CONSUMER ADR
Delivering Fairness and Justice for Consumers, Business and Markets

CONFERENCE
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Wolfson College, Oxford

INTRODUCTION Professor Chris Hodges

The focus has to be on *delivering* justice, rather than on (theoretical) access to justice.
We also need to think about how a sequence of functions are delivered in each country and at EU level – see the circular 'quality system' at the end of this note. Which organisations do we need to deliver these functions? Are the organisations integrated so as to deliver all of the functions and outputs, or what changes are needed? Courts and arbitration can deliver some functions, but Ombudsmen can deliver more functions.

DENMARK Lars Arent, ECC-DK

In Denmark the ADR landscape has 1 public (residual) ADR receiving approx. 2.800 complaints yearly, 17 private ADRs receiving in total approx. 5.500 complaints. No significant change in complaints, c 8,300 in 2017 in total. Furthermore, 7 other bodies established by law (e.g. the Danish National Enforcement Body on air passenger rights) are notified as ADRs.

New developments: 1 new private ADR approved for parking tickets; 1 new ADR soon for taxis, established as a result of political pressure to address dissatisfaction in particular areas.
Use of mediation is not progressing with the private ADRs, which retain a formal model, despite it still being seen as a success as high levels of consumers and traders are satisfied with the mediation process carried out at the public ADR.

Feedback from ECCs is that it remains a problem to refer cases to ADRs in the different EU countries: only between 1 and 49% of complaints not solved amicably by the ECC-Net centres were subsequently referred to ADR. The national ADR landscapes are too fragmented and there is a lack of trader involvement where a relevant ADR exists.

ITALY Dr Marcello Marinari and Ruggero Manenti, Banca d'Italia

The ADR system has various different models:

- MEDIATION
  - "Servizio conciliazione" (settlement agreement service) established by the Italian Regulatory Authority for Energy, Networks and Environment
  - Joint conciliation bodies (e.g. the joint conciliation body of Trenitalia SpA and the Consumer Associations)
- ARBITRATION
  - Ad hoc arbitration
  - Administered arbitration
  - Specialised arbitration
    - Arbitro Bancario Finanziario – ABF (Banking and Financial Ombudsman)
    - Arbitro per le Controversie Finanziarie – ACF (Financial Disputes Arbitrator)
    - ANAC Arbitration Courts (procurements and special financial disputes)
- ASSISTED NEGOTIATION

In 2017, the Banking Ombudsman (ABF) received 30,644 complaints (+42%). The majority of complaints were filed by consumers (97%) and the total amount awarded to customers was €19 million.

In 2017 (its first year of activity) the Financial Arbitrator received 1,839 complaints. The majority of complaints were filed by consumers (96.5%), and the total amount awarded to customers was €5.2 million.

Mediation in Italy – First Semester 2018

Type of Mediation Organization	Nr. of Organizations	Nr. of mediation processes concluded (first sem. 2018)	Settlement rate
Chamber of Commerce	79	7 609	47,0%
Private Organizations	381	41 514	49,4%
BAR Associations	103	29 469	38,1%
Other Professional Ass.	45	567	62,2%
Totals	608	79 159	44,3%

Source: Statistical Department – Italian Ministry of Justice

Some recent developments:

- New ABF Rules: including power for the Panel Chair to make a Settlement proposal to the Parties, and to issue an injunction.
- Article 185-BIS of the Italian Civil Procedure Rules: Settlement proposal by the Court (occasionally combined with a mediation attempt)
- Florence "Simple Justice" Scheme involving use of court referral's assistants.

Data on mediation: 200,000 requests for mediation in Italy, average success rate 44% when the parties participate in the process after their required appearance at the first meeting.
The outlook for the future:

- Increasing tendency for integration between judicial and non-judicial mechanisms
- Increasing number of judicial referrals
- New specialised arbitration court for insurance disputes

BELGIUM Prof Dr Stefaan Voet

Leuven will offer a mandatory course on ADR.

