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Response to BIS Call for Evidence on Consumer ADR

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In this Response, I will not deal with every question raised by BIS, but concentrate on some major issues that might be otherwise overlooked.

The Strategic Choice: CADR or Litigation?

In my view, the consumer ADR proposals need to be evaluated in a broad context. One needs to begin by asking what the ultimate policy objectives are. In my view, high level policy in relation to markets can be described simply as three things:

1. Set rules for business conduct;
2. Make sure that business practice conforms to those rules;
3. Restore balance as soon as possible after anything goes wrong.

Against that background, the techniques that are available for goals 2 and 3 can broadly be divided into enforcement by either public or private means. Classic private enforcement means individuals asserting their rights in court actions. Classic public enforcement means action initiated by a regulator. There are, of course, advantages and disadvantages with both those approaches, and variants of both have been developed. Court actions, for example, can be expensive, slow and not user friendly for consumers, so a small claims track and mediation can offer some advantages. Where individual issues occur for many people at once, on a wide scale, we wrestle with whether some form of collective private action can be devised, although there are perceived to be multiple disadvantages with such an approach. As an alternative, dealing with collective issues with the assistance of regulatory powers is being taken up in various contexts, and appears to offer a number of advantages in terms of speed and low cost.

The underlying question here is whether resolving individual and collective B2C issues is best done by an ADR technique or through the courts. I have little hesitation in thinking that an ADR approach is better than a litigation approach for resolving B2C disputes. However, if it is to be effective, the ADR approach must be incentivised and controlled. Accordingly, as a matter of high level policy, I strongly support the adoption of a policy of encouraging the development of a system of consumer ADR (CADR)[2] for such disputes. Indeed, I think that a

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[2] I think it is helpful to refer to CADR rather than consumer ADR, since CADR systems are different from the ADR techniques and systems with which many people are familiar, and this gives rise to confusion. ADR is usually understood as mediation in the context of court proceedings. The whole point about CADR is that court

decision of major strategic importance is now being faced at EU and national levels. We are at a very important cross-roads in terms of how we choose to develop not only dispute resolution but also regulation of business and consumer markets, and we must make the right choice now, and not defer it. The choice is between developing a system of CADR or a system of court-based enforcement and collective actions. We will miss the bus if we just kick the can down the road without picking it up. If a clear policy preference is not made between those two alternatives and things are allowed just to drift, both collective actions and CADR will be allowed to develop in parallel, and that will be a major mistake that will prove to be very costly. I believe that the evidence clearly favours prioritising CADR (and regulatory techniques) for delivering both redress and behaviour control, and keeping litigation as a long-stop. Issues of collective redress are being discussed now, and it is important to make consistent decisions between CADR and collective redress.

Accordingly I urge government, consumers and business to embrace the clear choice for development of an effective CADR system.

The rationale for this choice is based on the fact that CADR systems have a number of clear advantages:

- They can be quick and cheap to resolve disputes.
- They are cheaper and quicker than courts, both for consumers, businesses, the public purse supporting courts, and for the economy overall.[3]
- They can capture more individual disputes than would be attracted by courts or small claims procedures, on an individual basis.
- They are more speedy, cheap and effective for mass issues than a court-based collective action.
- Hence, they address gaps in access to justice that courts are not good at filling.
- They can do more than just resolve disputes, because they can also feed back market and regulatory information that can be used to affect market behaviour and regulatory action.
- That means that cost savings can be made on other regulatory and self-regulatory systems and enforcement.
- In many sectors, many of the contacts made by consumers to CADR systems are requests for information rather than disputes. That information function assists consumers and markets, and prevents disputes or dissatisfaction growing.
- In short well-designed CADR systems are good value for money and provide valuable benefits and savings.

