Reviewing the benefits of and options for Alternative Dispute Resolution in regulated sectors

A UK Regulators Network Consumer Working Group discussion paper by Barbara Hughes and Sean O'Hara

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This paper was drafted by Barbara Hughes, who at the time worked for Ofwat, and Sean O'Hara of Ofcom, as a contribution to a working group that was established by the Joint Regulators Group (now replaced by the UK Regulators Network). Other working group members included Ofgem, Office of Fair Trading (now the Competition and Markets Authority), the Financial Conduct Authority, the Civil Aviation Authority, Office of Rail Regulation and Monitor. This paper is for discussion and does not necessarily reflect the views of these regulators, either individually or collectively.

We welcome reactions to this discussion paper – please email Sean.O'Hara@ofcom.org.uk

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1. Introduction

About this paper

Effective schemes for dispute resolution bring benefits for consumers and companies in regulated sectors in the UK as well as the wider economy. Good dispute resolution mechanisms provide a clear route for consumers and companies to resolve problems if things go wrong.

Most regulators have a duty to protect consumers. One way to both protect and empower consumers in a sector is to ensure they have access to a free place to go to get a clear decision when the customer is not satisfied by a company's response to a complaint.

This paper considers the different approaches to dispute resolution offered in the regulated sectors and highlights some common themes, features and principles across the schemes. There are alternative solutions, and while the solution should be appropriate to the sector being regulated, in the end the customers for energy are the same people as the customers for financial services and water and are likely to have expectations about what they want from ADR.

There is increasing debate, further to the ADR directive, about reducing consumer confusion and simplifying the ADR landscape. This paper offers a review of the current approaches and the benefits they bring as a contribution to the debate and to assist regulators when considering how to ensure customers get appropriate outcomes.

Why have ADR?

Companies operating effective in house complaints handling procedures and providing effective redress mechanisms have access to intelligence which enables them to spot and tackle emerging issues efficiently. External redress mechanisms provide an independent place to go to resolve deadlocked issues.

Effective customer redress can also drive service improvements within companies by identifying what matters to customers and providing incentives to prevent problems arising in the first place. And it can act as an incentive – especially in the absence of competition – to improve standards.

Customers are demanding better value in the face of challenging economic conditions across markets generally and have growing expectations around standards of service and compensation if things go wrong. Government policy at home and in Europe[1] is increasingly looking to create empowered, confident consumers to help drive growth.

Customers should be able to resolve disputes in an accessible, cost-effective and timely way. An effective system for providing redress can ensure that.

There are several models for complaints handling and redress in the regulated sectors. For example, Ofgem and Ofcom are required to set complaints handling regulations and have a statutory requirement to approve a redress scheme; CAA investigate complaints themselves, whilst in rail and the English and Welsh water sectors consumer organisations investigate complaints. Ofwat has recently driven water companies to set up a self-regulatory ADR system for their customers and have secure legislative underpinning for this objective in the coming Water Bill.

We have looked across the sectors to identify good practice and the key principles to which effective ADR schemes should adhere, to explore the different models available and to share some learning from experience of what works well and what not so well.

[1] A summary of the EU directive on ADR is attached at annex 6.

2. What is redress?

Put simply, redress is a way in which complaints are resolved for customers. Specifically, for our purposes, it describes the mechanism or mechanisms used to put right any detriment that customers suffer.

When dealing with suppliers of goods and services customers are entitled to expect redress if things go wrong. There are various ways to resolve disputes. For example, the OFT's work on mapping redress in the UK[2] and Ofwat customer research [3] illustrate some of these.

Customer expectations of redress

- An apology from the supplier to the customer
- Financial compensation
- The reinstatement of the customer to the position they were in before the problem arose
- An acknowledgement of wrongdoing on the part of the supplier
- A commitment by the supplier to introduce changes in its practices in its future dealings with customers

There are a number of approaches that are used to provide redress to customers in different sectors. Different approaches will be appropriate in different circumstances. What matters is that the provision of redress should be proportionate and appropriate to the scale of the problem, and that the provider must be trusted to make findings fair to both parties.

Types of redress provision

- In-house complaints procedures.
- Conciliation
- Mediation.
- Adjudication.
- Arbitration.
- Ombudsmen schemes.
- Court action.

[2] Mapping UK consumer redress, http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf
[3] Domestic Water and Sewerage Customers' Expectations of Service, http://www.ofwat.gov.uk/future/monopolies/fpl/customer/rpt_com20110406creres_fpl.pdf

Customers' expectations when things go wrong[2]

Acknowledge the problem: "Just an acknowledgement and an apology, even just saying, 'really sorry we can't answer your query straightaway'. Generally, just someone acknowledging that they're at fault is often enough."

Offer compensation: "If it has caused you to lose money, they should recompense you really, up to what you have lost, or possibly more. It all depends on what the situation is obviously."

Keep customers informed: "I get texts coming through from [telephone bank] to apologise for the fact that you may not be able to get through to us because they've experienced bad weather and their call centres aren't 100% manned. And I didn't ask for it, I didn't want it, but they're apologising for the fact that if you do try and call."

Getting in touch with the company should be easy: "I think if you phone them, they should just deal with you. Don't pass the buck, don't pass you on and don't put the phone down and then forget all about you. So if I phone up and say, 'I'm not happy with something', either put me through to somebody that can help me or phone me back with the information that I need."

