what appears to be a material difference between the prospects of success for a consumer going to either scheme (64% at CISAS vs 88% at Otelo). This difference is even more significant for those cases where the schemes are required to adjudicate the dispute (35% vs 84% respectively). With respect to this latter figure, it is recognised that as CISAS settles a higher proportion of applications, the cases that do proceed to adjudication are likely to include a higher proportion of complex cases not capable of settlement. Nevertheless, these overall figures do demonstrate sufficient cause for concern regarding the divergence between the two schemes.



It is also noted that although a higher proportion of cases going to Otelo require the CP to provide some form of remedy to the consumer, the average financial award made is much lower than that awarded by CISAS. In 2009, the average Otelo award made to consumers was £103.47, while the average CISAS award was £173.

1.4 Ofcom's Hypotheses regarding differences

Ofcom has a number of working hypotheses as to what may explain the difference in outcomes of the cases that go to each scheme. For example:

- Otelo offers to complete an application form on behalf of all consumers, which means that complaint forms are likely to be comprehensively completed and consumers may be prompted to provide all the necessary evidence to support their case. By contrast CISAS places great weight on being neutral but will guide consumers if prompted.
- The CISAS adjudication model is likely to place more emphasis on consumers being able to articulate their complaint and supply evidence that supports each aspect of their claim, while as an ombudsman service Otelo may be more likely to investigate circumstances behind a complaint and contact consumers where further information may be needed;
- It is possible that each scheme is applying different standards of proof in their decisions. For example, the Executive of both schemes claim that they accept unchallenged assertions from consumers on 'good faith', but we have anecdotal examples where in practice this has not been the case.

- Ofcom believes it is possible that Otelo is more likely to be willing to consider the entirety of a CP's conduct when considering liability/compensation and often requires CPs to make 'goodwill' payments to consumers for shortfalls in customer service. It may be that as an adjudication scheme CISAS will only focus on the specific claims made by a consumer (i.e. it will only consider awards for poor customer service if the consumer requests such a remedy in addition to the original issue that gave rise to the complaint). If true, this may help explain the much lower average award made by Otelo.
- The lack of a 'right of appeal' at CISAS could contribute to the difference, particularly where a CP fails to respond to an application and the consumer only has 'one shot' to put forward their arguments and supply the correct evidence. However, Ofcom notes that Otelo offers both consumers and CPs the opportunity to appeal decisions, so this may not be a compelling reason why the existence of a right of appeal should result in more Otelo judgments in favour of consumers
- There could be other unknown reasons, such as
 - the possibility of poor/unreasonable decisions being made at either scheme; and
 - Internal pressure on Otelo staff to provide nominal remedies to consumers, whereas some CISAS adjudications are undertaken by external adjudicators who may not feel the same pressures.



As a result of the divergences noted, Ofcom decided to commission this review of the adjudication decisions at both ADRs with a view to understanding the drivers of the divergence.

1.5 Ofcom's Objectives

Ofcom asked for a comparison to be made between the adjudications/decisions published by CISAS and Otelo. It specifically required the study to identify likely reasons for the difference in the proportion of cases decided in favour of consumers/providers. Based on a sample of case material Ofcom expected this study to:

1. Comment on the most noticeable differences in outcomes for cases that proceed to adjudication/investigation at each scheme, including:
 - the reasonableness of the decisions

- Mott MacDonald understands that this did not require a full assessment of the merits of the case, but rather an analysis of whether the decision addressed the main points in issue, and provided a reasoned and broadly justifiable outcome given the evidence available);
 - whether similar cases result in similar outcomes;
 - whether similar cases result in similar remedies/compensation.
2. Identify the most likely explanation for any differences in outcomes, including a consideration of:
- whether there may be any systemic problems with the quality of adjudications at either scheme;
 - the extent to which each scheme appears to apply varying standards of proof;
 - the extent to which any difference in outcomes can be explained by consumer applications to one scheme being of a higher quality than at the other;
 - the extent to which adjudicators/investigators at each scheme are prepared to make findings on aspects of a case that may not have been the primary reason for a consumer making an ADR application (i.e. willingness to award compensation for poor customer service in a complaint about mis-selling).



The following section details the approach employed by Mott MacDonald to meet these objectives.

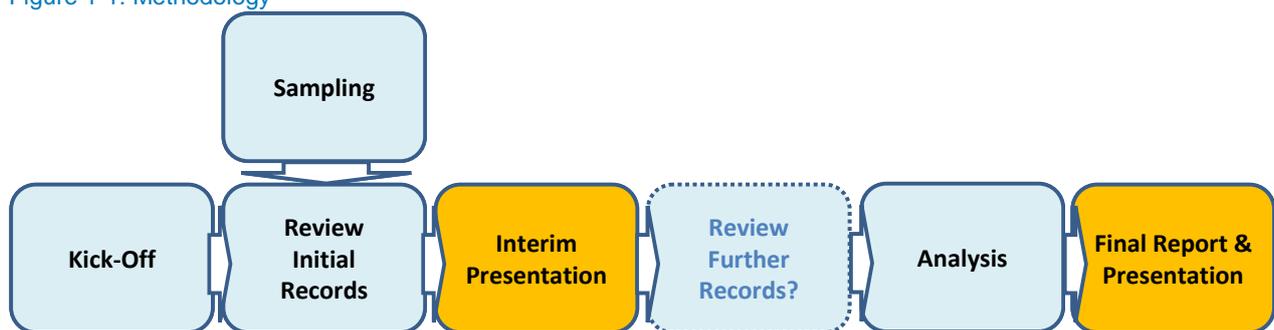
1.6 Mott MacDonald's Approach

1.6.1 Methodology

Mott MacDonald has completed several past assignments for Ofcom involving the analysis of external and internal case data, for example relating to sales calls and consumer complaints. The methodology employed, which draws on experience gained during these assignments, is illustrated in Figure 1-1:



Figure 1-1: Methodology



Whilst Mott MacDonald does not believe it is necessary to run through every detail of the approach, it may be useful to comment briefly on some of its key elements, so that the bases for the analysis and findings outlined in this report are understood.

1.6.2 Sampling

In 2010, 6,484 Otelco cases went through formal investigation and 667 CISAS cases through formal adjudication. In order to achieve Ofcom's objectives, Mott MacDonald sampled the same number of cases from each ADR. Given the budget cap stated by Ofcom in its terms of reference, Mott MacDonald sampled and reviewed 80 cases from each ADR, making a total of 160 cases in all.

In terms of the sampling process used to pick the records analysed, Mott MacDonald employed a technique called Stratified Random Sampling – used on several past assignments conducted for Ofcom. This involves dividing the sampling frame into groups, called *strata*, and then making a selection of a simple random sample from each one. This entailed:

- Taking each group of records (from the 2 ADRs) separately

- Sorting them into strata by a common factor such as case category and / or date
- Selecting every n^{th} record, such that (total records / $n = 80$)
- ...with the first record sampled selected randomly (eg by generating a random number between 1 and n at www.random.org)



Whilst Ofcom indicated it was not looking to gain an insight into the accuracy of decision-making by category of case at either ADR, Mott MacDonald believed it was still worth arranging the cases into strata by category, if possible, prior to sampling. Even if the categories used at the two ADRs were different, organising the sample in this manner would mean that a proportionate mix of the individual categories was sampled at each ADR. The intention being that this enables some cross comparisons to be made on approaches to similar types of case. In the event, Otelo provided a list of cases to sample with the category identified, but CISAS did not. Thus Otelo's cases were organised into strata by category, and CISAS cases were ordered by date and case number.

1.6.3 Case Review

To review the 80 cases from each scheme, Mott MacDonald drew up a list of all the factors it wished to assess, and built an Excel spreadsheet framework to record information on each case against these factors. The key information gathered using this method is identified in Table 1-2:

Table 1-2: Information recorded for analysis

Variable	CISAS	Otelo	Indicator
CP Identity	X	X	CP Name
Timespan	X	X	Days
Category	X	X	Termination Charges etc
Service Type	X	X	Fixed / Mobile
Customer Service (CS) Element to Case?	X	X	Yes / No
What consumer wants	X	X	Description
Case Summary	X	X	Description
Quality of consumer evidence	X	X	High / Medium / Low
Passed to Debt Collectors?	X	X	Yes / No
CP Responded?	X	X	Yes / No



Variable	CISAS	Otelo	Indicator
CP Comments / Defence	X	X	Description
Quality of CP evidence	X	X	High / Medium / Low
CP Verdict	X	X	Rejects / Makes offer (details of offer if made)
Did Consumer comment on Defence?	X		Yes / No
Consumer comments on defence	X		Description
Decision	X		Succeeds, Fails, In-Part
Details of Decision	X		Description
Provisional Conclusion		X	Succeeds, In-Part, Fails
PC Details		X	Description
MM Comments on PC		X	Description
Consumer Accept PC?		X	Yes / No
Consumer's Further Representations		X	Description
CP Accept PC?		X	Yes / No
CP's Further Representations		X	Description
Final Decision		X	As PC / Description if different
Financial award (total)	X	X	£
Compensation	X	X	£
Refund	X	X	£
Waiver	X	X	£
Did consumer get what requested (compare to request above)	X	X	Yes / No for each item requested
Who decision in favour of	X	X	CMR / CP / CP Mainly (see section 2.3)
Was CS Element considered?	X	X	Yes / No (and award if one made)
Overall Reasonableness	X	X	Reasonable, Questionable etc (see section 2.2)
Overall comments	X	X	Comments

As has been stated, the processes at Otelo and CISAS differ slightly:

- At Otelo there is a Provisional Conclusion by the adjudicator, following a review of the CP's evidence, with a chance for the CP and or / consumer to appeal this and make further representations
- At CISAS the consumer responds to the CP's evidence, and the adjudicator's Decision follows this (and is final)

As a result, slightly different sections were created in the spreadsheet to gather appropriate information on these steps, but otherwise the structure of the approach was identical.