The Vision of ADR

It is not widely known just how much CADR we have already. CADR has occurred within individual sectors, and gradually spread, rather than being centrally planned or organised. In UK, many sectors now have CADR systems, as a result either of statutory requirements where ADR has been imposed as an integral part of a regulatory structure (such as financial

proceedings are not the overarching structure within which the dispute resolution takes place, and the structure is provided by different architecture, namely consumer ombudsmen or code-based systems.

[3] We are looking at such micro and macro data: it is difficult to assemble but I am confident about these assertions.

services,[4] pensions,[5] telecoms,[6] legal services,[7] new houses,[8] energy,[9] gas, electricity, postal services and estate agents,[10] now to be extended to the water, rail, coach, bus and tram sectors[11]), or of development of ADR by business sectors for their own commercial advantage, such as travel agents,[12] encouraged by schemes such as the OFT's Consumer Code Approval Scheme, which covers traders such as motor vehicles (new, repair and servicing), debt managers, medical products, carpets, direct selling, removers, and will writers. A 2010 study by the OFT identified 95 discrete schemes across 35 sectors.[13]

Given that effective CADR schemes now exist for such a wide range of disputes, the United Kingdom is getting close to a stage at which there are few gaps left, and it would make sense to ensure that all gaps are filled. Belgium is currently taking imaginative steps to do exactly this, by constructing at some speed a national internal portal supported by CADR schemes for all major sectors, and a residual capability.

ADR systems have also spread widely in other areas, not related to B2C disputes. Use of ombudsmen or code systems is widely used and spreading for disputes as diverse as between citizens and state entities, and within higher education. Mediation or other ADR techniques such as early neutral evaluation are, of course, now an integral part of litigation procedure.

ADR and ombudsmen are extremely widely used, and their use is being extended and encouraged. But these facts are not generally known to citizens or business, since existing schemes are sectoral and not joined up. Against that background, government should be aiming at establishing a simple idea in people's minds: if I have a dispute, I should first raise it with the other party, and then raise it with an ombudsman. In short, we should substitute the current idea of 'court' in people's minds with 'ombudsman'. If there were a national system, formal or informal, with horizontal coverage of ombudsmen, we would capture more issues, widen access to justice, resolve more problems, enable greater feedback to businesses, consumers and regulators about their markets, raise consumer confidence in markets, improve competitiveness—all far more quickly, cheaply and effectively than courts.

Hence, I advocate taking a logical next step in the development of CADR, by adoption of a national policy on establishment of ombudsmen/ADR for *all* disputes. Such an attitude is emerging *de facto*, but could be so much more effective if it were stated, and if the disparate component parts were to be joined up.

The Central Problem

[4] The Financial Ombudsman Service under the Financial Services and Markets Act 2000, and the Lending Code scheme of the Finance and Leasing Association. Note also the Financial Services Compensation Scheme.
[5] The Pensions Ombudsman, under the Pension Schemes Act 1993.
[6] Ombudsman Services: Communications and CISCO under the Communications Act 2003.
[7] The Office for Legal Complaints and legal Ombudsman under the Legal Services Act 2007.
[8] Consumer Code for Home Builders' Adjudication Scheme.
[9] The Energy Ombudsman under the Consumers, Estate Agents and Redress Act 2007.
[10] ADR schemes for gas, electricity, postal services and estate agents all under the Consumers, Estate Agents and Redress Act 2007.
[11] *Empowering and Protecting Consumers. Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement* (Department for Business Enterprise and Skills, 2011).
[12] ABTA's Code of Conduct dispute resolution scheme.
[13] Mapping UK consumer redress. A summary guide to dispute resolution systems, (Office of Fair Trading, 2010), OFT, available at: http://www.oft.gov.uk/shared_oft/general_policy/OFT1267.pdf

In the consumer trading sector, there is a hurdle to be overcome. Many EU Member States currently have existing national CADR systems that provide full horizontal coverage for all types of B2C disputes in all consumer trading sectors. This is so across the Nordic States and central and European States. However, CADR systems in other Member States, importantly UK, Germany and France, CADR systems have been growing organically and cover quite a few systems, but there is as yet no full horizontal (residual) coverage. As noted above, wide comprehensive coverage has in fact been achieved by organic means in the UK. The problem is that, in the current economic climate, governments will be reluctant to fund the creation of extra CADR systems, or impose such extra cost unnecessarily on businesses, especially if the sectors that are not covered by CADR systems currently have in place good systems for dealing in-house with customer issues.