1. Belgium was one of the first MS to implement the 2013 Consumer ADR Directive. It led to the creation of the Consumer Mediation Service, Belgium's residual ADR entity. The composition is a bit peculiar. It is composed of 6 existing ADR entities: 4 public ones and 2 private ones. This body is the keystone in Belgium regarding the out of court resolution of consumer disputes. The Consumer Mediation Service is working well.
   In 2017 the Consumer Mediation Service received approximately 9,500 complaints. 50 percent were admissible. The other 50 percent were inadmissible (most of them were incomplete complaints). 70 percent came from Dutch speaking consumers. 30 percent from French speaking consumers.
   2,300 cases were dealt with by the Consumer Mediation service. In 50 percent a settlement was reached. Regarding the other complaints: 90 percent were to transferred to the competent sectorial ADR entity. 1,840 cases were sent to the ECC. So they were of a cross-border nature. Most other complaints were sent to the Retail Ombudsman and the Ombudsman for Telecommunication.

2. The Consumer Mediation Service has standing to bring a class action. In September 2018 it brought its first class action. It was instigated by the Energy Ombudsman. It was a case regarding the annual subscription / administrative costs that energy companies charge every year. If the consumer changes provider within that year, he still has to pay the full amount of annual costs. There is no

reimbursement of a proportional part of these costs. There are about 40,000 class members. The case is still pending.

3. The CMS now functions as the go-to and residual portal. A lot of sectors wanted to "escape" the jurisdiction of the Consumer Mediation Service. Hence, they created their own ADR entity. This happened in the retail sector, lawyers, notaries and huissiers de justice.
   As a consequence the landscape is scattered. However, most of these ADR entities now receive complaints from the Consumer Mediation Service. In order words, it plays its role as unique portal or access point. Belmed, the unique portal created by the Ministry of Consumer Affairs, is almost never used.

4. Two points of attention that come back in a lot of annual reports of ADR entities.
   - a lot of ADR entities face incomplete files by consumers; so consumer take the step to go to an ADR entity but lose interest to pursue the complaint
   - the perception of the consumer is also sometimes wrong; a lot of people see the ADR entity as their lawyer

5. Finally, there is more and more reaching out between courts (and in particular small claims courts, in Belgium justices of the peace) and ADR entities. There is more and more case law where courts accept and sometimes "copy paste" recommendations of ADR entities in cases where the company refuses to settle and consumers go to court.
   On the other hand, the Belgian Mediation Act was amended last year. More power is given to courts to persuade parties to mediate. Mediation is not mandatory, although this was on the table. The idea is to make courts ADR facilitators. A handful of courts already have experimented with sending parties to accredited ADR entities.

GREECE Dr Theodoros Koutsoumpas

ADR is not a new concept. Aristotle argued in favor of ADR in his Rhetoric (1374b).
The disastrous effects caused by the economic and financial crisis, which started in 2009, had devastating effects on the families and business in Greece.
The country was unprepared to confront the plethora of catastrophic phenomena occurring for the first time.
The intense arrhythmia resulted, among others, in a vast increase in complaints and disputes in the financial sector.
The same happened with all sectors of the economy.
The Hellenic Consumer Ombudsman announced 4 days ago that in 2010 the number of complaints was 3.697. In 2018 the number was three times as much, namely 10.843 complaints.
Today, following the recent legal developments on ADR, the landscape, in particular, as far as, consumers and small businesses are concerned, is as follow.