Take responsibility and ownership of the problem: "I think time is the biggest essence for everybody and the fact that sometimes you just haven't got the time to give that problem the time that it requires to solve it properly and go through all the protocols and then kick up the fuss that'll make it easier for the next person. So sometimes you just think, 'you know what, life's too hectic, I'll just live with it for now'."

3. Principles of good redress

There are six principles widely recognised as underpinning best practice in redress scheme design and operation. Regulated sectoral redress schemes should be able to demonstrate application of these in order to secure the confidence of government, regulators, consumers and their representatives.

1. Independence It should be independent from companies and other stakeholders with potential conflicts of interests.
2. Impartiality It should be able to take a neutral, objective and balanced view and deliver fair outcomes to customers and companies based on clear policy or rules.
3. Transparency All decisions should be made public (on an anonymous basis) so that the scheme is impartial; systemic failings in companies' policy or practice are highlighted; and they act as deterrent from poor performing companies – or unreasonable customers – and help drive service improvements.
4. Effectiveness The scheme must meet its objectives and provide value for money in resolving complaints cost-effectively and in a timely manner.

5. Accountability The scheme should be monitored and tested to ensure it is delivering efficient and effective outcomes for customers. The scheme must also be accountable to its users and the sectors.
6. Accessibility The scheme should be available to a wide range of customers and have a clear role so that customers know where to go depending on the type of complaint they have. As a minimum we think that the schemes should be accessible to households and micro-enterprises. It is also critically important that consumers are made aware of their right to use ADR. Different regulators have put in place different requirements on providers regarding how best to ensure that customers who would benefit from ADR are made aware.

4. Key features of redress schemes

Although there are many different designs of redress schemes three critically important features that can fundamentally affect the effectiveness of a scheme are:

- the type of scheme;
- how the scheme is funded; and
- the number of schemes in a sector.

The type of scheme

There are several types of redress scheme, which differ in their approach to complaints investigation. Redress schemes can also vary in the degree to which customers and companies are required to be bound by any decisions reached on individual complaints. How binding decisions are will reflect the legal status of the redress scheme. Schemes can be statutory or voluntary.

Different types of redress scheme and the nature of decisions are described below.

- **Conciliation** – A process where a neutral third party meets each party separately and encourages them to understand each others' positions and to make concessions and reach agreement. The third party is active in suggesting a resolution but does not make a formal decision. An example of this approach is the Furniture Ombudsman, which caters for consumers and retailers in the furniture, home improvement and floor coverings industries. Dissatisfied parties can take the matter further through the courts.

- **Mediation** - An independent third party actively assists the parties in working towards a negotiated agreement of a dispute. This approach is also used by the Furniture Ombudsman. Dissatisfied customers can take the case further through the courts.

- **Adjudication** - A temporarily binding decision is made by an independent expert appointed by the parties. Parties can then decide whether to take their dispute to arbitration or court (see below). It is most widely used in the construction industry.

- **Arbitration** - An independent third party considers both sides in a dispute, and makes a decision that resolves the dispute. The decision is legally binding for both parties. Customers

cannot go to court afterwards if they are unhappy with the outcome. An example of this approach is the Association of British Travel Agents (ABTA).

- **Ombudsman** - Independent, impartial intermediaries who consider complaints. The mechanisms of ombudsman schemes vary but they often combine neutral fact-finding, mediation and adjudication services. They can be introduced by sectors on a voluntary or legal basis. Examples of this approach are the Financial Ombudsman Service and Ombudsman Services for Communications. Also in the communications sector is CISAS (Communications and Internet Services Adjudication Scheme) which although not strictly an Ombudsman performs an identical role to Ombudsman Services for Communications – in both cases the decisions of Ombudsman Services for Communications and CISAS are binding on the communications provider but the customer can choose to take the matter further through the courts.

The degree and type of harm customers suffer as a result of poor quality goods or services can help determine the most appropriate redress scheme. And what is appropriate for any particular industry may evolve over time, depending on the scale and nature of harm caused and the sector's response to it.

For example, in the energy sector, the energy supply industry originally introduced its own voluntary ombudsman scheme albeit at the regulator's behest. However, the government later decided that a redress scheme in energy should be statutory in order to guarantee robust protection for consumers. The same legislation (the Consumer and Estate Agents redress Act 2008) also required the creation of statutory redress in the postal sector.

How redress schemes are funded and using fee structures to improve services

Redress schemes should be free for the consumer but come at a cost to the provider. There are different models for funding redress schemes but each should ensure that the scheme is sustainable and provide incentives on the companies.

Schemes will require participating companies to pay a membership fee to cover the fixed costs of the scheme's operation although, as is the case in energy, the membership fee can be waived for the very smallest. A fee is usually charged for each case that the redress scheme investigates. Effective forecasting of case volumes involving the scheme and providers should ensure that sufficient resources are available for investigating cases and an appropriate balance is achieved between the membership fee and case fee.

How companies fund or pay for a redress scheme can drive improvements in customer service. For example, the fee payment can be structured in such a way as to financially penalise negative behaviour by companies and so encourage changes in company practices that lead to customers using the scheme.

Schemes can structure their fees in different ways depending on the degree to which they want to use the case fee to incentivise good customer service so that providers resolve complaints themselves. A flat case fee set at a significant level can provide a monetary incentive on providers to

resolve complaints. A strong incentive may come from the use of discretionary case fees to tackle serious, sector-wide customer service failures.

