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Chapter 14

Regulating ADR: Lessons from the UK

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A. Introduction.....	2
B. Challenges in regulating the ADR sector	3
1. The benefits and limitations of ADR.....	3
2. The need to manage risks in the ADR sector.....	5
C. Implementation and the UK’s consumer ombudsman system.....	7
1. The regulatory consequences of the Directive in the UK.....	7
2. The consumer ombudsman model in the UK	8
3. The legitimacy claim of the ombudsman model.....	11
D. Evaluating the impact of the Directive on the consumer ombudsman model.....	12
1. The ombudsman promotes user access to justice	12
The claim	12
Enhancing consumer knowledge and managing expectations	17
2. The ombudsman allows for more justice to be delivered.....	19
The claim	19
Delivering individualised justice under the Directive.....	19
3. The ombudsman promotes collective justice	22
The claim	22
Delivering the lessons from complaints.....	22
4. The ombudsman is fair and operates to high standards.....	23
The claim	23
Evaluating the Directive’s approach to standards	24
5. The ombudsman is accountable	25
The claim	25
Evaluating the strength of the UK structure of competent authorities ..	26

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E. The future for the regulation of ADR in the UK.....	28
1. A unified competent authority	28
2. Alternative sources of legitimacy.....	29
F. Bibliography	31
Literature.....	31
Cases.....	34
Statutes	34

A. Introduction

The combined initiative of the Directive on Consumer ADR (the ‘Directive’)¹ and the Regulation on Online Dispute Resolution for commercial disputes (the ODR Regulation)² has further emphasised an ongoing shift taking place within the UK civil justice system. Once dominated by court based dispute resolution, the provision of UK civil justice is now increasingly reliant on a network of alternative dispute resolution (ADR) providers, within which multiple variants in process and form are used to settle disputes. A lot of hope has been invested in the Directive’s support for this network,³ but this chapter argues that the UK strategy for implementing the Directive has been minimalist and that, as in other countries, this represents a missed opportunity. Although the provision of ADR may be enhanced through the Directive, the system of regulation for the ADR sector looks deficient. As a result, there is a heightened risk that sub-optimal standards in the sector will go undetected which may in turn undermine user confidence.

Two key drawbacks with the implementation of the Directive in the UK are highlighted here: the lack of distinction made between the different forms of ADR and the dilution of the standards enforcement role of competent authorities. To illustrate the risks, this chapter focusses mostly on one form of ADR, the consumer ombudsman model, primarily because of its widespread prevalence in the UK, but also because of the bold claims made about the institution. The chapter begins in Part B by charting the landscape of ADR and highlighting its points of weakness as a provider of justice. The ability of the Directive to address such weaknesses is the key

¹ 2013/11/EU.

² (EU) 524/2013.

³ EC Directorate General for Health and Consumers. *Consultation paper: On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union*. (2011), p. 3.

focus of this chapter. In Part C, the UK tradition of consumer ombudsman schemes is explained, along with the implementation of the Directive in the UK. In Part D five key claims made in favour of the ombudsman model are interrogated and the extent to which the UK's implementation of the Directive has enhanced these claims analysed. The chapter concludes in Part E by exploring the options for making the regulatory structure stronger.

In short, the Directive is capable of laying the foundations for a robust ADR system, but more work needs to be done to make the regulatory set-up a standard-bearer for the sector rather than a passive observer. Without this extra work, the credibility of consumer ADR and the integrity of the rule of law will be left under-protected.

B. Challenges in regulating the ADR sector

1. The benefits and limitations of ADR

In the shadow of more formal legal institutions, over many years a network of ADR has grown-up in the UK and elsewhere. A key driver behind this development has been a need to respond to circumstance, with a common concern the limited capacity of the processes of judicial adjudication to deal with the scale and range of disputes that occur in the civil justice system. The Directive fits into this tradition, one which has a global heritage,⁴ with the main stated motivations behind it being to increase access to justice, whilst simultaneously reducing reliance on the court.⁵

More so than the drafters of the Directive, however, theorising on ADR generally puts forward a bolder claim for ADR, one based on its capacity to dovetail the complexities of human interaction.⁶ For ADR proponents there is not one solution best equipped to resolve the very different types of conflict that occur in society. This makes ADR justifiable not just on pragmatic grounds, it is also essential so as to enable a suitable dispute resolution method to be selected according to needs and circumstance. By adopting the right process, the likelihood of the delivery of relatively quick justice is enhanced, as is the encouragement of amicable dispute resolution

⁴ M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to Justice Movement' (1993) 3 *Modern Law Review* 56, 282-296.

⁵ EC Directorate General for Health and Consumers, n.3 above.

⁶ C. Menkel-Meadow, 'Alternative and Appropriate Dispute Resolution in Context: Formal, Informal, and Semiformal Legal Processes', in P. Coleman, M. Deutsch, and E. Marcus (eds). *The Handbook of Conflict Resolution: Theory and Practice*, Wiley, 2014. 1 – 28.

and the enhancement of better relationships and trust between consumer and provider.⁷

Part of the power of ADR, therefore, lies in its flexibility and diversity in method and form. Indeed, it is extremely difficult to capture all the nuances in approach that now exist. The options range from highly proceduralised, almost tribunal-like mode adjudication services, through inquisitorial-based ombudsman schemes, to arbitration, mediation and conciliation services.⁸ All these forms of ADR have their merits, but the methods deployed within them vary and overlap, with some providers applying a range of the techniques within one staged service.⁹ Further, the outputs vary. Thus some schemes (and processes) offer as an endpoint an adjudicated decision, whereas others focus only on negotiating a settlement. Some schemes conclude with a solution binding on both parties, some only binding on the trader, some binding on neither party. Some schemes operate fully independently of the sector against which complaints are brought, some operate within trade associations or within the investigated organisation itself. Some schemes are state sponsored, others industry sponsored. Some schemes now offer a completely online service.

This distribution is to be expected, but does raise difficult questions. For instance, is it viable to anticipate in advance which forms of ADR should be deemed appropriate for which types of dispute?¹⁰ A solution to this dilemma might be to make the process adopted the choice of the parties to a dispute, but this option will not always be realistic. Often the choice is largely dictated either by the state's structuring of the civil justice system or the stronger party in the dispute. In the commercial world this potential raises the possibility that the interests of the consumer in a cheaper, quicker and more user-friendly outcome might be used to 'buy' them into a weaker system of justice to their disadvantage.¹¹ These concerns are enhanced where the ADR system is funded by the private sector itself.

⁷ R. Behrens, *Public Trust and the Ombudsman: the case of the OIA*, Office of the Independent Adjudicator for Higher Education, 2015.

⁸ For a full analysis of the variety of ADR in the EU, see C. Hodges, I. Benöhr and N. Creutzfeldt-Banda, *Consumer ADR in Europe*. Oxford: Hart, 2012.

⁹ C. Gill, J. Williams, C. Brennan and C. Hirst, *Models of Alternative Dispute Resolution (ADR)*. Queen Margaret's University, 2014, 14-26.

¹⁰ C. Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context'. 54 *Journal of Legal Education* 7-29 [2004].

¹¹ E. Brunet, 'Questioning the quality of alternate dispute resolution' 62 *Tulan Law Review* 1 (1987); H. Eidenmiller and M. Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' 29 *Ohio St. Journal on Dispute Resolution* 261 [2014].

A further challenge for the ADR sector is the body of well-rehearsed critiques that its processes bypass and undermine essential rule of law obligations.¹² For instance, there is a public value in the process of seeing justice done ‘that transcends private interests’,¹³ such as the maintenance of an appropriate and well-constructed body of consumer law. The sheer effectiveness of the ADR bargain offered to the consumer might lead to a diminution in the development of the law as cases to the courts dry up¹⁴ and ‘the guidance function of substantive law’ may be eroded.¹⁵ Further, the rights-based model of justice in-built in the legal process is concerned with modifying behaviour around the rule of law.¹⁶ If hard enforcement of judicial rulings of the rights of consumers becomes rarer, this may in turn lead to businesses becoming less cautious in their attempts to comply with consumer protections built into the law or contract.¹⁷

Overall, against the known imperfections and limitations of existing formal legal processes, ADR can be argued to offer superior solutions in certain circumstances,¹⁸ not least because for consumers the courts will often not be a viable route for obtaining redress.¹⁹ Individual consumers may also have good reason to prioritise user-friendly informal dispute resolution over justice. But, if a key aspiration remains the promotion of justice, as well as the resolution of disputes,²⁰ then there is need for some form of background safeguarding to ensure adequate levels of performance in the sector, as well as protections for the rule of law.