The results of the analysis conducted with the aid of this approach can be found in section 2.

2. Case Analysis

2.1 Breakdown of Cases by CP and Service Type

Communications Providers in the UK are required to belong to one of the two ADR schemes. As such, the cases examined by each scheme come from different service providers. Figure 2-1 and Figure 2-2 below show the breakdown of cases analysed by CP.



Figure 2-1: Otelco Cases by CP

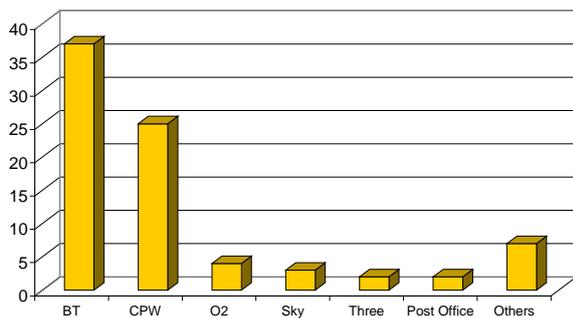
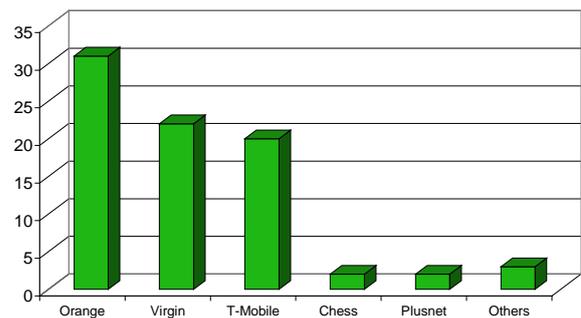


Figure 2-2: CISAS Cases by CP



As can be seen from these charts, BT and Carphone Warehouse group (CPW) companies provided the largest number of cases sampled at Otelco, and Orange, Virgin and T-Mobile the largest number of CISAS cases.

Several of the companies encountered provide both fixed and mobile services, and Mott MacDonald thought it would be useful to indicate the number of cases concerning each service, as shown in Figure 2-3 and Figure 2-4.

Figure 2-3: Otelco Cases by service type

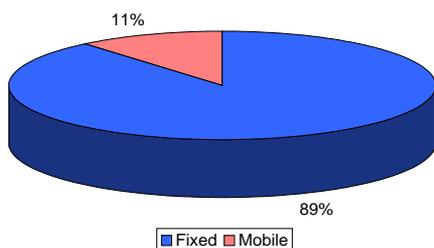
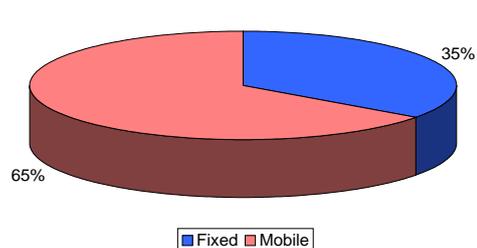


Figure 2-4: CISAS Cases by service type



Both fixed and mobile cases comprised a mix of subtypes of case – for example, those regarding telephony and broadband or data services – but it was not found to be pertinent to split these out separately..

2.2 The reasonableness of Decisions

One of the key objectives of the study was to evaluate the extent to which the decisions made by the two schemes could be considered reasonable, and the degree to which this might differ across the schemes. Is one scheme more or less reasonable in delivering verdicts? To what extent does this explain the difference in the number of verdicts made in favour of consumers?



To review the reasonableness of decisions, Mott MacDonald devised a rating of verdicts based on 5 possible outcomes, shown in Table 2-1.

Table 2-1: Definition of verdict ratings

Rating	Definition
Very reasonable	Entirely correct decision, with no scope for an alternative outcome
Reasonable	Sound decision on the whole, though a variation in verdict possible
Average	Acceptable decision, but a good argument for a different verdict
Questionable	Questionable decision, important evidence ignored and a different outcome preferred
Unreasonable	Incorrect decision, a different verdict ought to have been reached

Based on this rating system, a breakdown of verdicts at each scheme is shown in Figure 2-5 and Figure 2-6:

Figure 2-5: Reasonableness of decisions at Otelio

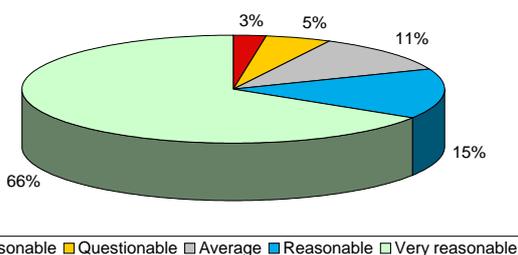
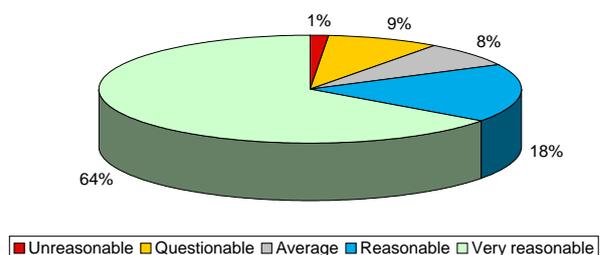


Figure 2-6: Reasonableness of decisions at CISAS





As can be seen, the general pattern is broadly similar across the two schemes. In relation to a sample of this size, small differences in percentages cannot be held to be significant. Indeed if one considers the number of Unreasonable, Questionable and Average verdicts, there are 15 such cases at Otelo and 14 at CISAS, little difference at all. It should be noted that such decisions are very much in the minority, and that over 80% of verdicts are rated as Reasonable or Very Reasonable at both schemes. This suggests two things: firstly, there is no systemic problem with the adjudications at either scheme – the majority of verdicts can be considered to make sense. Secondly, the difference in the *overall* number of verdicts made in favour of consumers is not directly explained by a difference in reasonableness – as neither scheme is any more reasonable than the other.

However, it should be noted that whilst the overall patterns are similar it is important to examine how this maps to different types of outcome. An analysis of this is undertaken in section 2.3.

2.3 The pattern of outcomes

2.3.1 Overview

At first glance there are three possible outcomes for any case: it can fail, succeed, or partly succeed. However in practice, the last of these three possibilities can mean many things – there are varying degrees of partial success, from cases in which the CP’s argument is almost entirely accepted but in which the consumer is awarded a small goodwill payment, to those in which the consumer achieves 90% of the remedies sought. In order to give a relatively granular view of case outcomes, Mott MacDonald devised a system comprising 5 categories of result, as shown in Table 2-2.

Table 2-2: Definition of Outcome categories

Category	Definition
CMR Only	■ Case Succeeds – consumer completely wins the case
CMR Mainly	■ Balance of verdict in favour of the consumer
50/50	■ Verdict evenly weighted in favour of consumer and CP
CP Mainly	■ Balance of verdict in favour of the CP
CP Only	■ Case Fails – CP completely wins the case

Mott MacDonald analysed the verdicts reached according using this system, and Figure 2-7 and Figure 2-8 show the breakdown of outcomes produced.



Figure 2-7: Case outcomes at Otelo

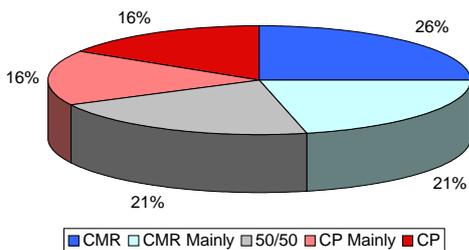
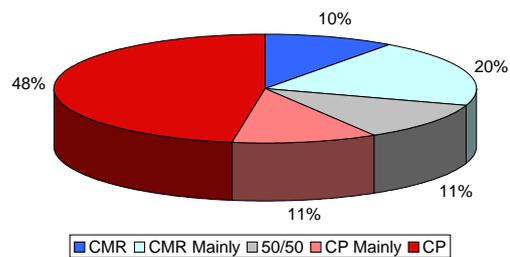


Figure 2-8: Case outcomes at CISAS



The pie-charts clearly show that, for the 160 cases analysed, more decisions were reached in favour of consumers at Otelo than at CISAS – not a surprise, given this was a reason this study was commissioned. Of the Otelo cases analysed, the consumer received a remedy of some kind 84% of the time, compared to 52% of the time at CISAS. 26% of decisions at Otelo were entirely in favour of the consumer, versus 10% at CISAS, and in almost all the categories where the consumer won a partial victory there were more cases of that type at Otelo.

The question is: why is the pattern so different? The following sections look at some trends observed regarding each of the outcome types.

2.3.2 CP Only Cases

Whilst Mott MacDonald has stated above in section 2.1 that “the difference in the *overall* number of verdicts made in favour of consumers is not directly explained by a difference in reasonableness” the italics are important, because a closer analysis of reasonableness in decision-making does reveal an impact in one particular category of outcome: the number of cases at CISAS in which the verdict was passed entirely in favour of the CP (CP Only cases in Figure 2-8).

AT CISAS there were a total of 14 cases which Mott MacDonald adjudged to be Unreasonable, Questionable or Average, and 12 of these cases were CP Only cases. Some examples include:

- A case in which a consumer's mis-selling claim is rejected as she cannot provide evidence of the original telephone sale or "substantive" evidence of customer service failings – despite providing a fairly credible account of both. The mis-selling claim related to being given a contract for £20 a month, when £18 had been promised and, given the customer went on to agree a more expensive contract with the CP subsequently, it seemed unlikely they would have fabricated the mis-selling claim over such a small amount.
- Two cases in which a consumer's case is failed for not being able to prove something promised in shop sale situation
- A further case being rejected for not being able to prove a verbal sale, with the adjudicator awarding nothing despite the fact that the CP had originally offered compensation
- Giving no benefit of the doubt to a consumer in a mobile phone theft case, making him liable for the full cost of calls since the phone went missing – despite the consumer having a compelling reason for not having reported the phone as stolen sooner. Moreover, the CP had originally offered to waive 25% of the cost – an offer it would have seemed reasonable to reinstate
- Rejecting a claim to reduce the amount owed by a consumer as a result of their partner, who, as a consequence of mental illness, had had run up charges - despite the CP changing its story about the requirement for medical proof. Again the CP had also agreed to waive a portion of the charge and this offer was not reinstated.