For example, the Financial Ombudsman Service (FOS) charges companies a case fee of £500 on their fourth case and for any other cases in the year. The size and effect of the incentive may be adjusted in proportion to the nature and size and scale of the risk of customer harm. For example, because of the scale of Payment Protection Insurance mis-selling cases being handled by FOS, companies are also required to pay a £350 supplementary fee per case if they have more than 25 of these cases in one year.

This ability to change charges to companies enables redress schemes to fund and tackle emerging problem areas effectively. Another example is reduced fees to providers for reaching early settlement, which is used in the communications sector by Ombudsman Services and CISAS. By charging a reduced fee if the provider settles early and to the consumer's satisfaction, simple cases are settled more quickly and resources can be focused on more complex cases. It should be noted that this entails a risk that if the totality of fees paid is significantly reduced as a result, the incentive effect of ADR in driving improvement in providers' processes may be reduced.

There is a further risk that it may be more cost-effective for the provider to use the redress scheme than to fund its own complaints function adequately.

How many schemes should there be in the same sector?

There are arguments for and against having more than one scheme operating in a sector. In favour is the fact that the redress schemes face competition in terms of providing their services efficiently and effectively, and if a scheme fails on these counts there is a ready alternative to which companies can switch.

Against this is the argument that having more than one scheme might lead to customer confusion, different service standards, limit the scope for awareness raising among consumers by the scheme provider, and since membership is a choice for the companies rather than the customers the companies may tend to choose the least expensive and possibly less robust defender of customers' rights.

In the energy sector, Ofgem decided that it was not in the consumer interest to have more than one scheme. In the communications sector, Ofcom requires the two ADR schemes to meet prescribed basic standards around their operation and processes, to ensure that appropriate levels of quality are maintained across both schemes. When Ombudsman Services decided to publish company by company data, they said they'd only do it in markets with more than one ADR scheme if the other scheme(s) did likewise. So this data is becoming available for energy but not generally in other sectors, illustrating the different dynamics between single and multi-scheme sectors and the need for regulation to adapt accordingly.

Another problem is the almost inevitable one of different schemes carrying out their work in ways which can result in inconsistent outcomes in relation to similar scenarios which can adversely affect both companies and customers. This consistency issue was identified by Ofcom as a potential

problem in the telecommunications market where two schemes operate. Ofcom's answer was to introduce compulsory decision making principles to be followed by both schemes. Contained within the decision making principles were decision guidelines and compensation guidelines.

5. Regulatory oversight of redress schemes

The approval process

Generally, where redress is required to be provided by statute the role of the relevant regulator is defined as being one of approval of the principles of any scheme for the provision of redress services. Most regulators would expect that any scheme submitted for approval is one that subscribes to the principles established by the British and Irish Ombudsman Association (BIOA) which are essentially reflected above. This approval can be withdrawn if evidence comes to light that causes the regulator to be concerned that relevant consumers are not being offered the appropriate protection.

It is equally important that the approving body is able to invest the necessary level of resource both at the design stage and in assessing applications for approval. A full consultation on the proposed criteria and approval processes is essential if the schemes are to have the support of consumer groups and industry. If the approving body wants to ensure that "best practice" for redress schemes is included within the criteria this will require thorough research given the range of initiatives across the UK and EU.

When devising approval criteria it is essential to consider what already works effectively in terms of existing schemes that may seek approval. For example, published customer survey results should provide an indicator of which processes work well. The experiences of existing scheme providers should be fed into the process of preparing the criteria.

Once the principles of the scheme or schemes are approved, the relationship between the regulator and the scheme will need to be formalised in respect of issues such as their respective roles and responsibilities, how they will work together, and what information the regulator will expect to see from the scheme. For example, in energy this includes reporting of trends and issues of concern across the industry and potential licence breaches. The relationship might be formalised in a memorandum of understanding.

Monitoring

As well as driving improvements in providers' performance, it is important that the redress scheme's own performance is carefully monitored. This might include reporting by the scheme as to the number of cases that have been accepted for consideration, the number and amount of awards, time taken to reach decisions, information about funding etc. Typically, these will be reported on a quarterly and/or annual basis and they can be extremely useful to regulators to ensure that the scheme is performing to the required standard and particularly in scenarios where there is more than one redress provider.

We consider it would be beneficial to have comparable data on each ombudsman schemes' own performance - not just monitoring by regulators but more for consumers about what they can

reasonably expect and how different schemes are doing. This would help to drive standards and create competition between providers even across sectors to be the best.

Schemes should be required to commission and publish independent customer satisfaction data annually and take remedial actions if this falls below agreed levels. Formal discussions should take place at least annually between the approval body and the scheme to consider customer satisfaction data and how the scheme intends to address any shortfalls.

When agreeing performance monitoring (KPIs) it is better to focus on results rather than processes i.e. consider how much redress is paid, the levels of customer satisfaction, and the type of complaints which are considered within scope. It cannot be assumed that just because a scheme has been operating in a sector for a period of time it is necessarily operating well, or that it will be able to deliver future redress to the required standard. Experience suggests that most redress schemes will rarely voluntarily undertake any form of monitoring/customer satisfaction and there may therefore be limited existing performance data. This emphasises the importance of agreeing clear undertakings along with the consequences for the scheme if they are not met.

Monitoring discussions should be undertaken routinely and regularly, for example establish quarterly statistical reporting by the approved scheme together with a scheduled meeting to talk about trends and issues. Problems can then be identified and tracked at an early stage, allowing solutions to be agreed between the approving body and the scheme. Generally it helps to ensure that the approving body has a full understanding of how the scheme is operating on an ongoing basis.