2. The need to manage risks in the ADR sector

A number of points follow from the above introduction to the ADR sector which should shape any analysis of the implementation of the Directive. First, there is an overlap in roles being performed by ADR providers. Primarily they aspire to resolve and settle disputes, but they do so within a larger landscape of civil justice and rule of law values. Although given

¹² O. Fiss, ‘Against Settlement’, 93 *Yale Law Journal* 1073 (1984).

¹³ H. Genn, ‘What Is Civil Justice For? Reform, ADR, and Access to Justice,’ *Yale Journal of Law & the Humanities*: Vol. 24: Iss. 1 (2012), Article 18, 398.

¹⁴ L. Mulcahy, ‘The Collective Interest in Private Dispute Resolution’, 33 *Oxford Journal of Legal Studies* 59 (2013) 59-80.

¹⁵ H. Lindblom, 2008, ‘ADR – The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden’, *European Review of Private Law* 1-2008, 63-93, 72.

¹⁶ *Ibid.*

¹⁷ Eidenmiller and Engel, n. 11 above, 2014, pp.278-80

¹⁸ L. Fuller, ‘The Forms and Limits of Adjudication’ in K. Winston (ed), L. Fuller, *The Principles of Social Order: Selected Essays of Lon Fuller*, (Hart Publishing, 2001).

¹⁹ C. Hodges, ‘Consumer Redress: Implementing the Vision’, ch. 16 of this edited collection.

²⁰ N. O’Brien, ‘The ombudsman as democratic ‘alternative’: Reading the EU Consumer ADR Directive in the light of the PASC reports’, *Journal of Social Welfare and Family Law*, (2015) 37:2, 274-282.

minimal coverage, this latter duty is recognised in the Directive which requires ADR providers to ‘have sufficient general knowledge of legal matters in order to understand the legal implications of the dispute’.²¹

Second, theory does not provide us with neat answers as to when and how different forms of alternative, or judicial dispute resolution, should apply. Indeed, the balance and shape of the ADR sector is driven by a combination of market and state pragmatism, as determined by ongoing reflections on current practical experience.²² Nevertheless, institutional design still has a role to play in protecting the underlying goals of the civil justice system.

Third, while all forms of ADR have strong claims to functionality and purpose, none are immune from criticism. But criticisms of an ADR scheme might be manageable provided that key stakeholders can be persuaded of its continuing benefit, relevance and effectiveness. But this outcome should not be taken for granted. Disillusionment and distrust with all forms of justice provision can occur. In the ADR sector, there is a particular problem in that often the parties can refuse to participate in the process and fall back on their legal rights. The rulings of ADR providers or the standards they promote can also sometimes be lawfully flouted. Sustained behaviour of this nature could lead to legal challenges against ADR schemes, user flight to other sources of dispute resolution and even organised campaigns against an ADR mechanism.

Fourth, if correct, what this logic implies is that all forms of ADR benefit from a background quality assurance structure which is capable of defending them from various layers of challenge and critique. From the consumer’s perspective, what is needed is reassurance that an ADR mechanism has adequate means of persuasion, is sufficiently ambitious in its interrogation of disputes, has not been captured by the stronger party, and provides a suitable quality service. Conversely, businesses and government need to be persuaded that an ADR mechanism is not too costly, cannot become a dangerous maverick or operate with a remit which contains too much discretion such that it threatens the authority of investigated bodies.

The Directive represents a response to this need for reassurance as to the quality of ADR by establishing a regulatory structure designed to strengthen ‘both consumers’ and traders’ confidence in [ADR] procedures’.²³ It does this by setting standards for the design, process and performance of ADR

²¹ ADR Directive, n. 1 above, Recital 36, as implemented by Art. 6(1)(a), see also Art. 11.

²² R. Bone, ‘Lon Fuller’s theory of adjudication and the false dichotomy between dispute resolution and public law models of litigation’ 75 *Boston University Law Review* 1273-1321 [1995], 1284.

²³ ADR Directive, n. 1 above, Recital 36.

schemes in the sector. Further it establishes a network of competent authorities to monitor and enforce those standards. Therefore, the key components of good regulation are present.²⁴ The question explored in this chapter is whether through implementation the UK Government has made the system robust enough to safeguard the effectiveness and legitimacy of the sector, and protect it from reputational risks.

C. Implementation and the UK's consumer ombudsman system

1. The regulatory consequences of the Directive in the UK

In the UK, the Directive's implementation amounted to a minimal endeavour in harmonisation because many of its background goals had been already realised. The Directive has been implemented by way of secondary legislation ('the UK Regulations')²⁵ and for the UK raises few completely new requirements. A process of checking that domestic legislation was in compliance with the various standards set by the Directive had to be followed, and arrangements made for ADR in areas not previously covered.²⁶ A system of accrediting competent authorities and reporting requirements had to be put in place.²⁷ Additionally, the ODR Regulation obliged all EU online traders to provide a link to the ODR platform on their website and the Directive meant that all traders, even non-participating traders, had to inform consumers of available ADR opportunities.²⁸

Beyond these obligatory commitments, the UK Government's implementation strategy comprises an uneasy compromise between a stated policy aim to enhance consumer rights and an ideological commitment to minimise the regulatory burdens on industry. The latter goal entails that the operational and consequent costs of delivering ADR cannot be ignored, particularly if the public purse or business is expected to be the sponsor. This has led the Government to adopt a *laissez-faire* model of ADR within which, outside existing statutory schemes, the shape and extent of the ADR sector is left to the combined responses of traders. Further, competition in provision is encouraged and used to drive standards and reduce costs.

²⁴ R. Baldwin, and M. Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999).

²⁵ The Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015).

²⁶ ADR Directive, n. 1 above, Art 5(3).

²⁷ Regulation 8, n. 25 above.

²⁸ Regulation 19, n. 25 above.

One significant extra cost on both businesses and consumers, and potentially government, is the accepted need for regulation. It is noticeable, however, that in the UK the regulatory impact will be reduced in two respects.

First, the Directive treats the ADR sector as a homogenous entity.²⁹ This looks like an efficient solution, but carries the risk that the diversity of methods and processes being deployed in the ADR sector will not be fully captured. If regulation is to succeed in providing stakeholders reassurance that ADR schemes are credible, then the standards that are set need to be appropriate for the form of ADR concerned and be sufficiently rigorous. But with the Directive, standards have been selected on the basis that they are generalizable to the ADR sector as a whole. A danger with this approach is that standards are set at a low common denominator in order to be appropriate for all forms of ADR. But if the standards developed do not connect sufficiently to the claims being made in favour of an ADR scheme, the Directive will provide reduced assistance in persuading stakeholders that a form of ADR is legitimate and effective.

Second, the UK Government has chosen to implement its regulatory duties in minimalist form by distributing the function of ADR competent authority across a number of pre-existing regulatory mechanisms. An argument pursued below is that this regulatory strategy also makes it more difficult for any one form of ADR to promote, demonstrate and protect its core claims to legitimacy and effectiveness.

To illustrate the impact of this implementation strategy in the UK, in this chapter the focus will be on only one form of ADR, the consumer ombudsman model, as it is probably the most commonly used form of ADR in the UK. However, the same set of issues may affect the remainder of the ADR sector.

2. The consumer ombudsman model in the UK

The UK was one of the earliest adopters of the consumer ombudsman model, starting with the Insurance Ombudsman Bureau in 1981. The first wave of development could be described as the ‘privatisation of dispute resolution’,³⁰ with various corporate sectors organising the provision of private ombudsman schemes.³¹ But from the late twentieth century onwards,

²⁹ ADR Directive, n. 1 above, Art 2(1).

³⁰ R. James, *Private Ombudsmen and Public Law*. (Socio-legal Studies, Dartmouth, 1997), p.2.