The other cases follow a similar pattern, with the following being common overall tendencies:

- Taking the CP's word over that of the consumer, when there is no firm evidence to support the version of either
- Citing T&Cs as proof of the CP's argument – ignoring the fact that T&Cs must be considered in light of the manner in which they were sold or agreed
- Expecting consumers to provide equivalent evidence to CPs of certain types of sale – when consumers do not tend to keep records of sales conversations, for example through system notes or call recordings

- Rejecting a consumer's claim for compensation, when there was an evident case for finding a middle ground
- This seemed particularly questionable in situations in which the CP itself had previously offered compensation or a waiver. The consumer may have rejected this in the hope of more, but to award nothing can seem not only a rejection but almost punitive. It could also act as a disincentive for consumers to engage with the process.



The impression created by these particular CP Only cases is of a tendency to take a slightly hard line when it comes to considering a consumer's claims. Of 38 CP Only cases, Mott MacDonald believes an argument for a compensation award of some kind could have been justifiable in 18 cases – nearly 50%. Even in fair number of Reasonable cases there were grounds for a compensation payment, even though the main thrust of the verdict was fine. Whilst CISAS's own rules stipulate that it can only make a compensation award where one has been requested, in almost all of those 18 cases the consumer had requested compensation of some kind. It is almost as if, when it comes to dealing with claims against a CP, a stance is taken that the consumer is guilty until proven innocent, rather than the other way round.

It should be noted, of course, that this is not true of all CISAS verdicts – 82% of which were adjudged Very Reasonable or Reasonable. But addressing this slight tendency would seem likely to increase the proportion of cases found in favour of consumers.

2.3.3 CP Mainly Cases

At Otelo, on the other hand, there was found to be a noticeably larger proportion of decisions partially in favour of the consumer. 16% of verdicts at Otelo were CP Mainly and 21% were 50/50, versus 11% at CISAS for both.

Taking the 13 CP Mainly decisions first, the most notable tendency is that there are a number of cases in which the consumer to all extents and purposes loses a case, but still ends up with a remedy of some kind. Some examples include:

- A consumer alleges mis-selling, but a call recording proves he clearly agreed to sale. However, he is awarded a £20 goodwill

- payment for receiving an incorrect first bill, even though neither this fact nor poor customer service were directly complained about, and indeed no compensation had been requested
- A consumer lied about being slammed, but is awarded £300 compensation for a shortfall in service levels relating to blocking a transfer to another CP
 - A consumer's request to have a default on her credit rating removed is rejected, as she did default, but she is awarded a goodwill payment on the basis that a CP rep may have told her the default could be removed
 - A consumer's request for a refund is rejected, as he has not understood his bill and has not been overcharged; the CP has responded rapidly to the consumer and no goodwill is awarded – but the CP is ordered to provide a written apology
 - A consumer's demand to be sent their written contract is rejected – as written contracts don't exist for such services – as is the apology she sought, but the consumer is awarded £40 goodwill as a “gesture of goodwill for the poor service provided” (though no compensation had been requested)
 - A consumer's requests for an explanation and refund of charges were rejected, and the case lost, but the CP's original offer of £40 goodwill is reinstated for other minor errors
 - A consumer's requests for a refund and to be allowed to move provider free of charge are rejected, but she is awarded £20 for customer service failings – which boil down to the CP failing to respond to an email.



The above CP Mainly cases suggest there is a tendency on the part of Otelo to award goodwill for relatively minor customer service failings or for inconvenience caused when in dispute, in spite of the fact that the main claims of a consumer are rejected. That is not to say Otelo is always wrong to do this. Whether or not it is right in these circumstances to award goodwill is a question of policy. If it is the conscious policy of an ADR Scheme to take a consumer-centric stance and award goodwill for relatively minor infractions – which may well have caused inconvenience – then the tendency observed is sound. However, there is no doubt that were this propensity of Otelo to make awards in largely losing situations was reined in, it would reduce the number of overall awards in favour of consumers – thus lessening a difference in outcomes between Otelo and CISAS.

It is notable, in this regard that there were 9 CP Mainly cases at CISAS, all of which were adjudged have Very Reasonable or Reasonable verdicts. Whilst 3 of these cases involved consumers receiving an apology or small award in a largely losing situation the tendency to award small amounts liberally was markedly less pronounced.

2.3.4 50/50 cases



As mentioned above, there was also a higher proportion of 50/50 cases at Otelo than at CISAS. Indeed, there were 17 cases at Otelo categorised as 50/50, 11 of which were rated as Very Reasonable decisions, 4 rated Reasonable and 2 Average. In contrast to some of the CP Mainly cases described in section 2.3.2, in the vast majority of 50/50 verdicts at Otelo there was a good argument for the consumer winning a remedy of some kind. A less liberal policy towards awarding goodwill would not have changed any of the verdicts to CP Only verdicts – but there were nevertheless a number of cases in which Goodwill was awarded as part of the remedy when compensation had not been requested.

There were 9 examples of 50/50 cases at CISAS, all of them judged Very Reasonable or Reasonable with balanced decisions being made in all but one case.

2.3.5 Consumer Mainly cases

There was a similar prevalence of this category of verdict at both schemes: it was reached in 17 cases at Otelo (21%) and 16 at CISAS (20%).

At Otelo 16 out of 17 cases were adjudged Very Reasonable and the other Reasonable. As with the 50/50 verdicts above, there was nothing to suggest that it had been wrong to award the consumer a remedy, but there were 7 cases in which the consumer received an apology or compensation not requested.

At CISAS there was one anomalous case in which the decision was questionable because the sum awarded in compensation – nearly £1000 – seemed unjustifiably high compared to other cases, with three separate aspects of the case, such as disconnection and losing a number - being awarded over £300 each.

The remainder of the cases were all adjudged Very Reasonable or Reasonable. If anything, there was an argument that a few of the CISAS cases could have been categorised as CMR Only – as the Consumer won pretty well every aspect of the case. However, unlike with Otelo, CISAS consumers are required to specify the level of compensation they are seeking. If the amount awarded falls short of this stated figure, it seems only right to record a partial success (ie to call the case CMR mainly, not CMR Only), even if the CP's case has been entirely thrown out. At Otelo, on the other hand, where there is no firm requirement to state a desired compensation figure, if a consumer wins a case and is awarded an identical sum to that awarded in the CISAS example the case would be categorised as CMR Only – in other words through keeping a request more vague it more easily translates into 100% success as the bar is not set as high. This helps partly to explain the greater proportion of CMR Only cases at Otelo.



2.3.6 Consumer Only cases

There were 20 CMR Only cases at Otelo (25% of the 80 cases) and 8 at CISAS (10%). One reason for the difference in the proportion of verdicts of this type is explained in section 2.3.5 – essentially a question of the “success” bar being set higher at CISAS through requiring consumers to state the level of compensation they require. This difference between the schemes is brought home by the requests made in 2 CMR Only cases at Otelo, in which the consumers wanted the ombudsman to:

- “Investigate the complaint and bring about a remedy”
- “Provide compensation for the losses and inconvenience suffered”

Such non-specific requests would not be acceptable at CISAS, thus lessening the chances of outright success. It was also notable at Otelo that there were 6 cases in which the consumer received more than requested as a remedy.

2.3.7 Conclusions

A review of the variations in outcomes across the two schemes revealed 2 main factors driving the differences:

- An occasional tendency of CISAS to be overly strict in denying consumers a partial remedy when there were reasonable grounds

for giving one. This has the effect of reducing the number of CISAS cases ruled in favour of consumers

- Differing attitudes to the awarding of financial compensation / goodwill, with Otelo being far more liberal and likely to make small awards – sometimes even in circumstances in which the consumer’s case has largely failed. This has the effect of increasing the number of Otelo cases found in favour of consumers.



The latter tendency was particularly pronounced. In order to understand its nuances and implications more precisely, Mott MacDonald analysed two particular aspects:

- The tendency to award compensation for customer service failings, particularly when customer service was not the main driver of the complaint (see section 2.4)
- The characteristics of the financial awards made (see section 2.5)

2.4 Compensation for customer service failings

Ofcom was interested in understanding the degree to which the two schemes were awarding compensation for customer service failings as opposed to issues relating to service delivery, charging or transfer, for example.

Specifically, Ofcom was interested to know:

- In how many cases was customer service mentioned as a specific element of a consumer’s case, even if not as the primary element?
- In how many of these cases was the customer service element of a complaint assessed by the adjudicator? (Whether or not it had been mentioned by the consumer)
- In how many cases was a remedy made to compensate for that customer service element.

Mott MacDonald analysed the prevalence of a customer service element in consumer requests and adjudicator awards, and identified the scenarios listed in Table 2-3 below.

Table 2-3: Request and Remedy scenarios

Request Category	Definition
CS – Not Specific	The consumer identified a customer service element but did not specify if / what remedy sought
CS – Money	The consumer identified a customer service element to the



Request Category	Definition
	case and asked for compensation / goodwill
CS – Apology	The consumer identified a customer service element to the case and asked for an apology
No CS Element	The consumer did not identify a customer service element to their case
Remedy Category	Definition
Money	The consumer received the award of financial compensation / goodwill for the customer service failing
Apology	The consumer received the award of an apology for the customer service failing
Rejected	The consumer’s claim regarding customer service failings was examined but rejected
Not Examined	The consumer’s claim regarding customer service failings was not examined

A Breakdown of cases, according to these scenarios is shown in Figure 2-9 and Figure 2-10.