The development of metrics to compare performance across redress schemes in other sectors or on an EU-wide basis might assist in delivering improvements in the redress schemes themselves. It is important that the activities undertaken by the redress provider are reported transparently so that customers, companies and regulators can understand how the service works, what options for further action are available after decisions have been made etc.

Anonymous case studies available on redress providers' websites are a typical way in which redress providers can inform customers and companies as to what they can expect in various case scenarios. Where there is a single scheme, for example in energy, information about the each provider's performance such as the number and types of cases and awards, will be published to provide consumers with better information and incentivise providers to improve.

The level of information provided by different schemes varies considerably. FOS publishes all decisions whereas others publish examples. Maximum transparency about the content of cases handled is likely to support greater learning for the sectors and empowerment for customers and ensure consistency. Clearly it is important that individual consumers' privacy rights are respected however.

Regular contact at an operational level will quickly identify any issues in the performance of the scheme or providers. In the absence of evidence that a redress scheme is failing to provide effective redress it is unlikely that contact between the regulator and the redress provider at a senior level will go beyond the annual reporting or any subsequent policy review by the regulator.

Useful evidence as to the effectiveness of redress schemes can be obtained through the use of feedback surveys of customers who have either attempted to go to redress or actually had their case considered. This can be particularly useful in identifying why customers often consider going to redress but subsequently decide not to proceed. In the case of the postal redress service such feedback led to a change in the way that evidence was obtained by the redress service from the companies. In energy research is being undertaken to understand why many customers' choose not to go to the redress scheme although they have the right to do so. Regular customer satisfaction surveys conducted either by the scheme or the regulator can assist in identifying areas of weakness in the scheme's operation or performance.

Scope

It is essential that there is an agreed understanding between the approving body and the scheme of the type of complaints that will be considered, not just in terms of broad subject areas but also down to the detailed specifics of particular complaints. This is highly relevant where the scheme seeking approval has already been operational for some time. It is likely to be difficult for a scheme to change its approach to meet approval requirements unless it is clearly agreed from the outset what will be considered, and what is excluded from scope.

6. What are the potential benefits of redress?

Effective redress can bring a range of benefits beyond customers having somewhere to go to get their problem solved, for example, companies will reap benefits from having a clear and coherent system for dealing with complaints across their sector.

Benefits to customers and companies

- Consumer empowerment – a direct benefit. Consumers do not feel powerless as there is a system to ensure their concerns are brought to companies' attention and addressed. They can see how other cases have been handled and know what to expect for their own case. In turn, the companies must take seriously – and deal with – issues that customers raise.

- A sense of fairness, which raises customer confidence in the market. Customers are more likely to be willing to engage if they know there is an effective system in place that will deal with problems when things go wrong. Satisfied customers are also more likely to trust companies and take on board changes or to raise things with a company when they suspect a problem. Research undertaken by Ofcom in 2012 found that customers who use ADR are significantly more positive about their experience than those who don't, regardless of the outcome of their case.

- A constraint on negative company behaviour. Companies are not able to act with impunity and so good behaviour is incentivised – particularly where redress decisions are in the public domain and companies must abide by the redress scheme's findings. In sectors where there is little competitive pressure on companies, redress can be an effective incentive for better customer service.

- Reputational issues can drive service improvements. Effective redress drives good behaviour. It does this by highlighting case studies of what has caused customer problems and signalling the appropriate remedy. Resulting improvements reflect in higher satisfaction levels and the overall reputation of the sector is enhanced – companies learn lessons that enable them to market more effectively to their customers and to reduce complaints occurring which reduces costs.

- A less burdensome process. Redress systems can be a cost effective alternative to court proceedings because:

  – they normally address issues more quickly than the court process;
  – the parties have more control and ownership of the process;
  – proceedings are not normally in the public domain and are less formal; and
  – costs can be lower for both parties.

  Similarly, redress systems can be more beneficial to customers than regulatory determination procedures. These procedures tend not to be designed to give redress to individual customers but rather to determine whether a supplier of goods or services is complying with its regulatory obligations. It can therefore be a lengthy, expensive and cumbersome mechanism, which may not efficiently address individual consumers' complaints.

Benefits to the whole economy

Proportionate and effective redress reduces the extent to which consumers suffer economic loss. This means that consumer spending power is maintained which can contribute to growth.

The UK Government sees confident consumers as an essential part of the economy and central to its growth agenda. It is therefore making changes to strengthen the arrangements that help empower consumers. The aim is for consumers to have confidence to be able to:

- get the best deals;
- demand better products and services; and
- resolve problems when things go wrong.

Better Regulation

Redress providers will have access to a rich vein of intelligence and information about consumer concerns, including where things are going wrong and the scale of detriment potentially at stake. This knowledge can enable regulators and companies to target scarce resource to areas of risk accordingly and to amend policies and services where necessary

7. List of annexes

The current picture across the regulated sectors:

- **Annex 1 – Ofcom**

OFCOM – ADR SCHEMES

Background: Ofcom regulates three ADR schemes; two in telecoms (Ombudsman Services: Communications and CISAS which commenced operation in 2003/4) and one in post (POSTRS which commenced operation in 2008). In each case Ofcom has a statutory duty to approve the principles by which the schemes operate.