³¹ For an analysis of the history of Consumer ADR, see C. Gill, J. Williams, C. Brennan and N. O’Brien, *The future of ombudsman schemes: drivers for change and strategic responses*, (Queen Margaret University, Edinburgh: 2013), pp.9-13.

legislation was passed which led to the formation of a number of statutory schemes. By 2015 there was a wide-ranging network of independent ombudsman schemes in place across many consumer sectors,³² and one which had already experienced reform and innovation. There were also other sectors in which either regulators or the industry itself strongly encouraged and made available complaint-handling services, with all schemes carrying the title ombudsman operating independently from industry. Nevertheless, large areas, such as the retail and transport sector, continued to operate with little or no ADR, let alone ombudsman, provision.³³

The growth of the consumer ombudsman model, together with its predecessors in the public sector, led to the ombudsman sector becoming an embedded feature of the civil justice system in the UK. This achievement should not be underestimated, as establishing and maintaining the credibility and authority of the ombudsman institution is everywhere a challenge. Evidence for the status of the ombudsman comes from several sources.

First, the scale of use of ombudsman schemes is substantial, as indicated by Table 1. The numbers provided need to be treated cautiously because, pre-ADR Directive, the reporting criteria used varied enormously from scheme to scheme. Nevertheless, the turnover of complaints is impressive.

Table 1: Applications/complaints received for the 2014/15 or last reported year, as per the relevant annual reports and court records.

Consumer Ombudsman schemes		Public Sector Ombudsman schemes		Courts for England and Wales³⁴	
Financial Ombudsman Services	329,509	Parliamentary and Health Services Ombudsman	8,037 ³⁵	County Court Civil (non-Family)	1,534,584 ³⁶
Ombudsman Services	62,806 ³⁷	Scottish Public Services Ombudsman	4,895	Administrative Court (Judicial Review)	4,064 ³⁸

³² Energy, financial services, higher education, legal services, telecommunications, pensions, postal services, real estate and green deal, see P. Cortes, 'The impact of EU law in the ADR landscape in Italy, Spain and the UK: time for change or missed opportunity?' *ERA Forum* (2015) 16:125–147, p. 138.

³³ Department for Business, Innovation and Skills, *Consultation on Alternative Dispute Resolution*, March 2014, pp. 15-6 and Annex B.

³⁴ Figures taken from the Ministry of Justice, *Civil Justice Statistics Quarterly: England and Wales*, available at: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2015>

³⁵ Referred to assessment.

³⁶ October 2014 – September 2015.

³⁷ Complaints resolved in year.

³⁸ 2014

Furniture Ombudsman	2,492 ³⁹	Public Services Ombudsman for Wales	2,296		
Legal Ombudsman	18,185	Northern Ireland Ombudsman	830		
Pensions Ombudsman	1,281 ⁴⁰	Local Government Ombudsman	20,286		

Other reports have indicated a steady, if not uniform, increase in the complaints received by most ombudsman schemes and suggested that over time there has been a generally higher propensity for people to complain.⁴¹ Within this cultural shift, significant numbers of consumers now use the ombudsman sector to pursue their grievances as ‘the dispute resolution pathway of choice for’ customer-to-business claims,⁴² and in some areas quite possibly to the effective exclusion of the courts. Meanwhile, the number of small claims hearings in the courts has been decreasing noticeably in recent years.⁴³

A second source of strength for ombudsman schemes in the UK is the emphasis placed upon ADR by successive governments and the sectors within which they operate. There are multiple instances of Government papers and legislation supporting and directly implementing policies that have sought to encourage and even prioritise ADR solutions over judicial/court-based solutions.⁴⁴ Into this renewed vision of justice, the ombudsman model sits very nicely.

Finally, the ombudsman model has been boosted by favourable judicial oversight of the sector. With at least the statutory ombudsman schemes in the UK now subject to judicial review, an increasing body of case law has developed around the work of the sector. A few exceptions aside, the case law that has evolved out of the senior courts has been broadly supportive of the ombudsman model.⁴⁵

³⁹ Includes only complaints investigated.

⁴⁰ Includes only new complaints investigated

⁴¹ Gfk NOP (2013) *Complaints to Ombudsman Services: Energy, Report for Ofgem exploring why few consumers refer their complaint to Ombudsman Services: Energy*, p. 36; Gill et al n. 31 above, pp.15-20.

⁴² C. Hodges, ‘Delivering Redress Through Alternative Dispute Resolution and Regulation’ in WH van Boom and G Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (De Gruyter 2014), para.20.

⁴³ C. Hodges, ‘Consumer ombudsmen: better regulation and dispute resolution’ *ERA Forum* (2014) 15: 593–608, 606-7.

⁴⁴ Genn, n. 13 above; Mulcahy, n.14 above.

⁴⁵ R. Kirkham, ‘Understanding the Case Law on the Ombudsman’ *Journal of Social Welfare and Family Law*, (2016) 38:3, xx-xxx. (forthcoming).

3. The legitimacy claim of the ombudsman model

The ‘ombudsman enterprise’ has long been promoted as a necessary institutional solution to the increased demands on the civil justice system of the early 21st century.⁴⁶ An ombudsman differs from other forms of ADR in that it is a predominantly inquisitorial dispute resolution service that is ultimately capable of *adjudicating* a dispute. Therefore, although the model often relies on the use of a variety of soft methods to be employed to arrive at a consensual settlement, its core legitimacy claim is that it can efficiently and effectively supply independently derived just and authoritative decisions.

But the ombudsman’s flexible institutional design enables it to do more than provide an efficient and proportional dispute resolution service. The ombudsman model can contribute considerable front-end consumer support services,⁴⁷ such as advising citizens and triaging complaints. Indeed, for most schemes the turnover of enquiries is higher than the complaints that are fully investigated.⁴⁸ The model also offers the potential for promoting collective quasi-regulatory goals, including the dissemination of the lessons learnt from complaints.

In recent times the power of this combined claim has led some to conclude that in certain sectors a serious policy option is effectively to phase out the role of the courts in favour of the ombudsman.⁴⁹ But the accepted legitimacy of the ombudsman variant of dispute resolution cannot be assumed, as ombudsman schemes can be subject to significant user scepticism of their claims to delivering effective justice.⁵⁰ In this respect, the Directive provides a convenient opportunity to bolster the foundations of the ombudsman model, raise standards and shore up its legitimacy in the eyes of stakeholders.

In the next section, five of the ombudsman model’s main legitimacy claims are worked through to test the impact on the sector of the Directive and its implementation in the UK. These claims are that an ombudsman: (i) improves access to justice, (ii) increases the provision of individual justice, (iii) enhances enforcement of collective justice, (iv) operates fairly and (v) is accountable.

⁴⁶ T. Buck, R. Kirkham and B. Thompson, *The Ombudsman Enterprise and Administrative Justice* (Farnham: Ashgate, 2011), ch.2.

⁴⁷ *Ibid*, ch.4

⁴⁸ Hodges, n. 43 above, 597.

⁴⁹ *Ibid*, 606 and Rogers, n. 19 above, p. x.

⁵⁰ Eg Communities and Local Government Committee, *The Work of the Local Government Ombudsman*, 2012/13 (HC 431).

D. Evaluating the impact of the Directive on the consumer ombudsman model

1. The ombudsman promotes user access to justice

The claim

As with other ADR forms, it is commonly argued that an ombudsman can increase access to justice and thereby help prevent civil justice gaps emerging.⁵¹ Being ordinarily free to use and positively supportive of non-technically proficient complainants, an ombudsman scores highly in access terms. An ombudsman also offers the capacity for proportionate dispute resolution because of the range of different techniques it can deploy. As such an ombudsman is well placed to appear an attractive dispute resolution route, even when the grievance involves low sums of money.

The extent to which the Directive's implementation assists the ombudsman sector in promoting access will be considered through three interconnected sub-questions.

(i) Increasing awareness of consumer ombudsman schemes

Despite its natural user advantages, there has always been a struggle to inform consumers of their rights to access an ombudsman scheme. But the Directive has operated as a one-off form of free advertising through conferences, various industry journals and the national media all giving prominence to the sector to a degree that would have been unlikely without the legislation. A further short-term impetus might derive from the simultaneous coming into force of the Consumer Act 2015.

Looking further ahead, the requirement for all businesses with unresolved complaints to notify their customers of the availability of ADR providers is a positive measure, which can reasonably be expected to go some way towards educating consumers on an ongoing basis.⁵² But concerns have already been expressed that many businesses will only pay 'lip service' to the requirements.⁵³ Further, the enforcement potential of this law is unclear as it requires checking websites, contracts and individual communications between traders and customers. In the UK, reliance for enforcement will be

⁵¹ I. Benöhr, 'Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures' *Journal on Consumer Policy* (2013) 36: 87–110.