Figure 2-9: Customer Service Remedies at Otelio

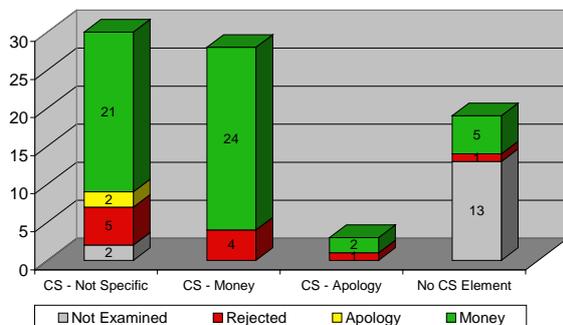
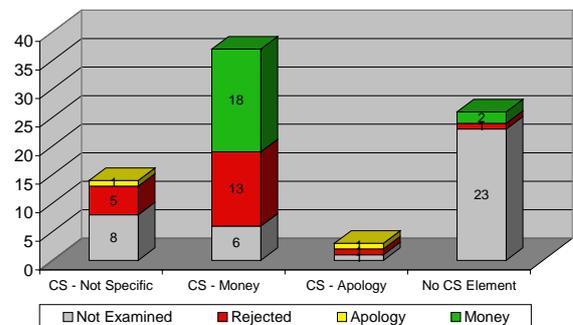


Figure 2-10: Customer Service Remedies at CISAS



It is worth examining each pair of columns of the graphs in turn, in order to explain the differences.



The columns on the far left-hand side of both graphs, labelled 'CS – Not Specific' show the pattern of awards made in cases where the consumer mentioned a customer service element but did not request a specific remedy to compensate for it. There were 30 such cases at Otelo, and in 21 of them the consumer received a financial remedy (as shown by the green section of the column). In marked contrast there were 14 such cases at CISAS, and in none of them was a financial remedy awarded. This is no surprise at CISAS, given that its rules stipulate that compensation cannot be awarded where it wasn't requested.

The second columns from the left of each graph relate to the number of cases in which a consumer stated a customer service failing as part of a case and specifically sought compensation for this fact. There were 28 such cases at Otelo and in 24 of them the consumer was awarded compensation (86%). In contrast at CISAS, there were 37 such cases, but in only 18 of them (49%) was this claim accepted – with the request for compensation being rejected in 13 cases and not examined in a further 6.

The far right-hand columns of each graph relate to the cases at each scheme in which no customer service element was explicitly stated as forming part of the case. There were 19 such cases at Otelo, and in 5 of them a compensation award was still made. There were 26 cases of this type at CISAS and in 2 of them an award was also made.

It is clear from the above that Otelo has a greater tendency to award compensation / goodwill for customer service failings, including in situations where such failings are not the main point of dispute between the parties, and occasionally does so in situations where the consumer has not directly asked for compensation. This stance increases the number of verdicts found in favour of consumers.

2.5 The characteristics of financial awards

2.5.1 Principal types of award

Mott MacDonald identified three principal types of financial award at the two schemes:

1. A refund: an award ordering the return of money paid by a consumer

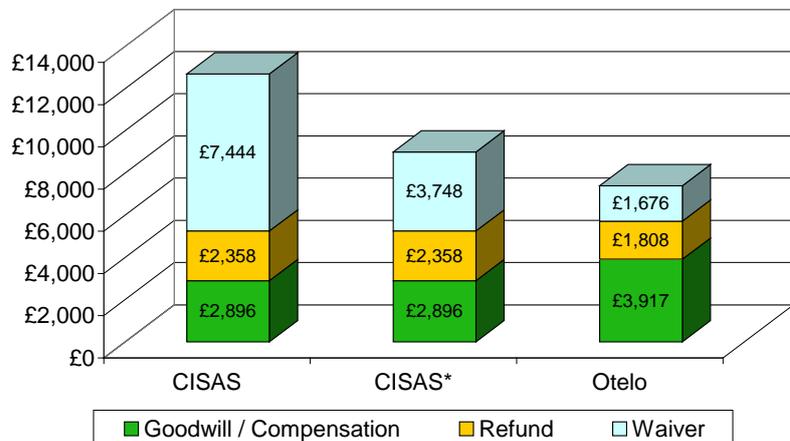
2. A waiver: an award ordering the setting aside of a sum being charged (but not yet paid)
3. Compensation / goodwill: a financial award to to offset, balance or redress loss of service or inconvenience suffered by a consumer.

The precise word used for the third type was often 'goodwill' rather than compensation, given that CPs were reluctant to use the word compensation in case it was interpreted to imply an admission of liability, but the distinction appeared semantic rather than material.



An overall breakdown of the financial awards made by the schemes is shown in Figure 2-11.

Figure 2-11: Breakdown of Financial Awards



* CISAS figures without single Waiver made for £3,969

It should be noted that one particular case had a significant impact on the CISAS figures, given that it involved a waiver of £3,696 of charges. Without looking at a larger sample of cases, it is hard to know how commonly CISAS awards such amounts, but it was significantly greater than any other awards made (a breakdown of awards by size is shown below in Figure 2-12). In case such awards are very rare, meaning this instance is distorting the figures across this sample of 80 cases, Mott MacDonald has shown the figures for CISAS both with and without this payment.

64 out of 80 Otelo cases (70%) resulted in a financial award of some kind, making a total of £7,401 – an average award of £116 across the 64 cases where an award was made and £93 across all 80 cases. In contrast at CISAS, 36 of 80 cases resulted in a financial award (45%), making a total of £12,694 – an average award of £352 across those 36 cases, or £159 across all 80. If discounting the £3,696 waiver, there were £8,998 of financial awards, at an average of £257 across the 35 cases, or £112 across all 80. So, considering financial awards overall, it is evident that CISAS makes fewer financial awards, but where they do, they are typically of a higher value.

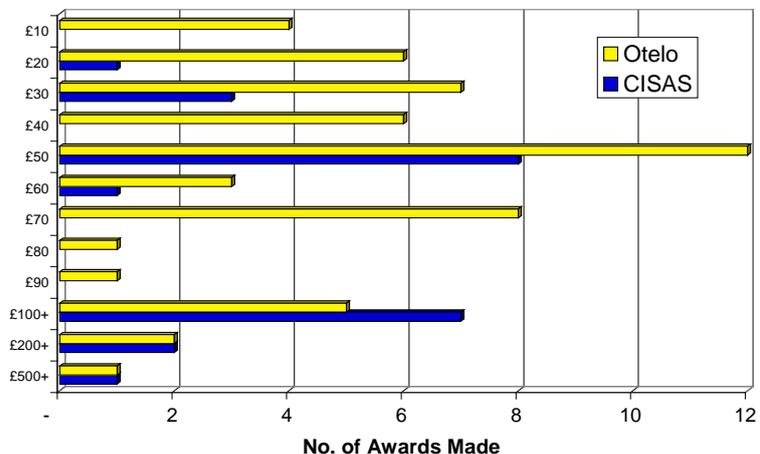


When it comes to Goodwill / compensation awards, the pattern is slightly different. Otelo awarded more compensation overall - making £3,917 of such awards, compared to £2,896 at CISAS. However, the level of individual awards was still lower at Otelo – with the compensation awarded in relation to 56 cases at an average if £70 per case. At CISAS compensation was awarded in 23 cases, at an average of £125 per case.

2.5.2 The distribution of compensation awards by size

At this point it is useful to look at the precise spread of compensation / goodwill awards by size, shown below in Figure 2-12:

Figure 2-12: Number of compensation awards by size



An analysis of the graph and the underlying numbers reveals a number of tendencies:

- In terms of the largest awards, the pattern is similar across the schemes, with both making a single award over £500 and 2 awards over £200
- CISAS made slightly more awards, however, of between £100 and £200
- Whilst CISAS made 8 awards of £50, in general Otelo made many more sub-£100 awards, including 12 awards of £50 and a further 23 of lesser amounts.



This clearly bears out the impression that Otelo has a tendency to award smaller amounts of compensation / goodwill more liberally than CISAS. Some examples of some of the sub-£50 awards made by Otelo included:

- £10 awarded to compensate for an engineer being 40 minutes late
- £14.50 for a customer service shortfall (in spite of the adjudicator stating "I also conclude that BT provided a decent standard of customer service")
- £15 as a goodwill gesture, to cover inconvenience from errors with bill labelling and lack of responsiveness
- £15 goodwill towards the cost of calls made to the CP
- £20 for customer service failures (failing to respond to an email)
- £20 for stress and inconvenience caused by shortfalls in customer service, despite the CP acting fairly swiftly in a case of loss of service to rectify the fault
- £20 goodwill to compensate for 2 letters not receiving a reply
- £25 goodwill for having failed to respond to all the consumer's letters
- £30 goodwill for a shortfall in customer service, as a result of it not being clear if the CP responded to all the consumer's communications
- £30 goodwill to make up for the fact that the consumer may have been told compensation was owed, when in fact there were no grounds for compensation
- £40 goodwill for poor communication regarding fact that a written contract doesn't exist and for sending correspondence to the wrong address.

It is notable that some of the errors committed, and therefore potentially the levels of inconvenience experienced by the consumer, seem relatively minor. This raises several questions as to when it is appropriate to award goodwill:

- Is any error or omission by a CP worthy of a goodwill payment in compensation?
- To what extent should CPs be allowed a degree of margin of error in their dealings with consumers, given the practicalities of providing services based on technologies which are not 100% reliable at all times?
- Is it reasonable to expect CPs to respond to every single communication or enquiry from consumers or should a view be taken of their general attitude and efforts over the course of a dispute?