In 2012 Ofcom published a report on a review of the ADR schemes in telecoms. The review assessed whether the schemes were performing satisfactorily against the following criteria which Ofcom applied when originally approving the schemes.

- **Accessibility** - ensuring that consumers and small businesses[5] can easily access all relevant information, are given appropriate support when making a complaint, do not face barriers when trying to make an application to the Scheme, and that disabled consumers are not disadvantaged;

- **Independence** - ensuring that the Schemes have appropriate governance procedures in place and that their member companies do not unduly influence decision making;

- **Fairness** - ensuring adjudications are of a high quality, that there are appropriate points of review for cases, that staff are appropriately trained, that there are appropriate internal guidelines in place for how decisions should be reached in particular cases;

- **Efficiency** - the degree to which the Schemes deal with complaints in a timely manner, allocate their resources appropriately and are financially sustainable;

- **Transparency** - the extent to which decisions and the decision making process is clear to consumers and CPs;

- **Effectiveness** - ensuring the jurisdiction of the Schemes are closely aligned and that the Schemes have appropriate procedures in place to:

    - monitor the implementation of decisions;

    - ensure disputes are effectively investigated; and

    - ensure awards of compensation enforced.

- **Accountability** - reviewing KPIs to make sure they are appropriately targeted, examining the level of reporting against KPIs to Ofcom and the public, and aligning the recording and reporting systems of the Schemes to enable direct comparisons on issues being dealt with; and

- **Non-discriminatory** - not discriminating against or in favour of consumers and small businesses or CPs in making decisions. 3.2 In addition to these criteria, section 54(7) of the Act requires Ofcom to have regard to the need to secure that there is **consistency** between the Schemes. Having appropriate internal guidelines in place for how decisions should be reached in particular cases as noted under the fairness criteria also promotes this aim. The Act also requires Ofcom to have regard to the need to secure that the number of approved Schemes is kept to a minimum

As a result of the review Ofcom required the schemes to adopt the following decision making principles:

Objective of the Schemes- To resolve disputes between consumers and communications providers (CPs).

Guiding principles - In doing so, the Schemes should consider decisions in accordance with the following principles:

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

Decision Guidelines

In achieving a fair and reasonable outcome for both parties, the Scheme's decision- maker will: i) Be able to demonstrate that they have treated the CP and the consumer fairly so that neither is unduly disadvantaged.

ii) Remain objective and shall promote neither the position of the consumer nor that of the CP.

iii) Consider the evidence presented by the parties, the specific circumstances, and other information directly relevant to the dispute and shall consider whether to request further information from either party.

iv) Recognise that both parties must, where it is in their possession, provide evidence relevant to the matters in dispute.

v) Give equal consideration to the word of the consumer and the word of the CP.

vi) Be mindful of, but not bound by, past rulings in similar cases.

vii) Where appropriate take account of, but not rely on, the usual behaviour or practices of either the CP or consumer.

viii) Have regard to the relevant regulations, law and terms and conditions.

ix) Ensure that the outcome will be based on the balance of probabilities in the absence of conclusive evidence and give full reasons for any decision.

The Schemes will aid the consistent application of these Decision Guidelines by working from time to time with Ofcom and one another on examples of typical and testing cases.

Compensation Guidelines

Pre-requisites for making an award. With all types of compensation awarded the decision-maker should clearly express:

i) What has triggered the award?

ii) Why this is sufficient to justify an award

iii) Factors affecting the size of the award

iv) The precise level of the award

v) The reasoning for setting the award at this level.

Setting the level of an award

The level of compensation awarded will be guided by a common approach to be used by the Schemes and developed by the Schemes and Ofcom based on current practice and principles.

It should be noted that these Decision Making Principles are intended to serve as an aid to the decision-maker, through creating common reference points. The precise sums awarded should always be left to the discretion of the decision-maker.

Annex 2

Ofgem – redress arrangements in the energy sector

Voluntary redress scheme – July 2006

Ofgem had called on suppliers to establish an independent redress scheme as part of its response to the super-complaint made by energywatch regarding suppliers' billing practices. The Energy Supply Ombudsman was established on a voluntary basis in July 2006 by the six largest energy suppliers to resolve billing and transfer disputes and provide redress where domestic energy customers' complaints had not been adequately resolved by suppliers within 12 weeks.

Statutory basis for the redress scheme – CEARA 2007

The Consumers, Estate Agents and Redress Act 2007 (CEARA) enabled the Secretary of State to require energy suppliers and network operators to be a member of an approved redress scheme to investigate and determine complaints relating to energy. CEARA placed a statutory role on the Gas and Electricity Markets Authority (the Authority) to approve redress scheme(s) for the energy sector. CEARA specified matters to which the Authority must have regard before approving the scheme.

Ofgem consultation – October 2007

Ofgem conducted a consultation process as part of the process of approving a redress scheme. It sought views on specific issues (the type of scheme, the number of schemes, the inclusion of all energy providers, whether the criteria for micro businesses, and the period of time to resolve complaints), and whether the criteria for approval (independence, accessibility, effectiveness, and public accountability) met the principles of best practice.

BERR redress – decision December 2007, Order October 2008

In order to require energy providers to be members of an approved redress scheme, the government (BERR) made secondary legislation (the "Order"). BERR consulted on consumer redress schemes in gas, electricity and postal services in July 2007, and published its decision document on 21 December 2007. (The Order came into force from 1 October 2008 setting out the scope of the redress schemes in terms of the categories of consumer and type of complaint to be considered.)