⁵² Regulation 19, n. 25 above.

⁵³ P. Causton *Confusion reigns – BIS Survey – ADR Directive and ODR Regulations*, 16 December, 2015. Available at: <http://www.promediate.co.uk/confusion-reigns-bis-survey-adr-directive-and-odr-regulations/>

placed upon existing budget strapped trading standards bodies,⁵⁴ which in operation will risk being non-compliant with the spirit of the Directive which requires “effective, proportionate and dissuasive penalties”.⁵⁵ The Government has also encouraged the introduction of new players into the ADR market. Leaving aside the merits of this policy, extra provision and competition adds incentives and opportunities in the ADR sector for providers to promote their services amongst the business community and the public. More advertising, innovative use of social media and other forms of promotion should result from the underlying need for ADR providers to generate business.

To supplement the work undertaken by ADR providers themselves, the Government has committed itself to supporting a complaints online and telephone “helpdesk” to increase awareness of ADR and the process for accessing it.⁵⁶ This policy it has proposed to achieve through funding a UK charity, Citizens Advice, albeit the budget for that organisation is itself under significant pressure. An alternative is for the free market to fill the information void, as with the rapid growth of the internet site Resolver,⁵⁷ which provides within one easy to use website access to the knowledge you require to pursue almost the entire network of complaint systems available for consumers.

Overall, therefore, the Government might claim some success in raising awareness of ADR as a result of the implementation of the Directive, albeit one achieved through minimum endeavour and reliant upon the ongoing goodwill and continued input of traders and a number of non-government organisations.

(ii) Increased availability to ombudsman schemes dependent on the market

Before the Directive, in the UK there was not universal provision of an ombudsman, or ADR, service across the consumer sector, with the suggestion that powerful business and departmental interests were resistant to creating new barriers to free trade.⁵⁸ Under the Directive, however, the Government has to ensure that all sectors are at least covered by an ADR

⁵⁴ Under Part 8 of the Enterprise Act 2002, an enforcer can apply for an enforcement order from the court if the enforcer believes that a trader is not complying with its obligations under Regulation 19, n. 26 above.

⁵⁵ ADR Directive, n. 1 above, Art.21.

⁵⁶ BiS, n. 33 above, 16.

⁵⁷ <http://www.resolver.co.uk/>

⁵⁸ W. Merricks, *Private Sector Ombudsmen and the Administrative Justice System*. Speech at the annual conference of the AJTC, 12 November 2009. Available at: http://ajtc.justice.gov.uk/adjust/articles/conf09_merricks.pdf

scheme, subject to the exceptions of health and publically provided further or higher education.⁵⁹

Table 2 details the accredited ADR sector as of the implementation date for the Directive. For the time being, the Government has relied upon all sectors being filled by applicants rather than appointing a residual provider.⁶⁰ Should these schemes make an economic decision to withdraw or narrow their services the Government would have to reconsider its position.⁶¹

Table 2: ADR provision over consumer to business disputes according to competent authority, as of 1 October 2015⁶²

COMPETENT AUTHORITY	ACCREDITED ADR PROVIDER
Secretary of State for DWP	Pensions Ombudsman Service
Financial Conduct Authority	Financial Ombudsman Service (FOS)
Legal Services Board	
Civil Aviation Authority	Ombudsman Services
Gambling Commission	ADR Group, BACTA ADR service, Centre for Effective Dispute Resolution (CEDR), eCOGRA, IBAS, Isle of Man Gambling Supervision Commission (IoM), Jennifer Gallagher (Lindsays), Joel Goldman, National Casino Forum - Independent Panel for Casino Arbitration, Ombudsman Services, Tattersalls Committee
Gas and Electricity Markets Authority (Ofgem)	Ombudsman Services
Office of Communications	Ombudsman Services: Communications, Communications and Internet Services Adjudication Scheme (CISAS), The Postal Redress Service
National Trading Standards Estate Agency Team, Powys County Council ⁶³	The Property Ombudsman, Ombudsman Services: Property, Property Redress Scheme
Chartered Trading Standards Institute ⁶⁴	ABTA, Association of Chartered Certified Accountants (ACCA), British Vehicle Rental and Leasing Association (BVRLA), Centre for Effective Dispute Resolution (CEDR), Dispute Resolution

⁵⁹ ADR Directive, n. 1 above, Art. 2(2). Because most UK students have to self-finance their higher education, the Independent Adjudicator for Higher Education has gained accredited status.

⁶⁰ In different ways, Ombudsman Services, Pro Mediate, Small Claims Mediation, the Retail Ombudsman and the Furniture Ombudsman all offer ADR that covers a very broad reach over the consumer landscape.

⁶¹ Cortes, n. 32 above, p.140.

⁶² Information taken from the websites of the Competent Authorities.

⁶³ The lead enforcement authority for the purposes of the Estate Agents Act 1979 (residential property).

⁶⁴ Responsible for non-regulated industries.

	Ombudsman (DRO), Federation of Master Builders, Furniture Ombudsman, Home Improvement Ombudsman (HIO), Motor Codes, National Conciliation Services, NetNeutrals EU, Office of the Independent Adjudicator for Higher Education, Ombudsman Services, Pro Mediate, Property Redress Scheme, Renewable Energy Consumer Code, Small Claims Mediation, The Independent Parking Committee Ltd (The Independent Appeals Service), The Property Ombudsman, The Retail Ombudsman, TrustMark, The Waterways Ombudsman
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The Directive has, therefore, made a difference in increasing ADR *coverage*,⁶⁵ but what the Directive and its implementing UK Regulations have not necessarily achieved is any expansion in the *availability* of ADR. The Government has rejected the idea of expanding the scope of mandatory ADR coverage for consumer to trader dealings, and has not added to the list of compulsory schemes.⁶⁶ In evaluating the merit of this policy, two key areas of the consumer sector provide clues as to how it might play out.

First, the Chartered Trading Standards Institute (CTSI) has been made responsible for accrediting ADR schemes in those consumer areas where there is not already in place a regulator with responsibility for complaint-handling. This is a vast terrain within which traders will not be obliged to use ADR, and includes much of the travel and retail sector. Here the Government has left it to the market to decide whether ADR is required, and for those business sectors currently outside of the ADR network to be persuaded of its merits and become voluntary adopters. The extent to which the ombudsman providers operating in this sector, Ombudsman Services (and its self-badged Consumer Ombudsman service), the Retail Ombudsman, and the Furniture Ombudsman⁶⁷ manage to capture new business will be the litmus test of the success of this approach.

A second way forward is for individual sectors to agree collectively to the benefits of ADR. An example of this development can already be found in the aviation sector. Participation in ADR remains voluntary but the sector's competent authority, the Civil Aviation Authority (CAA), has responded to the Directive by moving away from acting as a joint regulator/complaint-handler towards a model of accrediting an independent ADR provider to operate as the Aviation Ombudsman.⁶⁸ Further, it has explicitly stated that

⁶⁵ There is currently no ADR scheme accredited by the Legal Services Board (see below), but both Pro Mediate and Small Claims Mediation can receive complaints from the sector.

⁶⁶ BiS, n. 33 above. As of writing, a proposal from the EU Commission to amend the 261 Regulation to incorporate mandatory ADR is under debate.

⁶⁷ Although predominantly the Furniture Ombudsman deals with complaints about the purchase of furniture products and fittings, it offers to its members the additional service of dealing with complaints about other products.

⁶⁸ Civil Aviation Authority, *Consumer complaints handling and ADR*, CAP 1286, April 2015.

it might in the future advise Government to introduce legislation to make both membership of an ADR scheme and acceptance of the scheme's determinations mandatory.⁶⁹ In doing so the CAA has cited the unfairness of requiring consumers to go to court to enforce their consumer rights.

Such soft processes towards expanded ADR coverage may work. But the concern is that they cannot tackle the access to justice problem unless traders can be persuaded of the merits of ADR. In order to persuade traders of the tangible benefits of ADR, providers will need to be innovative in their sales pitch and offer different forms of services depending on the needs of the trader concerned. But whether businesses make the choice to adopt ADR is dependent on a commercial equation as to the economic and information benefits to be secured from participating in an ADR scheme.⁷⁰ On this equation, there is research to suggest that many businesses will not voluntarily opt for ADR.⁷¹ The costs of participation will look significant in the short-term and may not outweigh either the potential costs of judicial dispute resolution or an alternative investment in enhanced internal systems of customer service.⁷² A risk is also created that providers might reduce the quality of their service both to reduce costs and to seduce traders into ADR.