It should be noted that not all of the sub-£50 compensation awards at Otelo were made in isolation – in other words, 6 were awarded in conjunction with another remedy such a refund or waiver – meaning that eliminating such awards would not turn all of these cases into wins for the CP. Nevertheless, in 17 of the 23 cases the sub-£50 goodwill award was the only remedy made to the consumer. At CISAS only 4 sub-£50 awards were made, 3 of them cases in which that award was the only remedy made. If sub-£40 awards were eliminated across both schemes, through setting some kind of minimum threshold for justifiable payouts, it would certainly lessen the difference outcomes made in favour of the consumer.

Given that both CISAS and Otelo made more compensation awards of £50 than of any other amount, Mott MacDonald compared examples of this level of award to see what light might be shed on the differences between the schemes. Otelo made 12 such awards and CISAS 8. Whilst there were 2 cases at both schemes in which it seemed a little generous to have awarded £50 given the scale of misdemeanours of which the CPs had been guilty, in the vast majority of cases the award of £50 compensation seemed proportionate. This would suggest that, if a minimum award threshold were established, it should not be far away from this mark.

As a final note on compensation, as mentioned previously, CISAS's own rules prevent it awarding compensation if the consumer has not requested it – and it can only offer compensation up to an amount stated in the application. Ofcom was interested to understand whether there were cases at CISAS in which there was a good argument for paying compensation even if the consumer hadn't requested it. Two examples from the CISAS cases analysed included:

- A dispute over mobile phone contracts, in which the consumer simply requested the contracts be cancelled

- In the Decision, the adjudicator states that he cannot give compensation as it was not requested, but states: “It is noted however, that the Respondent was at one point prepared to offer compensation of £25.00 for inconvenience and there may be a case for reviewing that offer”
- A dispute over a £6,000+ bill in which the consumer asked for a reduction in the bill, which was run up by their bi-polar partner
 - The CP originally offered a 25% waiver, and some kind of compensation or waiver would have been fair.



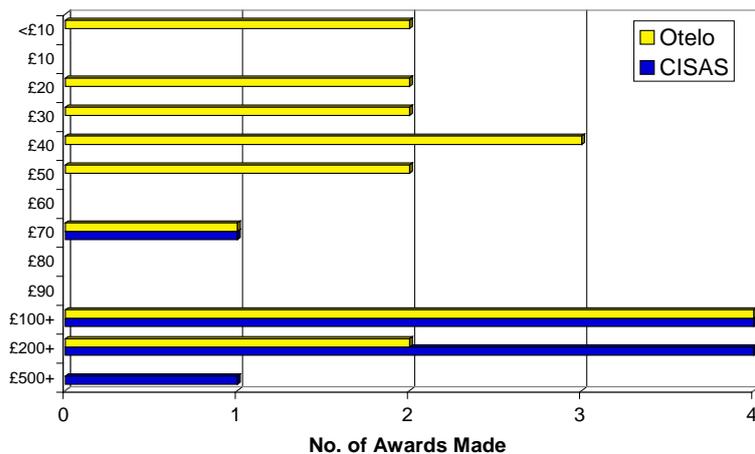
However, Mott MacDonald's view is that this is as much a question of principle as example. Why limit the ability to award compensation in such a way? It could be argued that the adjudicator is a better judge not just of how much compensation to award, but of whether compensation is appropriate. Why not leave the decision to the educated adjudicator rather than forcing the consumer to make a less educated guess about whether they deserve compensation and how much? If there is a desire to ensure that all similar cases receive similar outcomes, which would seem fair, then the current rule acts contrary to that objective – as two cases which were identical but for the presence of a compensation claim in one and the absence of a compensation claim in the other would receive different verdicts, even if the failings of the CP were exactly the same.

2.5.3 The spread of refund awards by size

Mott MacDonald also examined the number of refund awards of different sizes, the spread of which is shown in Figure 2-13.



Figure 2-13: Number of refund awards by size



The most notable overall pattern observable from the graph is that Otelo again tended to make smaller awards – with 11 of the 18 refunds awarded being for £50 or less, in contrast to no refunds of this size at CISAS. At the same time, CISAS tended to make larger awards – with 9 of the 10 refunds it awarded being £100 or greater in value. Indeed the average award at CISAS was £214 compared to £100 at Otelo.

To understand this pattern better it is useful to look at some examples of the refunds made. Examples of the CISAS refunds included:

- £768 for mobile data charges while roaming, accepting consumer's word that mis-sold a data package before trip abroad
- £287 for line rental charges wrongly made by CP during 18 months since the consumer switched provider
- £235 for charges paid for telephone and broadband services in spite of loss of service lasting several months

- £200 for mobile charges billed incorrectly having been mis-sold a mobile tariff package (promised 500 inclusive minutes, not 200)
- £118 for charges run up on a mobile phone which were over and above a credit limit the consumer agreed with the CP

These and other similar refunds are thus all for charges erroneously made by the CPs in question, either for cancelled services, services not provided, or those mis-sold or billed incorrectly. It is notable that the charges over £100 made by Otelo were similar in nature – refunds for erroneous early termination charges, incorrect line rental charges, and call charges which should have been included in a package. However, as noted above there were also 11 charges of £50 or less at Otelo and these were different in nature. Examples included:

- £50 for half a missed appointment charge
- £45 for three months line rental
- £35 for service charges which should have been credited
- £25 of credits for erroneous call charges due to the wrong call plan being applied.

These smaller repayments seem to apply to details of service, rather than fundamentals of service. In seeking to explain this, it should be remembered that the CISAS cases which go to adjudication are those which have failed initial attempts to settle informally. It may be that some of the smaller sums awarded by Otelo are awarded in the cases settled by CISAS prior to this process.

Mott MacDonald did not have visibility of those cases that settled early but feels they are unlikely to explain the fully the difference in the scale of payments – given that the cases coming adjudication at CISAS and Otelo do not have notably different characteristics. What seems to differ, rather, is the philosophy towards making small awards.

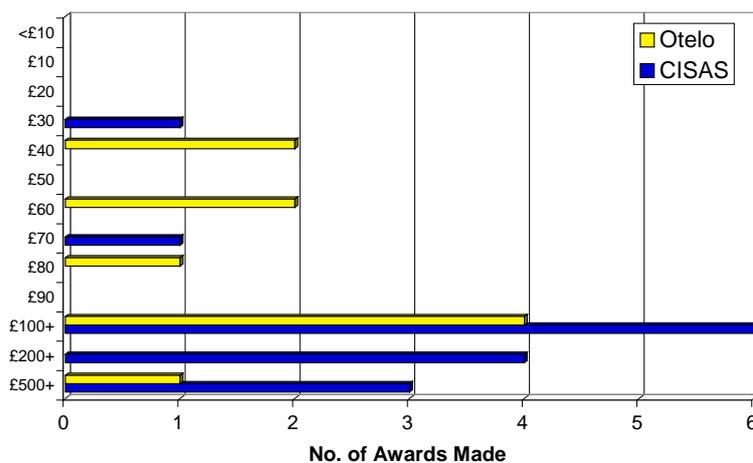
2.5.4 The spread of waiver awards by size

Mott MacDonald also examined the number of waiver awards of different sizes, the spread of which is shown in





Figure 2-14: Number of waiver awards by size



It is again evident that the awards made by CISAS were larger, with 13 of the 15 waivers awarded being over £100, compared to 5 out of 10 at Otelo. The average size of waiver at CISAS was £499 (if including the single £3,696 instance) and £270 if excluding this. At Otelo the average was £168.

The differences between the awards at Otelo and CISAS follow a similar pattern to that described in section 2.5.3 regarding refunds. The principal types of waiver over £100 at CISAS included:

- Setting aside a portion of mobile roaming charges
- Waiving early termination charges
- Waiving charges which should have been included in a tariff package
- Waiving an engineering charge for which not liable.

As with refunds, there were a number of similar cases at Otelo where awards of over £100 had been made, but also number of smaller awards mostly relating to waiving erroneous charges.

2.6 Analysis of Cases by Category

One of the key objectives of the study was to examine whether similar cases examined by the two schemes resulted in similar outcomes and similar remedies or levels of compensation. Mott MacDonald has so far indicated that the approaches to making remedies differ considerably across the two schemes, and it is important to understand to what extent this is influenced by the category of cases each scheme handles.



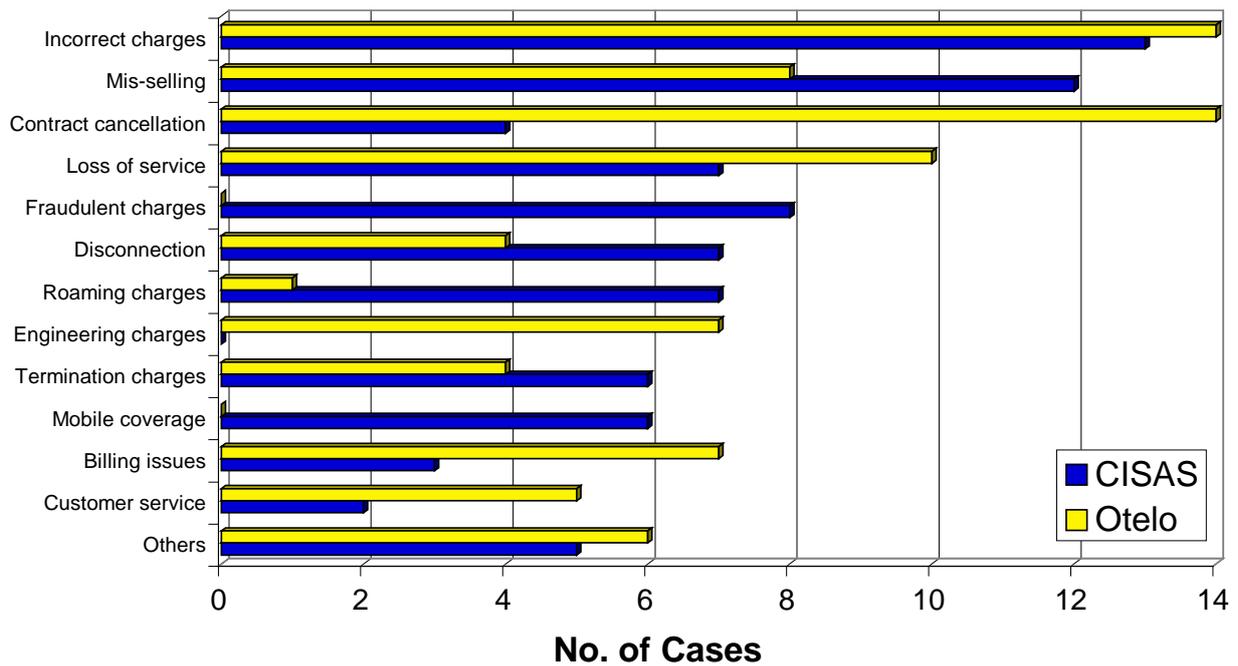
Each case Otelo provided had already been categorised on two levels – in other words allocated a high level category (eg Disputed Charges) and a sub-category (eg Package Charges). At CISAS, some consumers had recorded a category on their application form, although not all of them had done so. Whilst ideally Mott MacDonald would have used the categories already allocated by Otelo and CISAS, this proved difficult because:

- a. Different categories were used by Otelo and CISAS
- b. Mott MacDonald found that in a number of cases the category allocated did not fit the case very well
- c. Some CISAS cases did not have an allocated category.

For these reasons Mott MacDonald decided to allocate its own categories to the cases, to aid comparisons to be made across the two schemes. Where possible, these incorporated the categories already established by Otelo and CISAS. Figure 2-15 shows a breakdown of cases according to the categories devised.



Figure 2-15: Number of cases by category



It is notable that some categories at each scheme are influenced by service type – eg fixed versus mobile service concerns. As was shown in Figure 2-4, the 65% of CISAS cases concerned issues relating to a mobile service, and hence there are cases regarding fraudulent charges (made when mobile phones were lost or stolen), roaming charges and mobile coverage. Conversely at Otelo, Figure 2-3 showed that 89% of cases involved fixed services, and hence there are more cases involving engineering charges than at CISAS.

However, a number of categories are well represented across both schemes, and it is useful to look at some examples from these to see what it reveals about the verdicts reached for similar cases.

2.6.1 Incorrect Charges

There were 14 cases of Incorrect Charges at Otelo and 13 at CISAS. The outcomes of the cases were in line with the pattern of outcomes for all cases – in other words there were more verdicts in favour of the CP at CISAS (in fact 7 were CP Only, compared with 1 at Otelo), and there were more consumer centric verdicts at Otelo (including 3 CMR Only verdicts, compared to none at CISAS). Apart from 1 Otelo verdict, all of them were adjudged Reasonable or Very Reasonable.



The nature of the cases is very similar, each comprising a mix of cases about being charged or billed incorrectly for charges cancelled, not agreed, outside the plan or priced incorrectly. The sums of money involved and sizes of claims made were similar. Both had examples of consumers requesting unrealistic compensation of £5,000, and both included some relatively small claims. In terms of refund and waiver awards there was not enough of a pattern to be significant, though CISAS awarded more in waivers and Otelo more in refunds.

It is noticeable, however, that the propensity to offer goodwill awards was greater again at Otelo. 11 goodwill awards were made by Otelo, totalling £335, at an average of £30. In contrast CISAS made 4 awards, totalling £175, at an average of £45 - in fact 3 of the awards are for £50. This £50 figure seems to be a standard CISAS amount for what is referred to in one case as “the stress and inconvenience caused by its failure in the duty of care owed”. In the case where £25 is awarded, the adjudicator comments “at first I was minded to dismiss it with no compensation at all” – and it is fair to assume that in most cases CISAS does not tend to award such an amount. Mott MacDonald identified 3 cases in which a more generous policy towards offering goodwill might have related in an award for the CP’s failings.

However, overall Mott MacDonald did not find that there were any category specific factors relating to different outcomes. What patterns there were in this category of case were consistent with patterns across cases of all types.

2.6.2 Mis-selling

There were 12 cases of Mis-selling at CISAS and 8 at Otelo. The outcomes of the cases were again in line with the pattern of outcomes for all cases – in other words there were more verdicts in favour of the CP at CISAS (in fact 6 were CP Only, compared with 0 at Otelo). At Otelo the consumer received a remedy in all 8 cases, although it is notable that in 6 of the 8 the case was a CP Mainly verdict.



Looking at these Otelo CP Mainly verdicts more closely, it is apparent that in 4 of the cases an award is made to the consumer in spite of their mis-selling allegation proving to be false. This contrasts with the situation at CISAS where Mott MacDonald believes the consumer should have won at least a partial victory in 2 of the CP only cases.

However, this is all consistent with the general pattern of decisions described in this document, and indeed Mott MacDonald did not observe any different tendencies in the assessment of Mis-selling cases versus cases overall.

2.6.3 Conclusions on differences by category

Mott MacDonald examined a number of other categories in addition to the above, but found that there were few category specific differences between the verdicts made or approach to cases. Indeed the pattern of outcomes produced by the two schemes was consistent with that found across all cases – ie relating to factors such as the propensity to award compensation / goodwill.

2.7 Quality of applications

One of Ofcom's stated objectives was to understand the extent to which any difference in outcomes can be explained by consumer applications to one scheme being of a higher quality than at the other. It could be the case, for example, that because Otelo offers to complete application forms on behalf of consumers, the applications to Otelo were of a higher quality than those submitted to CISAS, which places weight on being neutral.

Mott MacDonald did not find this to be the case, and indeed felt that the quality of applications to both schemes was of an equal quality. This

was both true of the application forms filled in by consumers in which their case was stated and of the correspondence and supplementary evidence attached. Consumers to both schemes included materials such as:

- Letters explaining their cases
- Copies of correspondence to and from CPs (both letters and emails)
- Contracts and order forms
- Bills, sometimes showing itemised charges
- Letters from solicitors and debt collectors
- Receipts proving postage.



There were of course differences in the quality of the materials provided, but these varied by individual rather than by scheme.

Another related hypothesis was that a more communicative approach at Otelo might be aiding the building of a case – in other words ongoing communication with the consumer might

- a. be improving the quality of evidence provided beyond that originally submitted and
- b. be aiding the consumer's chances of gaining the sympathy of the adjudicator, thus leading to a greater number of favourable outcomes.

Mott MacDonald did not find this to be the case – the primary evidence submitted was the key factor in decisions. It should be noted that it was not possible to compare any effect this might have had with tendencies at CISAS because of the different ways in which Mott MacDonald was provided with information. Regarding Otelo access was provided to the online system in which all information and communication is recorded, meaning Mott MacDonald could access notes on all communications made throughout the case. Regarding CISAS only the key case files (Application, CP Case, Response, Decision etc) were provided on a memory stick, meaning that Mott MacDonald was not privy to any associated communications.

2.8 Standards of Proof

Ofcom was also keen to understand whether each scheme might be applying different standards of proof. It could be the case, for example, that CISAS places more emphasis on being able to articulate and

supply evidence, whereas Otelo may be more likely to investigate the circumstances behind a complaint.

Mott MacDonald found no strong evidence that this was the case. As stated in section 2.7, the quality of evidence sought and provided was of a similar quality, and this evidence was the core basis for decisions made by adjudicators. At both Otelo and CISAS the adjudicators interpreted this primary evidence as best they could – piecing together the most probable sequence of events and the burden of responsibility from often quite patchy data. Whilst the schemes have slightly different processes by which this information came into their hands, the task of adjudication itself was carried out in a very similar way.



Key to this adjudication task was the requirement to rule on the balance of probabilities; key to doing this, was determining to what degree to give the consumer the benefit of the doubt – less a question therefore of standards of proof, as of what to do when proof is lacking and both parties have a different version of events. Mott MacDonald felt that in most cases both schemes got this right, although there were a few exceptions – cases in which the adjudicator rejected the consumer’s word regarding matters such as tariffs agreed at point-of-sale, promises made by telephone, or the fact that the consumer had repeatedly called the CP. It was certainly the case that in some of the CP Only cases at CISAS the consumer could have been given more credence and thus received a remedy of some kind. In such cases Mott MacDonald believes the appropriate course of action is to take a middle path, giving some credence to the consumer as well as the CP, and reflecting this in the verdict delivered. A good example of the optimum attitude is encapsulated in this quote from a CISAS case:

“upon applying the balance of probabilities I have decided that I prefer the evidence submitted by the Claimant. I find that his evidence is cogent and credible and I accept his account of what transpired when he telephoned the Respondents to upgrade his contract.”

However, whilst Mott MacDonald did not find significant differences in the burden of proof required to prove a case, it was notable that there was a more flexible relationship at Otelo between that which the consumer requested and the remedy provided. Given that the

consumer was not required to state categorically the remedies they required – particularly with respect to a compensation figure – there was more flexibility to give remedies which seemed fair rather than ones which were tied to any specification. This difference between the schemes was not black and white: many Otelo consumers did state what they wanted and adjudicators responded to these requests; and CISAS adjudicators did award remedies not specifically requested. But in general there was a more flexible framework in this regard at Otelo, which contributes to the tendency to award remedies in more cases than at CISAS, though for lower amounts.



2.9 Cases in which the CP failed to submit evidence

Ofcom was also interested in understanding the extent to which CPs failed to submit evidence in response to the claims made by a consumer – and whether such incidences had an impact on the pattern of outcomes.