Accordingly, support and funding for CADR systems must come from business, since it is they who must pay for the system. In fact, our research shows that the vast majority of existing CADR systems across Europe are funded by business. This means:

- CADR systems must enable all existing customer care systems to continue and to be encouraged. This should not be a problem. All existing good CADR systems require consumers to raise disputes with the trader before it is able to be considered by the CADR. This should be made mandatory. That would encourage better and more widespread customer service.

- Pricing of CADR systems must be such that overhead costs and case costs that are imposed excessively on businesses that do not attract high volumes of complaints. Such pricing structures already exist in some schemes, so this should be soluble.

- There must be an obligation imposed by law that all traders must belong to a CADR scheme. Such an obligation has in fact increasingly been imposed by (EU and UK) statutes on various sectors.[14]

- The definition of CADR and the essential requirements must be wide enough to encompass all existing effective methods of dispute resolution, and others that might become introduced.

In relation to the last point, the Call for Evidence rightly mentions Chargeback. Pathways such as chargeback are widely used, effective techniques for resolving disputes between consumers and traders. With chargeback, the card company acts as intermediary, somewhat similar to an ombudsman, in being a channel for resolving a dispute, whilst also reversing/freezing the payment until the issue is resolved. This is a technique that should be encouraged. However, it is a voluntary technique adopted by payment companies, not a dispute resolution system as such. Its essential mode of operation is to freeze payments, and that acts as an incentive for consumer and trader to solve their dispute bilaterally. But this mechanism does not apply to all types of dispute. It works for issues such as non-delivery, but not for unfair terms.

Competitive Advantages

[14] eg financial services, telecoms, energy, insurance, and others.

CADR in UK is in fact more developed than in most Member States, in terms of technique, sectoral coverage, numbers of disputes per head of population, efficiency, effective outputs, and low cost. Accordingly, compliance by UK ADR schemes with many of the requirements proposed by the Commission should overall not present a challenge. This would apply to the matters listed at para 27 of the Call for Evidence.

The UK possesses considerable knowledge and experience about 'how to do CADR' that could be spread across other States, quite possibly also to the commercial advantage of the UK CADR providers. Some Member States, particularly smaller ones, might wish to outsource handling of CADR disputes in particular sectors to larger CADR providers located elsewhere, which can offer advantages of sectoral expertise and economies of scale and hence value for money. Private sector CADR suppliers such as Ombudsman Services and CEDR/IDRS may be well placed to expand their businesses internationally.

Qs 5 and 6. Quality Issues

Almost all of the matters proposed by the Commission raise no particular problems and represent development of pre-existing trends. I would, however, comment on one issue, which is how to ensure the quality of CADR systems for cross-border disputes.

A pan-EU CADR system that will be used by consumers depends crucially on establishing trust, which in turn depends entirely on the quality of every national CADR scheme in complying with the essential requirements. Quality compliance is hardly an issue for UK CADR schemes at present. But it would clearly be an issue with some other Member States—but by no means all, such as the Nordics, where the residual CADR body either forms part of, or is closely linked to, the national consumer enforcement agency: hence those States have little problem in constructing a proposed CADR competent authority, and possibly little problem, over the extent of its funding. This highlights the point that where a Member State has CADR providers that are private sector bodies, the proposals around quality, essential requirements, and a competent authority, inherently involve greater concern. The UK's architecture involves both public and private CADR bodies. Although the UK might well not want to change this architecture, some thought should be given to whether converting to fully-public CADR bodies might save money overall.