Another downside of the free market approach towards ADR provision is that individual ADR schemes might, for reputational reasons, actively choose not to accept complaints from certain sectors and traders. What might result, therefore, is a two tier network of ADR providers, with the top tier processing complaints from safer, more long-standing and, from the perspective of the ADR provider, more cost-effective traders; and the bottom tier including those ADR schemes that effectively sweep up the remainder of the market.

Notwithstanding the problems with the voluntary approach, however, it is not clear that mandatory ADR coverage is the right solution or that the imposition of extra costs can be justified. Indeed, an organic approach to the expansion of the ADR sector, built around identifying concentrations of poor customer service,⁷³ matches the logic of the predominantly consensual and informal approach to dispute resolution which the sector is grounded upon.

⁶⁹ Ibid, para. 74. As of writing one airline had signed up to the new ombudsman scheme.

⁷⁰ C. Hodges and N. Creutzfeldt, *Implementing the EU Consumer ADR Directive*. The Foundation for Law, Justice and Society, University of Oxford, Policy Brief, 2013, 5.

⁷¹ Consumer Council, *Back to Business* (published in January 2014)

⁷² IT packages are now available for purchase that enable traders simultaneously (a) to offer a more direct ongoing consumer relationship and (b) to collate more data on their customers.

⁷³ Which?, *Consultation Response: Alternative Dispute Resolution for Consumers*, Available at: <http://www.staticwhich.co.uk/documents/pdf/alternative-dispute-resolution-for-consumers-which-response-371039.pdf>

It is also an approach that should facilitate diversity, experimentation and innovation in ideas on how to do dispute resolution, including encouraging traders to do more to manage intelligently their own internal complaint systems. Imposing a mandatory consumer ombudsman scheme might even lead to neutering the viability of other ADR methods which may be more appropriate.

Alternatively, the need for imposing any mandatory solution might be offset by the development of an Online Court that by itself provides a more realistic choice for consumers to bring legal proceedings than the current small claims court.⁷⁴ As for the dangers from competition in ADR provision of 'rogue' ombudsman and ADR schemes emerging which offer a service more amenable to the trader than the consumer, here the answer lies in the rigour of the regulatory process, a point which is returned to below.

Enhancing consumer knowledge and managing expectations

In terms of promoting awareness of and access to the consumer ADR network, the Directive has had some influence. However, these achievements need to be weighed against the potential obstacles to comprehension of the ADR network and the negative side-effects of the approach embodied in the UK's implementation strategy.

This is not a new concern. The consumer ADR sector has been described as 'blinkerred and haphazard',⁷⁵ with no template for its design and position within the overall civil justice system. Instead, new schemes have been introduced as and when necessary to meet the dominant prevailing pressures, others have been developed by the private sector. Far from tackling this issue, post-Directive, the Government has made no attempt to distinguish formally the different forms of ADR available, other than creating an accredited and unaccredited division, and is content to let the market-place dictate the resultant structure. A key downside to this approach is that it creates a number of layers of confusion amongst all parties even where a viable ombudsman route is available. Frequently, in order to identify that route a reasonably sophisticated awareness of the processes in place is required. Prior to the Directive, over 70 ADR schemes operated in the UK,⁷⁶ by the end of 2015 there were 38 accredited and an unknown

⁷⁴ Lord Justice Briggs, *Civil Courts Structure: An Interim Review*, 2015, ch.6, available at: <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-interim-report-published/>; P. Cortes, 'The Brave New World of Consumer Redress in the EU and the UK' (2016) *Dispute Resolution xxxxx*; See also P. Cortes, 'Conclusion' of this edited collection.

⁷⁵ Merricks, n. 58 above.

⁷⁶ Bis 2014, n 33 above.

number of unaccredited schemes. This proliferation will continue to make it difficult to promote and explain all forms of ADR to the general public.

Such complexity is not insurmountable, particularly in the age of the internet and the various information sources described above. But complexity creates additional costs, with individual schemes required to take on the role of ‘traffic director’ for lost complainants who do not fall in their jurisdiction.⁷⁷ Sometimes this complexity leads to overlaps with ostensibly the same matter from the consumer’s perspective (eg social care, house purchase) requiring the input of more than one ombudsman.⁷⁸

A further problem is that the complexity in the ADR network and its different forms, together with the variable titles that schemes use, make it considerably more difficult for the sector as a whole to promote a powerful and well-known ombudsman brand.⁷⁹ There is research that suggests that consumers are more likely to use the ombudsman if they are already aware of an ombudsman before something goes wrong.⁸⁰ But lack of consumer awareness has been a common problem for ombudsman schemes, creating for them the further burden of managing the mixed and often unrealistically high expectations of the complainant as to the process it entails and what it can offer. The Directive will likely make this situation worse because of the multiplicity of undefined ADR available. Further, under the Directive⁸¹ and ODR Regulation⁸², traders are required to notify consumers of the potential ADR routes available, regardless of whether or not a trader is a member of any nationally approved ADR process. This mixed message creates the potential for raising ‘false expectations’ amongst consumers as to the reach of ADR,⁸³ and later cynicism when expected redress opportunities do not materialise.

It is hardly surprising that the one scheme that has gone the furthest in overcoming these challenges is the integrated and large scale Financial Ombudsman Service. Without such integration, or at least rationalisation, the ability of the ombudsman sector to develop a clear and powerful narrative around the service it provides will always be held back. Worse still, the perceived legitimacy of the sector might be damaged if it comes to be seen as a tradeable commodity with variable standards applied. A degree of

⁷⁷ Gill et al, n. 9 above, 11.

⁷⁸ Ibid, 12.

⁷⁹ Ibid, pp.16-20.

⁸⁰ Gfk NOP, n. 41 above, 36.

⁸¹ Art. 13(1) of the ADR Directive.

⁸² Art. 14(1) of the ODR Regulation

⁸³ N. Creutzfeldt, ‘Ombudsman Schemes - Energy Sector in Germany, France and the UK’ ch.5 of this edited collection.

harmonisation in the ombudsman sector would be one solution to this problem. Another is the maintenance of robust regulation.

2. The ombudsman allows for more justice to be delivered

The claim

The core claim in favour of the ombudsman model is that it delivers justice, it does not just resolve disputes. But the concept of justice is a multi-faceted one, as is the ombudsman's claim.

In terms of individualised justice, the ombudsman resolves disputes in both equitable and rights-based terms. Using an equitable approach, an ombudsman is empowered to review a dispute in the round in order to arrive at a 'fair' result, looking at a range of factors over and above strictly legal issues. This approach offers the potential for remedies which a judicial process focussed purely on the law might struggle to match. Ombudsman schemes though do additionally resolve numerous disputes purely on rights-based terms, as defined in law. Indeed, many ombudsman schemes may claim to work to higher standards still, as they will be charged with applying sector codes of practice as well as the law.⁸⁴

On the downside, this mandate exposes the ombudsman to the critique that its decision-making lacks rigour and is unpredictable to all sides. For sceptics, a standard concern with ADR generally is that the hard legal interests or rights of the weaker party may be compromised within the process of resolution employed.⁸⁵ At the very least, the claims in favour of the ombudsman require supporting evidence that an emphasis on the institution is not worsening the position for users, through consumer standards being driven by a weaker justice model.

Delivering individualised justice under the Directive

The implementation of the Directive enhances our ability to scrutinise the ombudsman community's claim to effectiveness. As indicated in Table 1 above, the workload of consumer ombudsman schemes is already very high. But what the accreditation process offers the opportunity for is the provision of a more uniform and better coordinated set of benchmarks from which to note dispute resolution trends into the future. Such data analysis has proved problematic in the past because there has been no standardisation for recording key performance indicators in the sector. This is a shortcoming that competent authorities are now in a position to address.

⁸⁴ C. Hodges, *Modes of Redress for Consumers: ADR and Regulation*, University of Oxford, Legal Research Paper Series, Paper No 48, July 2012, p.12.

⁸⁵ Eidenmiller and Engel, n. 11 above, pp.278-282.