There were 9 cases at Otelo in which the CP failed to respond, 8 of which were decided in favour of the consumer. The verdict of the 1 case awarded to the CP, despite a lack of response, was rated as Questionable by Mott MacDonald as there was a good argument for the consumer's case that their narrowband service ought to have been automatically cancelled when they migrated to a broadband service with their existing CP.

There were 4 cases at CISAS in which the CP failed to respond, two of which were decided in favour of the CP, with the other two being CMR mainly and 50/50 verdicts. One of the CP Only verdicts was rated as Average by Mott MacDonald because, even though the consumer failed to provide coherent evidence, there was enough information to infer errors on the part of the CP which might have been compensated. The other CP Only verdict was judged to be Reasonable as the consumer failed to provide any proper evidence either.

The latter case does raise a question: if there were an appeals process at CISAS, enabling a consumer to view the verdict and provide more evidence to counter it, might the consumer have secured a different outcome? In considering this it is worth bearing in mind that the failure of a CP to respond to CISAS cases prejudices not only its own position

but also the consumer's case – as the consumer normally has two chances to present information, the second time being in response to the CP's evidence. If the CP doesn't respond, the consumer loses this opportunity. The merits of introducing an appeals system at CISAS, for this and other reasons, are debated in section 2.11.

However, given the small number of cases at both schemes in which the CP did not respond, and the fact that the majority of these cases were decided in favour of consumers, Mott MacDonald does not believe the failure of CPs to respond is affecting the pattern of overall outcomes to any significant degree.



2.10 Time taken to reach a Final Decision

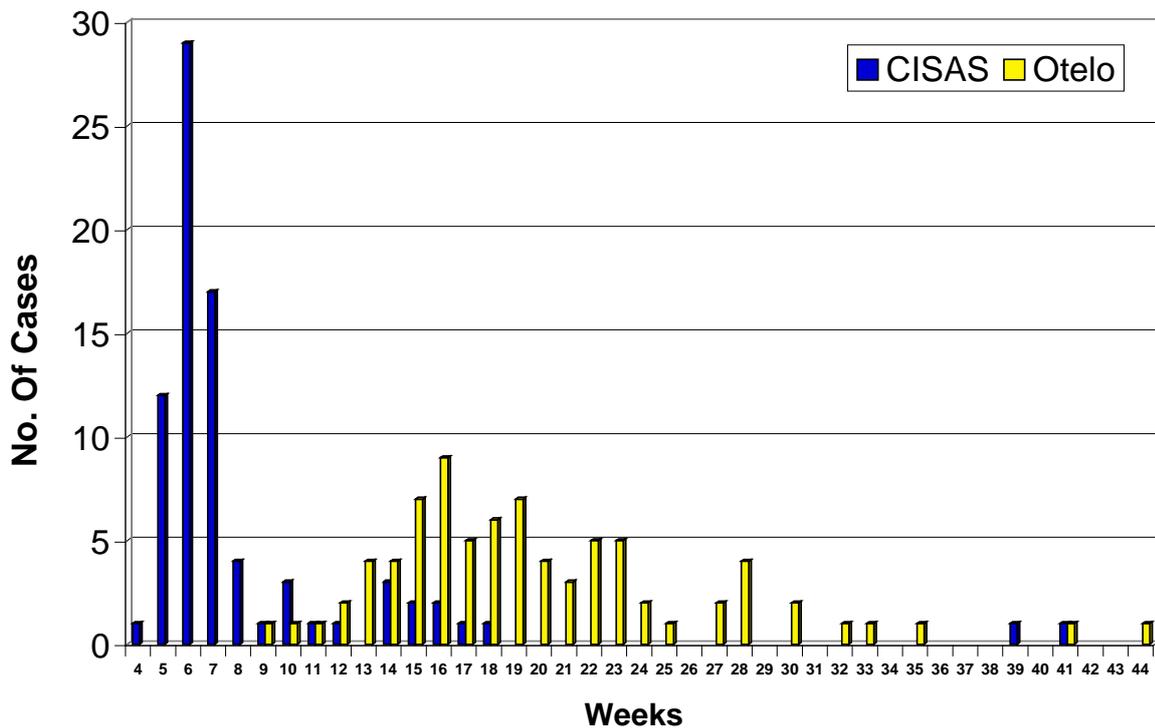
Mott MacDonald analysed the time taken to reach a Final Decision, in order to assess if this was having any impact on the outcomes produced by the schemes.

On average CISAS cases took 56 days from application to decision (8 weeks), with the quickest case taking 25 days (under 4 weeks) and the slowest 286 (41 weeks). On average Otelo cases took 135 days from application to decision (19 weeks), with the quickest case taking 57 days (8 weeks) days and the slowest 304 (43 weeks). It is notable the the quickest Otelo case took longer than the average case at CISAS.

A spread of cases across time is illustrated in Figure 2-16:



Figure 2-16: Spread of cases across time (weeks)



The graph emphasises the significant difference in the time taken to process cases at Otelo and CISAS. In the case of CISAS, most cases are processed within 8 weeks; at Otelo no cases are processed within this timescale. However, whilst this contrast was stark, there was no firm evidence that the time taken is having an impact on the outcomes of the schemes.

That is not to say it is an insignificant factor. The wider impact of the difference in timescales was not studied in detail – because it was not

within the scope defined for this exercise, and is being reviewed separately by Ofcom. However, there was anecdotal evidence that the time taken at Otelo is adding to the stress of consumers. There were a few cases – and closer analysis might reveal more – where the time taken to reach a decision was itself becoming an indirect inconvenience of the ongoing dispute with a CP. It should be noted that in some cases such disputes are very much still alive during the adjudication process – meaning that the CP may still be issuing demands or debt agencies may still be pursuing the consumer for money. Whilst a successful case may bring such activities to a halt, in extreme cases the CP's awareness of this fact can mean that it sees this period as a last opportunity to turn the screw. The longer the process takes, the more difficult it can be for consumers. .



2.11 The merits of an appeals process at CISAS

Ofcom was interested to understand Mott MacDonald's opinion on the merits of introducing an appeals process at CISAS. Mott MacDonald identified 8 cases in which there would definitely have been grounds for appeal, had such a process existed, and a further 7 cases in which an appeal might have been advisable. Broadly, these correlated to the number of Unreasonable, Questionable and Average verdicts.

However, whilst there is no doubt some consumers would take advantage of such a facility, careful consideration should be made of whether this is the best way to address debatable verdicts. As stated, Mott MacDonald found that, on the whole, decisions were Reasonable or Very Reasonable at CISAS. The main issues to address would seem to relate to engineering a slight loosening in attitudes towards consumers, with regard to giving the benefit of the doubt and the awarding of compensation. It might be better to address these issues – thus reducing the number of cases meriting an appeal – rather than to change the process itself, a case of treating the cause rather than the symptoms.

In considering the merits of such a change it is also worth looking at the pros and cons of an appeals stage at Otelo – where it already forms part of the process. There were 19 cases at Otelo (24% of cases) in which the consumer made further representations, having disagreed in whole or part with the Provisional Conclusion. In 14 cases the consumer did not respond to the Provisional Conclusion (from which

one could infer they did not agree with it) but did not provide any further argument or evidence. In 47 of 80 cases (59%) the consumer accepted the PC.

In 13 of the 19 cases in which the consumer did make further representations the Final Decision was the same as the Provisional Conclusion – in other words, the further representations did not alter the final verdict. Only in 6 cases (8% of the 80 cases) did the appeal alter the verdict. It should also be noted that on the whole, the changes made were quite minor. Table 2-4 shows the Provisional Conclusion and Final Decision in these 6 cases:



Table 2-4: Comparison of PC and FD for cases appealed

Provisional Conclusion	Final Decision
<ul style="list-style-type: none"> ■ No remedy ■ Provide a gesture of good will for £5.38 for the difference in line rental charges ■ Provide a goodwill gesture of £20 for the shortfalls in customer service identified within this report 	<ul style="list-style-type: none"> ■ CP to account for any credit balance ■ Provide a gesture of goodwill equivalent to the difference in line rental between the Anytime calling package and the Unlimited Evening and Weekend Plan (which is to include the £2.99 per month credit plan deal) for the months you were on the Anytime package; ■ Confirm that it has removed the Friends and Family mobile service and refunded all charges taken for this service; and ■ Provide you with a goodwill gesture of £30 for the shortfalls in customer service identified within this report.
<ul style="list-style-type: none"> ■ No remedy ■ Provide a letter of apology. 	<ul style="list-style-type: none"> ■ Provide a credit of £20 and apologise for the shortfall in customer service experienced ■ Provide a letter of apology. ■ Provide £30 as a gesture of goodwill for the poor service received
<ul style="list-style-type: none"> ■ No remedy ■ Provide evidence of clearing the connection charges. 	<ul style="list-style-type: none"> ■ Provide a goodwill payment equal to £200. ■ Investigate whether it has billed you correctly on account MCxxx 00364xxx and provide you with its findings in writing

As can be seen from Table 2-4, the differences are relatively minor – in three of them involving making a goodwill addition of between £10-£30.

Only in one case was the impact of appeal notably significant – entailing the requirement for a £200 goodwill payment.

Mott MacDonald is not suggesting that the appeals step be removed from the Otelo process – it is important to allow the consumer more than one opportunity to state their case. But given the relatively small number of cases successfully appealed and the relatively small changes brought by appeal, one has to question the value of adding such a stage to CISAS's process – given that at CISAS the customer is already given two chances to present evidence (through the initial application and in response to the CP's case).



A final consideration regarding the implications of an appeal stage concerns the amount of time this adds to the process. As shown in section 2.10, on average cases at Otelo took 135 days to process. For the 19 cases in which further representations were made the average rose to 187 days – an additional 52 days per case (over 7 weeks), making the whole process last an average of just over 6 months. One can reasonably assume an appeals process at CISAS would add less time, but it still has to be questioned whether the extra time would be justifiable.