Ofgem decision and invitation to seek approval – March 2008

Ofgem published its decision on the redress scheme, setting out its final criteria for approval (independence, accessibility, effectiveness, and public accountability). Redress schemes were invited to submit their applications for approval according to the criteria. Ofgem stated that it would carry out a review of the approved scheme 12 months after approval was given to ensure that it continued to comply with the criteria.

Approval of redress scheme – scheme operational from 1 October 2008

The Ombudsman Service Limited (since renamed Ombudsman Services) submitted an application to operate a redress scheme in the energy sector (the Energy Ombudsman). Conditional approval (pending publication of the BERR "Order") setting out Ofgem's expectations of the scheme in respect of governance, effectiveness, and performance was given to Ombudsman Services in June 2008. The scheme was given formal approval in September 2008 following publication of the BERR "Order".

MoU – October 2008

A Memorandum of Understanding between the Authority and Ombudsman Services was agreed and signed in October 2008. It sets out the respective roles and responsibilities of the Authority and Ombudsman Services, points of contact for support and the sharing of information, expectations of Ombudsman Services in respect of alerting Ofgem to trends and emerging issues of concern, and the provision of information about the performance of the Energy Ombudsman (now renamed Ombudsman Services:Energy).

Scheme review – October 2009

Ofgem appointed a consultant to carry out an independent review of the Energy Ombudsman. The results were published in June 2010. The review identified areas where the Energy Ombudsman was not fully meeting the scheme criteria and necessitated one change to the effectiveness criteria.

Research on satisfaction with the Ombudsman – March 2010

Ofgem appointed a research company to carry out research into customers' satisfaction with the Energy Ombudsman. The results were published in June 2010.

Key issues in the redress scheme development

Type of scheme

Ofgem considered whether the redress scheme should be one based on arbitration, adjudication or ombudsman. Arbitration involves an independent third party hearing both sides in a dispute and making a decision to resolve it. Adjudication is similar to arbitration but it asks both sides for information rather than relying on each party to form its own case. Ofgem decided that an ombudsman scheme offered benefits over the two alternatives as it: ensured members' signpost the scheme and have complaints processes; inform and help customers submit complaints to it; encouraged service improvements by recommending changes to members' processes; and informed regulators and the public about industry issues.

Multiple schemes

CEARA allowed for there to be more than one scheme in the energy sector but in considering whether to approve a redress scheme Ofgem should have regard to the consumer interest including having regard to the number of schemes. Respondents to our consultation favoured a single scheme citing consumer confusion, cost, and consistency in decision making. Ofgem decided that the consumer interest would be best served by having only one scheme, which would provide simplicity for consumers and cost efficiency for scheme members.

Inclusion of all energy companies

CEARA required all energy companies to be members of a redress scheme. Ofgem considered whether de facto exclusion would occur as a result of the governance or financial arrangements, particularly in respect of small energy companies. Ofgem decided that the governance arrangements and any fees should not have a disproportionate effect on any particular group of members (for example the annual scheme membership fee should be set at a proportionately lower level for smaller companies or those with fewer complaints) and included a requirement to this effect in the scheme criterion.

Annex 3

OFT – Estate Agents Redress Schemes

In March 2004, the Office of Fair Trading's (OFT) report on the *Estate agency market in England and Wales* recommended that a statutory redress mechanism should be established if voluntary codes of practice did not provide the required improvements in benefits to consumers. The Government's response in July 2004 supported the statutory requirement for estate agents to belong to an industry redress system.

The Consumers, Estate Agents and Redress (CEARA) Act 2007

The CEARA amended the Estate Agents Act 1979 (EAA) to introduce, by way of an order, a requirement for those engaging in estate agency work in respect of residential property to join an approved estate agents redress scheme. The OFT was empowered to both approve and withdraw approval of a redress scheme. Before the order could be made the OFT had to approve one or more redress schemes. The CEARA placed no limit on the number of schemes the OFT could approve.

OFT Approved Estate Agents Redress Schemes

The OFT issued a public consultation on the draft criteria for estate agents redress schemes in May 2007. In formulating the criteria the OFT took into account:

- the requirements specified by the EAA,
- best practice in relation to redress schemes generally,
- ensuring compliance with the Human Rights Act in relation to oral hearings to allow all the parties concerned to present their viewpoint before the ombudsman.

The OFT published criteria for approval of estate agents redress schemes in April 2008. The criteria requirements include: independence of the ombudsman, members of the scheme to have an effective internal complaints procedures, the scheme itself to be publicised to consumers and its procedures to be transparent, access to the ombudsman's service to be easy and free to buyers or sellers of residential properties who can have their complaints investigated fairly and, if appropriate, receive compensation or an apology from the estate agent.

The ombudsman is required to make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law and good practice including the principles of good administration. The ombudsman's decision is binding on the estate agent, although a complainant can choose to reject the decision and pursue their complaint through the courts.

The criteria further require that the scheme's effectiveness is monitored on a regular basis. This involves scheme operators providing the OFT with information on customer satisfaction surveys, reports on the achievement of the performance indicators as agreed with the OFT and appropriate information about complaints.

In June 2008 the OFT approved the estate agents redress schemes of **The Property Ombudsman** (formerly Ombudsman for Estate Agents Company Limited) and, in August 2008, approved the **Ombudsman Service: Property** (formerly Surveyors Ombudsman Service). The order requiring estate agents to join an approved redress scheme came into force on 1 October 2008.