If competent authorities are to take up the challenge and provide a meaningful analysis of ADR activity, however, they will need to measure the different forms of ADR that are provided. But this will not be a straightforward exercise. For instance, of the 38 accredited schemes as of 1 October 2015, only eight offer a full independent ombudsman service.⁸⁶ Of the remainder, there is a spread of complaint-handlers, adjudication services, arbitrators, and specialised conciliation and mediation services. Indeed, an interesting feature of the way that the UK has implemented the Directive is that it has encouraged competition between different forms of dispute resolution, as well as individual providers. In order to understand the impact of the Directive, therefore, it will be important to trace the distribution of workload across these different forms, both in terms of the overall numbers and the nature of disputes.

It is possible that an impact of the Directive will be to enhance the workload of ombudsman schemes, but that does not necessarily entail that more *adjudicated* justice will be delivered. For some years, most ombudsman schemes have moved away from a ‘Rolls Royce’ investigatory approach to dispute resolution, to one which has become much more pragmatic and proportional in its attention to detail.⁸⁷ What this means is that the complaints selected for full investigation and thence adjudication have been significantly reduced, with instead an enhanced focus placed upon weeding out weak or inappropriate cases and employing various informal strategies to settle affairs before any kind of formal determination is required. In the UK, the scale of this activity has been much highlighted,⁸⁸ raising a concern that the drive for user satisfaction through securing early settlements might mean that the goal of securing *just* settlements becomes deprioritised in the ombudsman process.⁸⁹ The Directive does not alter this dynamic towards informal and proportionate dispute resolution, and possibly accelerates it.

A key safeguard against declining adherence to standards of justice is that, unless there are overwhelming public policy grounds for doing so, access to judicial dispute resolution must remain a viable option. In some areas, procedural incentives, such as cost orders, operate to penalise parties who

⁸⁶ Financial Ombudsman Service, Pensions Ombudsman Service, Furniture Ombudsman (a scheme which also comprises the Dispute Resolution Ombudsman and the Home Improvement Ombudsman), Office of the Independent Adjudicator for Higher Education, Ombudsman Services, The Property Ombudsman, The Retail Ombudsman, The Waterways Ombudsman.

⁸⁷ Buck et al, n. 46 above, ch.4.

⁸⁸ Gill et al, n. 31; V. Bondy, M. Doyle and C. Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study*, Hot off the Press: London, 2014. Available at:

<https://ombudsmanresearch.files.wordpress.com/2014/10/the-use-of-informal-resolution-approaches-by-ombudsmen-in-the-uk-and-ireland-a-mapping-study-1.pdf>

⁸⁹ Genn, n. 13 above.

‘unreasonably’ do not use ADR to resolve disputes.⁹⁰ This policy reduces the control that the consumer has over the resolution of their dispute, but is mitigated so long as access to the civil courts is retained after an ADR process, including the ombudsman, has been completed.⁹¹ This is the position under the UK Regulations,⁹² and is an important principle for reasons that go beyond the need to adhere to rule of law requirements.⁹³ In order to demonstrate the integrity of the ADR scheme it must be possible for its output to be disputed and scrutinised in a court of law, a factor which outweighs the cost implications for the consumer as well as the trader.⁹⁴

Another measure to protect justice values is for ADR schemes to identify cases best suited to the courts if, for instance, they raise contentious legal issues. The Directive has reduced the grounds available to an ADR scheme for refusing to consider a complaint, but still allows for some channelling of disputes on the ground of ‘seriously impair[ing] the effective operation of the ADR’ scheme to leave some cases to be heard in court.⁹⁵ To deal with the crossover between ADR and the courts, a further option might be to provide all statutory ombudsman schemes with the power to refer points of law to the courts, for later application to the complaint by the ombudsman.⁹⁶

But despite the potential for the courts to become involved in ADR proceedings, the instances of judicial oversight are low. Thus the potential for rights-based justice to be bypassed by the operation of ombudsman schemes remains significant post-implementation. To confront concerns, the emphasis in regulation of the ADR sector should be on not just laying out the rule of law standards that should apply, but evidencing their performance. For the consumer ombudsman community this should include an account as to how individual schemes contribute towards the maintenance of a consistent body of standard-setting decision-making (what might be referred to as ombudsprudence) that offers guidance to businesses and users. As will be described below, however, not all of these considerations have been factored into the Directive or its implementing UK Regulations.

⁹⁰ English Civil Procedure Rules, r 44.5(3). *Halsey v Milton Keynes General NHS* [2004] EWCA Civ 576.

⁹¹ Eg Case C-317/08, C-317/08, C-319/08 and C-320/08, *Rosalba Alassini v Telecom Italia SpA, et al*, March 18, 2010.

⁹² Eg see Regulation 14C and Sched.3 8(c)(3) and 11(a), n. 26 above.

⁹³ Eg ECHR, Art. 6; the EU Charter for Fundamental Rights, Art. 47; ADR Directive, Arts. 11 and 12.

⁹⁴ Hodges, n. 43 above, p. 596.

⁹⁵ Art.5(4), n.1 above, see *Directive 2013/11/EU (Directive on consumer ADR) - issues emerging from the meetings of the ADR Expert Group* p.11.

⁹⁶ Eg Legal Services Act 2007, s. 133(3)(b) and see Hodges, n. 19, xx-xx for a discussion on this point.

3. The ombudsman promotes collective justice

The claim

One of the oft-stated benefits of the ombudsman model is that it is capable of moving beyond individualised dispute resolution in order to feed into a wider process of learning lessons from complaints and transferring these back to the overseen sector. This quasi-regulatory role establishes a capacity for advancing justice that is potentially far-reaching in terms of: delivering for individuals that are otherwise unlikely to complain; preventing multiple injustices occurring in the first place; and improving the reputation of businesses. It is also a role that can be enhanced through the regular interchange of intelligence between an ombudsman and its partner regulator.

Critics of the ombudsman, however, point to the lack of evidence that such gains are achieved in practice and express concern about over-regulation.⁹⁷ Indeed, far from being a constructive service, the process of attempting to feedback information might be a costly distraction, often delivered too far after the event to make a meaningful impact with providers who, if they are minded to, probably already possess sufficient information with which to change their practices.

Delivering the lessons from complaints

Under the Directive, the requirement for ADR schemes to report information to a competent authority should enhance data on their operations and the sector it oversees, albeit in a fashion that will be quite complicated. However, it is uncertain that the Directive will encourage more intelligent use of complaint data than at present.

The Regulation does require ADR schemes to include in their annual report ‘a description of any systematic or significant problems that occur frequently and lead to disputes between consumers and traders’,⁹⁸ alongside recommendations for good practice.⁹⁹ But in a competitive market, ADR schemes may be disincentivised from using that information to construct lessons, or training, for traders if it makes their product more expensive and thereby less attractive to traders. That same set of incentives also reduces the potential for ADR schemes to make public information about the complaints that they have handled about traders. Data on individual traders is not required to be published by the UK Regulations making it less likely that consumers will benefit from increased knowledge on the service

⁹⁷ Eg Cabinet Office, *A Public Service Ombudsman: Government Response to Consultation* Cabinet Office, 2015.

⁹⁸ Schedule 5(c), n. 26 above.

⁹⁹ Ibid, Schedule 5(d).

standards being applied by traders. The one set of data that must be published is the rate of complaints found in favour of the consumer, but this might assist traders in selecting those ADR schemes more likely to find against the consumer.¹⁰⁰

Competent authorities may be the driver for sector-wide information gathering to take place, yet their incentives or available resources to enter into such work are also unclear. There is no mention of this role in the UK Regulations and with large sectors of the consumer market to be covered by competitor ADR schemes, what information that is collated will come from multiple schemes and will be difficult to harmonise and interpret.

Under the UK implementation model, therefore, there is no embedded drive towards using complaints information to promote consumer action or better industry responses. Where sector complaints data is analysed and published it will be either as a result of legislative requirements in particular sectors, or through the self-generated initiative of a consumer ombudsman or competent authority. For instance, in a regulator commissioned report, Ombudsman Services has recently been urged to clarify its approach towards identifying systemic bad practice and to do more to disseminate good practice.¹⁰¹ Without such a take up of responsibility, the potential for complaints information to foster collective goals will not be realised.

4. The ombudsman is fair and operates to high standards

The claim

The ombudsman method has a strong claim to offering a fair process, one which creates a level playing field capable of overcoming the in-built biases of the adversarial approach. However, a familiar critique of the ombudsman process is its rather opaque approach to due process, with common concerns the transparency in decision-making and the reduced capacity to cross-examine the evidence of the other side or participate actively in the process of resolution.¹⁰²

Without reassurance as to the quality of decision-making then the output of the ombudsman can be variously portrayed as arbitrary, insufficiently cognisant of the input of the parties, and biased. Other concerns will relate

¹⁰⁰ Cortes 2015, n 32 above, p. 129.