However, as discussed separately, there is one situation at CISAS in which adding the possibility of appeal may have merit: cases in which the CP has failed to respond, thus denying the consumer the chance to present fresh counter-evidence. Mott MacDonald believes there would be merit in allowing the consumer to appeal in these circumstances.

2.12 The involvement of debt collectors

It was notable that in a significant number of cases, the debt owed to a CP (legitimately or not) had been passed on to a debt collection agency. Indeed this occurred in 24 cases at CISAS (30%) and 19 at Otelo (24%). Given that in a significant number of these cases the CP was found to be at fault, it would seem the decision to send a sum owing to debt collectors is being taken prematurely in some cases, causing a lot of stress and anxiety to consumers. It may be that debts are automatically forwarded to debt agencies after a certain amount of time, but there must be a question as to whether this amount of time is too short.

Mott MacDonald found few examples of the act of sending a debt to a debt agency being central in its own right to the ruling made by an adjudicator or being compensated for specifically if the CP's case failed. Compensation penalties for abuse of this power, one of the most punitive and distressing actions a CP can take, might act as a deterrent against using this tactic except where really justifiable. There were examples of cases being sent to debt collectors in situations where consumers were withholding payment because the reason for charges was unclear, and others in which consumers claimed the first they knew about owing money to the CP was upon receiving a letter from a debt collector. Whilst it is not within the scope of this project to analyse this complex issue, it is something of which Ofcom ought to be aware.



3. Conclusions and Recommendations

3.1 Conclusions

There does not seem to be a systemic problem with the adjudication process at either scheme. Both Otelo and CISAS made verdicts adjudged by Mott MacDonald to be Reasonable or Very Reasonable in over 80% of cases.

In spite of process differences at the two schemes, and nominally different approaches to the consumer, the evidence gathered from consumers was of an equivalent quality and the act of adjudication was very similar at both CISAS and Otelo. By this Mott MacDonald means that the different strands of the consumer's evidence, and the counter evidence presented by the CP, were weighed up with a similar objective of reaching a reasoned verdict based on the balance of probabilities. Differences in style or process did not translate into differences in critical analysis when it came to the crunch.



However, there were two principal respects in which the adjudications made by CISAS and Otelo did differ, which had a direct bearing on the number of cases decided in favour of consumers.

1. CISAS displayed an occasional tendency to be too dismissive of the consumer's argument.

This was demonstrated through failing to give the consumer sufficient benefit of the doubt when their word conflicted with that of the CP. Instead of taking a middle ground, CISAS took the CP's viewpoint unduly in such cases. This resulted in a high number of outcomes in entirely in favour of the CP (47% of cases). It was notable that 12 of the 14 cases at CISAS for which Mott MacDonald believed the verdict reached was Unreasonable, Questionable or Average were cases ruled by CISAS in favour of CPs. Of 38 cases ruled entirely in favour of the CP, Mott MacDonald felt there were 18 cases in which there were grounds for giving the consumer a remedy of some kind.

2. Otelo displayed a tendency to be overly liberal with compensation / goodwill payments.

The number of compensation / goodwill payments made by Otelo far outweighed the number at CISAS, and the majority of payments were for relatively small amounts. Otelo made 23 awards for sums less than £50, whilst CISAS only made 4 awards in this range. Some of these awards appeared to be for relatively

minor infractions such as failure to respond to the odd letter or phone call, rather than persistent failings. It was also notable that in a few cases compensation awards were made to consumers in spite of the CP essentially having won the case.

Mott MacDonald is of the view that both of these factors contributed to the difference in outcomes produced by the two schemes. Were both of these tendencies reduced the number of verdicts produced in favour of consumers would certainly become more equal across the schemes.



With regard to each of these tendencies it is important to make a clarification.

At CISAS, the fact that rulings may have occasionally given too little credence to the consumer's viewpoint did not mean this was always the case. There were plenty of rulings in which a balanced view was taken and adequate benefit of the doubt was given. Hence over 80% of rulings were adjudged Very Reasonable or Reasonable. This suggests there is a slight issue with consistency regarding an understanding of the optimum line to take.

At Otelo the issue was less with consistency, but more with the fact that there is an apparent predisposition to make awards to the consumer, which was reflected through small awards being made across all types of case. This could not be said to be intrinsically unreasonable – the examination of evidence and the judgements made were essentially sound, but they were translated into remedies according to a liberal policy or philosophy regarding goodwill which differed considerably from that applied at CISAS.

The question is: what is the right approach to the consumer and the provision of goodwill? In answering this question – and whether, for example, to make frequent small compensation payments could be considered spurious, consideration needs to be given to what the objective is of an adjudication scheme. What is such a scheme trying to achieve? Whilst at a high level the schemes have a common objective, there appears to be divergence on this issue. For example, is the objective:

- To protect the best interests of the consumer?

- To provide an objective viewpoint in situations of conflict between consumer and CP?
- To ensure adherence to industry codes of practice / contractual requirements?

Each of these objectives are worthy, but each could lead to different outcomes if taken as the guiding principle. In particular there are difficult decisions of interpretation to be made when the word of the consumer conflicts with the word of the CP, or the manner in which a contract is sold must be weighed up against the terms of that contract. Which takes precedence?



What is clear is that Otelo and CISAS have a slightly different guiding ethos, in practice if not in theory. Although the decisions each makes can usually be considered reasonable, they produce different outcomes. In an occasional tendency to prefer the letter of a contract to the word of a consumer, CISAS is a little too CP-centric. In handing out goodwill almost as a matter of course, even in situations where the CP has erred little, Otelo is a little too consumer-centric.

Whilst aspects of process or styles of communication may affect the outcomes to a degree, these are the symptoms of this difference in ethos rather than the cause of the problem. Ultimately, in order to ensure consistency between the outcomes of the schemes, it is this difference in ethos that needs to be addressed. The danger is that otherwise, for all the tinkering done with the processes, this difference will still find a way to come out.

Whilst Otelo's process involves the ability for the consumer or CP to challenge the Provisional Conclusion, this right of appeal was not found to have a significant impact on the outcomes of cases. The changes it brought were mostly minor and tended to be consistent with the prevailing philosophy in place – ie triggering minor awards of goodwill. And whilst there were cases at CISAS in which an appeal might have been made – such as in those CP-centric cases where the consumer deserved more – on the whole Mott MacDonald does not believe adding an appeals process would necessarily achieve a change in the proportion of cases ruled in favour of consumers. As long as such decisions are driven to a degree by the ethos of CISAS, they will be present – and are likely to remain as Final Decisions in some cases, even after an appeal. Perhaps an appeals process would lessen the frequency of the occurrence, but a shift in ethos would achieve more.

It should be noted that Mott MacDonald does however believe that a right to appeal should be introduced for cases in which the CP has failed to provide evidence – as at the moment the rules are acting against the interests of consumers, through denying them the usual second chance to qualify and enhance their case.

Another argument against introducing an appeals process is the added time it would involve. At Otelo, where an average case took 19 weeks to reach a Final Decision, appealed cases took an additional 7 weeks, taking the whole process beyond 6 months. Whilst CISAS took much less time – reaching a Final Decision in 8 weeks, on average – an appeals process for all cases would be likely to add several weeks and additional expense, which are hard to justify.



3.2 Recommendations

Mott MacDonald believes there are a number of actions which could help to ensure greater consistency in outcomes between the schemes.

1. Establish common ground regarding guiding principles
Mott MacDonald would recommend working with the two schemes to review, critique and establish common ground regarding the guiding principles governing decisions. This should be done with two particular issues in mind
 - a. Giving the benefit of doubt in cases where the consumer's word conflicts with the CP's word and / or terms and conditions
 - b. Policy on compensation and financial remedies (the circumstances and size of awards).

Efforts should be undertaken to get the two schemes to sign up to a common code of practice or set of governing guidelines to ensure that similar cases do receive similar remedies.

In terms of an approach to doing this, Mott MacDonald would recommend a programme of work involving

- Consultation with key stakeholders and executives at the two bodies in order to understand current ethos and guiding principles
- Interviews with adjudicators and ombudsmen to understand how in practice current rules are actually applied

- Workshops with participants from both schemes to test attitudes and gather opinions on the two key issues and other points of principle (eg appeals process, inclusion of customer service elements etc)
- Through the workshops and further engagement agree a set of guidelines from which both schemes should seek to operate going forward
- A review after 6 months of putting guidelines in place to assess the impact on outcomes.



2. **Develop a more formal compensation scale**

Adjudicators sometimes mentioned guidelines on awards or a requirement for consistency with other cases, but there was no concerted evidence of any formal scale being referred to as a means of setting the compensation awards made. Ideally this would exist more formally, be referred to more consistently, and would exist in common across the two schemes.

3. **Introduce a minimum compensation threshold**

Mott MacDonald also feels there is a good case for introducing a minimum threshold for awards. If a case only merits a £20 award, does it really merit an award at all? It would be better to start with a threshold of, say, £50 and be clear that it is not the job of the adjudicator to fight battle over 1 or 2 missed letters or phone calls. Persistent customer service failings should of course be compensated, but CPs should be allowed some margin of error if they generally seem to be making best efforts to rectify an issue.

4. **Introduce an appeals process at CISAS, for cases in which the CP has failed to respond**

At the moment the consumer is getting a raw deal if the CP fails to respond, as the consumer loses the usual second chance to add to their case or clarify points not understood. Introducing an appeal in such cases would seem fair. However, Mott MacDonald does not believe introducing an appeals process for all cases would be greatly beneficial.

5. **Undertake a review of the time taken to process cases at Otelio**

Whilst it has not been within the remit of this study to examine the functioning of the processes used by the two schemes, the time

taken to reach a conclusion at Otelo seems excessive, and there is evidence it sometimes adds to the stress of a dispute, when, if anything, the scheme ought to be helping to alleviate such stress.