If a number of public sector CADR bodies are to remain, some thought needs to be given to whether a separate or new competent authority is necessary for them. Would the FSA's successor be sufficient for the FOS?[15] Would there be a sufficient level of confidence in all foreign CADR systems that are located in or close to regulatory authorities?

If a significant number of private sector CADR bodies remain, in this country or any Member State, the issue is how to guarantee the necessary level of confidence in their quality. This is a classic regulatory question. The main options are *ex ante* approvals and/or *ex post* inspections and powers. Would it be enough to act only after quality complaints arise? I do not think so. So one is forced to contemplate an *ex ante* approval system plus some *ex post* monitoring. That technique inevitably brings a cost, but it is unavoidable.

[15] I in fact favour separating the FOS and other CADR bodies from regulatory authorities, since I do not believe that they build sufficient business confidence in the required level of independence. There needs to be transparency of the CADR bodies' data, but it is not satisfactory for a CADR body to be too close to a regulator.

In the UK, we have the models of the OFT's CCAS scheme (which it is proposed to cease, and replace by some form of standards-based self-certification or audited system), and a system in which a CADR provider is approved by a sectoral regulator (like telecoms and energy). The Commission's proposal is for national competent authorities (CAs), and that CADR providers notify the CA (self-certification). This is a light-touch requirement, not necessarily involving major cost. However, it may well not be strong enough. It might be, however, that a pragmatic and developmental approach is appropriate: the major objective is to establish CADR as a general proposition.

A further and related issue should be noted, and that is whether there should be any limitation on the number of CADR bodies. In general, private sector entities should be subject to the forces of competition. However, dispute resolution is not necessarily a market. The state's courts are monopolistic providers. All public sector ombudsmen are monopolistic. In the energy sector, a single CADR provider was appointed. Important considerations are that consumers should know of the existence of CADR, and trust the provider(s). Those objectives might be threatened if too many providers are permitted in individual sectors, or as a whole.

I believe, however, that the 'essential requirements' need to be reviewed and updated. The drafting of the Commission's 1998 and 2001 Recommendations was done a long time ago in terms of the development of CADR, and should be reviewed.[16]

Q 7. Requirement for traders to inform consumers of CADR

Quite a number of traders now inform consumers of the CADR option. My clear impression, although unsupported by data, is that where business sectors have done this, mandatorily or voluntarily, the number of consumer contacts has risen, as has consumer confidence in the sector and the prevailing standards of business practice. There may be some instances where the cost of providing particular types of information, at particular stages, might be disproportionate. Some sectors may argue that an information requirement would generate a rise in unmerited complaints that would cost significant sums to dispose of. In general, I do not believe that that fear is justified. I believe that the historical evidence supports the view that where consumers know about CADR schemes, there is a rise in requests for information, which can only be a good thing, since it reveals that consumers do not otherwise have enough information, but that the level of unmerited complaints has not risen. Those who feel driven to make complaints that are rejected would cost a great deal more to dispose of through court claims, especially collective actions. I therefore support the policy that consumers should have information about CADR.

However, the issue is 'when?'. It might not be necessary for traders to be subject to a requirement to provide information about CADR options before, or at the time of every purchase, or as soon as any dispute arises. A great deal would be gained if there were a national culture that consumers thought 'CADR' in place of 'courts'. I believe that different sectors raise different needs for information, at different times. Many large retailers print customer care contact information on the back of till receipts. As a matter of policy,

[16] We will propose a new version in our book.

consumers should be directed to contact customer care or trader information or complaint functions *before* referring issues to external CADR systems.

There should clearly be a requirement for traders to inform consumers about CADR options once it is clear that a dispute has crystallised, and cannot be resolved within a reasonable time. The telecoms sector has recently reduced the time for resolution of disputes from 12 to 8 weeks. Different sectors might have different times: the length should be a matter of empirical research.