¹⁰¹ Lucerna partners, *Review of ombudsman services: energy : A report for Ofgem*, July 2015, available at:

https://www.ofgem.gov.uk/sites/default/files/docs/2015/09/review_of_ombudsman_services_energy_2.pdf

¹⁰² J. King, 'Accountability: The Value of Courts in the Light of the Alternatives', Social Science Research Network (SSRN) paper (18 June 2007). Available at SSRN: <http://ssrn.com/abstract=1027626>, pp.27-29.

to the quality of the individual ombudsman and his/her team, particularly where it is known that most decisions are made by delegates. There is no formal recruitment criteria for entry into the profession or requirement of legal qualification.

Evaluating the Directive's approach to standards

Prior to the Directive, regulation of the sector was lightweight and ad hoc, being exercised through a combination of: (i) legislation, if the scheme was statutory; (ii) occasional interventions of Parliament and the Executive; (iii) any corporate governance arrangements built into the scheme; (iv) courts, if litigation was brought. Noticeably, there was very little by way of holistic consideration of sector standards, with responsibility for ADR dispersed across several government departments. Only in-built corporate governance arrangements offered the prospect of sustained oversight.

By contrast, the Directive offers the potential for a robust regulatory model to be built for ADR. The most radical idea embraced by the Directive is its dual regulatory ambition to set standards for the sector and monitor schemes in delivering those standards. This approach provides the sector with the potential capacity to defend its authority and status as against the standard criticisms that ADR, including the ombudsman method, lacks in terms of fairness and transparency.

Subject to some alteration in legal language, the UK Regulations repeat the standards included in the Directive.¹⁰³ In general, two forms of standards can be distinguished as being imposed: those standards aimed at (i) setting benchmarks for customer service and (ii) enhancing the quality of decision-making.

In the UK, the ombudsman sector already widely employs the service standards included in the Directive, albeit in places the required detail and time-lines have changed as a result of implementation. In the short-term, this has meant that the new set of service standards have created work for ombudsman schemes, insofar as their internal processes have had to be interrogated, changed and new processes and training put in place. But while enhancing customer service is an important issue for which the sector has on occasion been criticised, it is the quality controls imposed by the Directive that in the long-term should represent the most significant innovation for the UK. Much of what is contained in the Directive/UK Regulations in establishing minimum requirements for access, expertise, impartiality, transparency, fairness and legality represents an important

¹⁰³ See in particular Schedule 3, n. 26 above.

step forward.¹⁰⁴ However, because the Directive seeks to capture standards across the whole of both the ADR sector and the EU, in some respects the standards included within it may not go far enough for the purposes of upholding the ombudsman brand.

One example will be provided here to illustrate the potential risks. ADR schemes are required to be independent under the UK Regulations, including the requirement for an ADR entity to have ‘a ring-fenced budget at its disposal which is sufficient to enable it to carry out its functions’.¹⁰⁵ But the UK Regulations establish no special measures for the appointment processes of office-holders, or full autonomy of the ADR schemes from their funders. This means that it is possible to satisfy independence requirements through the device of creating Chinese walls between funders and ADR schemes. The resultant risk is that close connections can be retained between traders and accredited ADR schemes, as is evident in the UK where trade associations and self-regulatory bodies have been able to gain accredited ADR status. This may be a sensible approach towards encouraging parties into ADR that might not otherwise be favourable towards it, but it lumps together highly procedurally independent forms of ADR, such as the Financial Ombudsman Service, with a range of ADR schemes which offer only arms-length independence.

Other examples exist where the ombudsman community should be aspiring to higher standards than those outlined in the Directive. For instance, ombudsman schemes should not just be relying on fair processes, they should be demonstrably verifying and providing evidence of the fairness of decisions made. Alongside publication of their decisions, this could include embedding into their internal governance systems that allow for a measure of external scrutiny of the quality of their decision-making.

Member state regulatory arrangements may serve as the vehicle for going further than the minimum requirements of the Directive. However, as will be argued in the next section, in the UK this is unlikely to happen because of the institutional design adopted.

5. The ombudsman is accountable

The claim

No system of justice is error-proof, hence there is a need for mechanisms by which to verify and test the quality of output. Various models for establishing accountability frameworks around ombudsman schemes do

¹⁰⁴ ADR Directive, n. 1 above, Articles 6-11.

¹⁰⁵ Schedule 3 para.3, n. 25 above.

exist which can assist in verifying the efficacy of decision-making and output. But unless an appropriate accountability framework is put in place, the reputational risk for the institution is high, as has been demonstrated in recent years with some ombudsman schemes.¹⁰⁶ Potentially the risk to an ombudsman's reputation are especially high when the state's input, with its accompanying claim to neutrality and representation of the collective interest, is kept to a minimum.

Evaluating the strength of the UK structure of competent authorities

The standards developed in the Directive represent only a starting point. Their true power and effectiveness will be dependent on the capacity and willingness of the regulators of the sector to monitor and enforce performance, and develop the standards further.

For the first time in the UK there is a system of competent authorities to regulate the sector. However, consistent with its overall policy of minimising the creation of new regulatory burdens and avoiding the cost of establishing new public bodies, the Government passed on the competent authority responsibility to pre-existing regulatory bodies. An advantage of this approach is that traders might trust their sector regulator more than an alternative agency with no particular knowledge of their sector. It might also allow regulatory bodies to take advantage of their specialist knowledge of the sector and pre-existing working relationships.

But there are a number of downsides to the UK multiple competent authority approach. First, by distributing the power of monitoring standards across a series of bodies the importance of the role has been downgraded. Instead of creating a central pool of knowledge on the ADR sector, the authority and stored expertise is diluted by another layer of complexity in the system.

Second, what might appear a sensible cost-saving exercise has created numerous forms of duplicated activity in terms of training, system construction, form filling and decision-making, both for the regulatory bodies involved and some of the ADR schemes. In what might be an extreme example, Ombudsman Services has applied to be an accredited ADR scheme to six different competent authorities. Because these are costs that can be charged for in the accreditation process, they are costs which are ultimately passed on to the consumer.

Third, because the responsibility for the ADR sector is distributed, the opportunities for economies of scale are lost and the potential for any form

¹⁰⁶ Communities and Local Government Committee, n. 50 above.

of added value scrutiny of standards in the sector limited. The danger is that competent authorities will limit their input to the strict terms of the statute and not undertake more detailed work. This need not necessarily be the case, as for instance with the FCA's recent review of complaint-handling in the financial sector.¹⁰⁷ But the UK Regulations are virtually silent on the standard setting duties of the competent authorities. Indeed, the UK Regulations only include a brief reference at Regulation 18 to the duties of the UK's 'Point of Contact', which is the Secretary of State, to 'identify best practices', 'shortcomings' in the functioning of ADR schemes and 'recommendations on how to improve the effective and efficient functioning'. For less well-resourced sectors, which are occupied by a multiple variety of ADR schemes, the likelihood is that the capacity of the competent authority to provide any form of improvement role will be limited. Instead, reliance will be placed on the market to act as the de facto regulatory agent, and this risks a drift to the bottom.

Fourth, the formation of a network of competent authorities creates the potential for variable standards to be applied across the sector, with no discernible explanation as to why such variety might be justified other than that different competent authorities have been given the responsibility. ADR schemes may feel penalised for operating in more onerously regulated sectors, and insofar as there is competition, tempted to migrate to those sectors where the standards imposed are less rigorously applied. As for consumers, it will become harder for them 'to understand and navigate the landscape and to calibrate their expectations from provider to provider'.¹⁰⁸

Fifth, absent of responsibility for the sector as a whole or any overriding duty to enhance standards in ADR, each individual competent authority is incentivised to undertake a minimalist job. A particular concern here is the degree of ongoing oversight of the sector and the prospect of removing accreditation status.¹⁰⁹ Being established and empowered by secondary legislation, competent authorities will be subject to judicial review and will be required to provide reasons for any decision to refuse accreditation.¹¹⁰ In such circumstances, sticking to soft interpretations of the UK Regulations and not attempting to impose more onerous standards might be the default strategy.