Estate Agents Redress Schemes Review

The OFT monitored the performance of the approved redress schemes, and in March 2014 completed a review of certain aspects of the operation of the schemes including the schemes' complaint handling processes. The OFT advised the schemes that the review had identified a number of issues which the OFT required them to address and requested written proposals from the schemes on how they intended to address each of the issues that had been identified.

Changes to the approval of estate agents redress schemes

In March 2012, the Government announced its plans for reform of UK's competition and consumer regime. These included creating a new single Competition and Markets Authority (CMA) from 1 April 2014 following abolition of the Office of Fair Trading(OFT) and the Competition Commission (CC). The CMA has taken on the functions of the CC and many of the competition and consumer functions of the OFT. The OFT's power to approve estate agents redress schemes under the 1979 Act transferred to a lead trading standards authority – Powys County Council.

Next steps

The OFT received proposals from both schemes on how they intend to address the issues raised in the review and agreed these as the way forward. The proposals submitted by the schemes and their impact will be monitored by the schemes and the OFT's successor authority, Powys County Council.

Annex 4

Ofwat - redress for water and sewerage customers

Current arrangements

There are a number of organisations involved in the redress system for water and sewerage customers once a customer has exhausted their companies' complaints process. The organisation that customers use will depend on the nature of their dispute with their company. It will also depend on individual customers' awareness of the organisations; and preferences, and ability to access.

We set out each organisation and their roles below.

- Ofwat. The economic regulator can make decisions ('determinations') on specific types of customer complaints. For example for companies not meeting their statutory duties or the terms of their licence conditions. Ofwat can also tackle such things as the payments under the Guaranteed Standards Scheme regulations or the costs of supplies for non-households. But Ofwat cannot make determinations which result in customers receiving financial redress such as compensation or rebates.

- The Consumer Council for Water (CCWater). CCWater is the legal organisation that represents customers. They can investigate complaints for the purpose of determining whether it is appropriate for them to make representations on behalf of the customer to the company or to Ofwat about the complaint. But they can only negotiate a mutual, non-binding agreement between companies and customers to resolve disputes. For binding agreements, CCWater must refer the matter to Ofwat.

- Other customer bodies. Organisations, such as Citizens Advice and Which? can offer advice and help to customers.

- The Courts. Customers can potentially refer any matters to the county court. But in practice, where Ofwat has powers to determine a matter, the courts will normally consider that the customer should refer the matter to us instead. The small claims court will consider matters which either consider a customer's liability for charges or claims for loss or damage that have resulted from poor service up to £5,000.

Gaps in the current arrangements

Ofwat's review of redress in the sector and our research, Empowering Water Customers: Customers' attitudes to information provision in the water and sewerage sectors', found a number of gaps and weaknesses in the existing system including absence of a clear route to independent ADR.

Ofwat has worked with the regulated companies, Water UK (the industry body) and Consumer Council for Water to agree principles and a specification for a self-regulated independent ADR scheme which will be put out to tender in the summer with a view to an operational scheme for all water customers being in place by the end of the year.

This initiative has been supported by the Water Bill currently in parliament which includes clauses to enable Ofwat to impose licence conditions to require licensees to provide independent ADR to their customers.

CAA - The Civil Aviation Authority's role in complaint handling

Current position

The CAA has a Passenger Advice and Complaints Team which handles air passenger complaints on issues including baggage problems, ticketing issues, denied boarding (when a flight is overbooked and passengers are bumped), delayed and cancelled flights.

Historically, the Air Transport Users Council (AUC) was the complaint handling body for aviation. The AUC was an independent body, which was funded by the CAA. In March 2011 the AUC was incorporated into the CAA and renamed the Passenger Advice and Complaints Team (PACT). PACT now sits alongside the consumer enforcement team.

PACT runs a telephone advice service, and mediates complaints for passengers who have already complained to airlines and airports. The mediation service offered comprises writing letters to airlines to take up the passenger's complaint, and thereby seeking to resolve the complaint on the passenger's behalf.

Where complaints are unable to be resolved by correspondence, PACT do raise the complaint with more senior contacts at airlines and airports.

PACT has recently launched an online service where passengers can submit their complaints online.

Complaints from passengers with a disability are currently handled by the consumer enforcement team. Passengers with a disability do not have the right to have refunds or compensation, so complaints are generally taken up as enforcement issues to ensure future compliance with the law.

PACT is currently experiencing a greatly increased demand for its services due to greater awareness of air passenger rights following judgments of the Court of Justice of the European Union which have been covered by the media.

Legal basis

The CAA is the National Enforcement Body in the UK for European air passenger rights law (EC261/2004). As such, we have a legal duty to receive complaints on denied boarding, delays and cancelled flights and take enforcement action to ensure compliance with that law. We have no legal duty to mediate on behalf of individual passengers. Rather, this is a discretionary service that we offer passengers.

The CAA is the National Enforcement Body in the UK for European law on air passenger rights for passengers with reduced mobility (EC1107/2006). Enforcement action does happen following individual complaints to ensure future compliance with the law.

The CAA has powers to take enforcement action on consumer law under Part 8 of the Enterprise Act 2002. We are unlikely to take enforcement action generally due to individual complaints, but complaint data does inform our enforcement action.

Cost

PACT currently has 7.5 full time members of staff. Including overheads, this equates to around £500,000 per annum, or around 0.3p per passenger flying out of the UK.