Finally, the UK's implementation process has not made it a compulsory requirement for ADR providers to be accredited, meaning that there will

¹⁰⁷ Financial Conduct Authority, *Improving Complaint Handling*, CP14/30, December 2014.

¹⁰⁸ Financial Ombudsman Service, *Alternative Dispute Resolution for Consumers*, June 2014, p. 5.

¹⁰⁹ Regulation 13, n. 25 above.

¹¹⁰ Regulations 9(7) and 13, n. 25 above.

remain the potential for a deregulated sector of ADR schemes. The premise is that the market advantage in being accredited will isolate the unaccredited market in ADR provision and make it unattractive for traders to use their services. But traders will retain a natural incentive to use unaccredited ADR providers that are not independent and offer cheaper services. Indeed, in some sectors with small numbers of complaints, the ongoing costs of accreditation may make it disadvantageous for all parties to enter into the process. Moreover, even if made aware of the options, whether a consumer whose trader has offered dispute resolution through an unaccredited ADR provider will have the wherewithal to make the distinction is debatable. One sector that has currently opted out of the ADR accreditation process altogether is the legal sector. Both the statutory schemes set up to deal with complaints in the legal sector, the Legal Services Ombudsman and the Scottish Legal Complaints Commission, have as yet been unable to revise their schemes of rules to make them compliant with the Directive, with the profession seemingly unwilling to accept the required measures.¹¹¹

E. The future for the regulation of ADR in the UK

What the previous section has argued is that in several respects the Directive provides for only a shallow level of protection of the standards of fairness and process required of ADR providers, and requires little in terms of evidencing the quality of decision-making. With regard to the ombudsman sector at least, this level of safeguard may not be enough to shield it from the criticism that it provides insufficient levels of justice. The risk is that in the market-place, competition for business might lead to the perception of an unacceptable reduction in the quality of ombudsman services being provided and a subsequent loss of faith in the sector.¹¹² Further, the manner in which competent authorities have been introduced does not provide for a focussed role in monitoring, enforcing and upgrading standards of ADR. To mitigate the potential problems that might arise, in this last section two ways forward are explored.

1. A unified competent authority

In the multiple competent authority model adopted in the UK, no one body has the data to collate best practice on ADR and there is only a minimal incentive for competent authorities to compile such information or act as a

¹¹¹ Eg Legal Ombudsman, *Consultation: Proposed ADR Scheme Rules*, September 2015, available at: <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Consultation-ADR-Scheme-Rules.pdf>

¹¹² Hodges, n. 43 above, 598.

force for higher standards. The suspicion is that quality controls will be kept to a minimum and restricted to attributes that are easy to measure and tick off.

The challenge of enforcing appropriate regulatory standards would be less of a problem if responsibility were endowed on a single authoritative regulatory voice, rather than eight. But even if the principle of merging the functions of the competent authorities within one ADR focussed body were accepted, there is no obvious candidate body to host this function and creating a new body goes against wider Government policy.¹¹³ Even the solution of parking Government responsibility for ADR in the Ministry of Justice, the Department most likely to have the relevant expertise to promote justice issues, is unlikely to be taken forward given the business focus of the ADR Directive. Potentially, EU-wide guidance on best practice may come out of the reports that are submitted by competent authorities to the Commission ‘on the development and functioning of ADR entities’.¹¹⁴ But the diversity of ADR models in place across the EU would not assist the construction of more focussed standards for any one form of ADR, such as the consumer ombudsman model, even if this was considered a politically acceptable solution. One other potential development may be that, under revised devolution arrangements, the Scottish Government takes on the role of providing a unified competent authority service.¹¹⁵ If this happens, then although the jurisdiction of the Scottish arrangement would apply only to Scotland, as most UK based ADR providers will operate in Scotland they would probably build their operation around the standards set by the highest competent authority. As this chapter is completed, however, the function of consumer protection has not been included in the reserved list for the Scottish Parliament.¹¹⁶

2. Alternative sources of legitimacy

The ombudsman sector in the UK offers the possibility of another way forward, namely self-regulation. Separately to the Directive, the combined impact of section 56 of the Companies Act 2006, the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014,¹¹⁷ and Companies House guidance, grants the Ombudsman Association (OA) a quasi-regulatory role. As from 7 April 2015,

¹¹³ Minister for Cabinet Office, *Written Statement to Parliament*, 17 December 2015, available at: <https://www.gov.uk/government/speeches/achievements-of-the-2010-15-public-bodies-reform-programme>

¹¹⁴ ADR Directive, n. 1 above, Art.20(6).

¹¹⁵ Hill Report, *Report of the Working Group on Consumer and Competition Policy for Scotland*. (Scottish Government, Edinburgh, October 2015), p. 24.

¹¹⁶ Scotland Bill, ss.47-58.

¹¹⁷ Schedule 1, Part 1, n. 25 above.

for an organisation to register its company name with the title ombudsman, amongst other things, it must 'be a member of the [OA] at ombudsman level membership'.¹¹⁸ Thus all the accredited ADR schemes carrying the title ombudsman now possess the stamp of approval of both a competent authority and the OA.

Assuming that there is a commercial advantage in being branded an ombudsman, this set of provisions provides the OA with an opportunity to take control of the standards-setting agenda. The positives in this solution are that the OA has a strong self-interest in maintaining and enhancing the reputation of the sector. It also possesses the knowledge and expertise required to collate data and develop higher standards across the ombudsman sector as a whole, not just the consumer sector. Further, being a soft law organisation, it can proceed in this process organically through sharing best practice, training and revising internal membership rules at a pace appropriate to practitioner developments. This reflexive model of self-regulation in the short term looks the most viable way forward and provides a model for how other forms of ADR can demonstrate their legitimacy.¹¹⁹

But the self-regulatory model also offers an uncertain road map forward. The OA is a very broad church made up of a range of very different organisations from a number of different jurisdictions. Some of the membership may be reluctant to concede to more rigorous oversight. Further, the OA's remit is conflicted in that it is primarily a representative association with a role to bring like-minded bodies together to share ideas and experience, as well as to lobby Government and other sectors. The prospect of the OA toughening up its standards on membership is also offset by the possibility of legal action being brought against it for the rejection or removal of membership status. In view of this pressure, and the knowledge that at present the Government favours competition in ADR provision, can the OA be strong enough to push for higher standards?¹²⁰

3. Conclusion

The ADR Directive has added further energy to and thrown the spotlight on a rapidly evolving and confusing sector of the civil justice system. The analysis in this chapter suggests that there will be an advance in the

¹¹⁸ Companies House, Guidance (see Annex A, p.51-2). However, once the title is registered, there is no obvious legal means to force the removal of the ombudsman brand should the scheme subsequently fail to secure revalidation with the OA.

¹¹⁹ For a discussion on mediation, see P. Cortes, *The Promotion of Civil and Commercial Mediation in the UK* (July 19, 2015). University of Leicester School of Law Research Paper No. 15-23. Available at SSRN: <http://ssrn.com/abstract=2633215>, pp.16-8

¹²⁰ P. Causton, 'Confusion over the future role of alternative dispute resolution', *Practical Law*, 2015, available at: uk.practicallaw.com/3-618-9292.

availability and public awareness of ADR, and in the quantity of information on the operation of sector. There is also now a strong template, that was previously absent, for providing reassurance that the quality of provision in the sector is sufficient.

However, this chapter has also demonstrated that the implementation strategy of the Government is likely to be less influential than it could have been. In part this may be because solutions in the ADR sector are wrapped up in a larger debate about the best design for the civil justice system. In particular, if a viable Online Court can be introduced, then the need for mandatory ADR recedes. But the refusal of the Government to introduce a single competent authority means that the sector lacks a focus point for quality control. Until this decision is reversed, professional groupings such as the OA represent the best hope for protecting the public interest in maintain appropriate standards of justice.

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Abstract

This chapter analyses the manner in which the ADR Directive and ODR Regulation have been implemented in the UK, with a particular focus on the ombudsman sector. The chapter argues that in the UK implementation has been minimalist and that this represents a missed opportunity. The Directive is capable of laying the foundations for robust ADR, but the regulation of the sector looks deficient. As a result, there is a heightened risk that sub-optimal standards in the sector will go undetected which may in turn undermine user confidence. More work needs to be done to make the regulatory set-up a standard-bearer for the sector rather than a passive observer.

Keywords

Ombudsman, Regulation, Standards, ADR Directive