Funding

The service is funded by the aviation industry through the CAA's general charges. Ultimately passengers pay for the service through their purchase of tickets.

Numbers of complaints handled

In 2012, PACT received 6800 complaints, with the majority focussing on delayed and cancelled flights.

This works out at a cost per complaint handled of around £80.

Numbers of complaints resolved

Unfortunately, our previous complaints database does not record whether we were successful or not in mediating a complaint. We have recently implemented a new system to capture the appropriate management data.

Future work on ADR

The CAA is aware of the ADR Directive and is raising the issue with airline trade associations and our contacts at airline customer service teams. The CAA will shortly be auditing the PACT service internally and is due to carry out a benchmarking exercise against other similar complaint handling services. The CAA is also considering outsourcing part of the service (the telephone advice service initially) in order to help us meet the current demand for our services.

The consumer enforcement team currently gives a view on whether compensation is payable where flights are delayed or cancelled. This includes reviewing evidence provided by the airline on bad weather or technical problems. This view is not legally binding on airlines or passengers (who remain free to go to court), but airlines have abided by our view so far. It would be helpful for us to be able to take decisions that were binding on the airlines and we are looking to the ADR Directive for the legal basis for this development to our service.

Annex 6

EU DIRECTIVE ON ALTERNATIVE DISPUTE RESOLUTION (ADR) AND ONLINE DISPUTE RESOLUTION (ODR)

Background

The ADR directive requires Member States to have in place ADR schemes to enable any dispute in respect of goods and services to be submitted by consumers. For transactions/sectors where there is no suitable ADR scheme in place, Member States must either amend existing schemes to meet the criteria under the directive, or set up a residual ADR scheme to cover all transactions not caught elsewhere.

The scope of the directive includes all types of domestic and cross-border disputes except for healthcare and further/higher education. The directive does not prevent Member States from adopting or maintaining rules that go beyond the requirements of the directive.

The directive allows Member States to decide whether ADR entities where the solutions are binding on the parties are also covered. This suggests that redress schemes such as those operated under CEARA or CCAS would not necessarily be required to be aligned unless BIS chooses to do so. However, it is likely that in order to ensure full coverage, such schemes would be included in national legislation.

The directive was adopted on 22 April 2013 and is due to be implemented into the UK in early 2015.

ADR Directive

In order to be able to be listed as an ADR entity under the directive, schemes are required to fulfil requirements under the following:

Accessibility - maintenance of a website allowing online submission of complaints; acceptance of both domestic and cross border disputes; procedural rules on which complaints cannot be dealt with.

Expertise, independence and impartiality – those undertaking dispute resolution must have the necessary knowledge and skills, including a general understanding of law; individuals must be appointed for a sufficient duration to ensure the independence of their actions and be remunerated without a link to the outcome of the procedures; overseeing bodies must have equal numbers of consumer and business representatives.

Transparency – schemes must provide information on: contact details; details of appointment procedures and length of appointment; types of disputes dealt with; rules of procedure; languages in which a claim can be submitted; types of rules used for the basis of the dispute resolution; preliminary requirements before ADR can be used; ability to withdraw from the procedure;costs; average length of the procedure;legal effect of the outcome of the ADR procedure; enforceability of the ADR decision.

Annual activity reports must be produced to set out: numbers and types of disputes, systemic or significant problems, rate of disputes not dealt with, average time taken to resolve a dispute, rate of compliance (if known) etc.

Effectiveness - procedures must be able to be used without the need for a lawyer or legal advisor; procedure is free or at nominal cost for the consumer; outcome is 90 calendar days from receipt of the complete complaint file (can be extended for complex cases).

Fairness – both parties must be provided with the arguments, papers etc from the other party; consumers can withdraw from the procedure if they are unhappy with it; parties are notified of the decision and the grounds for it; consumers are told they have the choice of accepting the decision or not with a reasonable time to reflect; parties are informed of the legal effect of agreeing to the solution; participation in the procedure doesn't preclude them from going to court.

Liberty - if a solution is binding on either party, they must be notified that this is the case in advance.

Legality – in schemes where a decision is imposed on a consumer, the consumer cannot be deprived of their legal rights; where the outcome of a decision is not binding, prescription and limitation periods for court procedures don't apply.

Information for Consumers – traders must inform consumers about the relevant ADR entity where they have agreed, or are committed to use it. The information must be on the trader's website, and if applicable, in the general terms and conditions.

Exchange of experiences with other ADR entities – ADR entities must co-operate on the resolution of cross border disputes and exchange good practice on the settlement of cross border and domestic disputes.

Member states are required to provide the following:

- **Competent authorities** (these must be public authorities but there can be more than one of them per MS**)** are required to publish and update a list of ADR entities that comply with the directive. ADR entities are required to provide information to the competent authority on the operation of the scheme every two years.

- **Penalties for non-conformance**, in particular for the information provisions from traders to consumers.

ODR Regulation

The ODR Regulation will set up an interactive website (ODR platform) which consumers and traders can use to facilitate dispute resolution for online transactions, both domestic and cross border. The platform will provide facilities for complaints to be submitted electronically to the relevant ADR entity. All listed ADR entities will be required to register on the platform and provide a link to the platform on their website. All traders who operate online sales/services will also be required to provide a link to the platform from their website.

The Commission is tasked with ensuring the ODR platform will be in place by the end of 2015.