A. EXTRA-JUDICIAL MEDIATION (Directive 2008/52/EC adopted by Law 3898/2010, which latter was substituted by Law 4512/2018). Mediation in civil and commercial matters in Greece is governed by a Law enacted a year ago. The new Law aims to provide for an effective framework for disputing parties to resolve their disputes with the assistance of a professional accredited mediator, who is an independent and impartial third party. The mediator is neither a judge nor an arbitrator. He is an expert facilitator, able to help the parties to communicate effectively in order to settle their disputes. He may express his opinion only if all parties involved agree. A Central Mediation Committee, is competent to observe the application of the Law, the Code of Conduct, and the requirements and procedure for the accreditation of mediators. The Central Mediation Committee has also disciplinary authority for professional misconduct. Accredited Centers offer intense specialized courses to candidates, who eventually have to pass written and oral examinations. Mediators are under the obligation to declare any conflicts of interest. Disputing parties and the mediator are bound by confidentiality. A Mediation Agreement constitutes a title of execution, if filed with the secretariat of the competent Court. One of

the most important and controversial elements of this new piece of legislation is the introduction of compulsory mediation for some categories of disputes. These categories are: joint property, car accidents, family matters, debt settlement, medical malpractice stock market transactions and intellectual property issues. This however, is suspended until the 16th of September this year, in order to consider a critical opinion issued by the Supreme Court.

B. JUDICIAL MEDIATION (Directive 2008/52 art 3 par. b. Law 4055/2012, art 214b of the Code of Civil Procedure). According to Art. 214b of the Code of Civil Procedure, civil and commercial law disputes may be resolved in Judicial Mediation. The procedure is optional and may commence before or at any stage of the proceedings before the Civil Courts.
In every Court of first instance, one or more of the senior Judges are appointed as full or part time Mediators.
Any of the disputing parties, may file a written request to the competent Court to refer to Judicial Mediation. It is also within the competence of the Court, before which the case is pending, to call the parties, at any stage of the proceedings, to refer to judicial mediation and to adjourn the hearing for a period not exceeding 6 months. The procedure involves a number of sessions with the disputing parties, their legal counsel and the Mediator Judge, who may address to the parties non-binding proposals for settlement. In the event the parties reach a settlement, a Mediation Agreement is signed and filed with the Secretariat of the Court. It is worth noting that Judges who are appointed as Mediators do not receive compulsory special mediation training.

C. THE HELLENIC CONSUMER OMBUDSMAN (Law 3297/2004 amended and supplemented by Law 4342/2015, Directive 2013/11, Joint Ministerial Decision 70330/2015, Regulation 524/2013) is an independent Authority of the public sector mandated with the out-of-Court consensual settlement of consumer disputes against any business. The independent Authority is competent to deal only with the complaints of consumers, leaving outside its scope the small and medium size enterprises. The opinions of the Authority are not binding and do not constitute titles of execution. However, they may be considered by Courts as judicial presumptive evidence or as a means of proof. The Authority applies the "name and shame" principle. In the event the disputing parties reach an amicable settlement, the agreement signed is filed with the Secretariat of the Court and becomes a title of execution.

D. THE HELLENIC FINANCIAL OMBUDSMAN (Directive 2013/11, Regulation 524/2013, Joint Ministerial Decision 70330/2015) is the oldest scheme of Alternative Dispute Resolution in Greece, established 20 years ago, and it is the only expert in the field of Banking and Investment Services. It is a non-profit private legal entity, registered with the General Secretariat of Consumer ADR entities. It has been officially recognized as an EU Alternative Dispute Resolution scheme operating under a clearly defined legal framework. The Hellenic Financial Ombudsman examines impartially, independently, confidentially and free of charge disputes between financial service providers and consumers and small business. It also deals with consumer advice, aggregation of data and cooperation with regulator. It is competent to examine disputes regarding electronic contracts through the EU ODR Platform, and cross-border disputes. It is a founding member of the Financial Dispute Resolution Network (FIN-NET).

HELLENIC FINANCIAL ADR CENTER
A few months ago the Hellenic Financial Ombudsman took a strategic decision to broaden its ADR service provision, including Mediation. The ADR Center aims to offer high quality mediation services. Two distinctive elements that our new mediation function has embedded with the aim to facilitate the successful evolution of Mediation:

1. **Expertise of mediators**

Given the complexity of the financial services and products, as well as, the intense micro-prudential supervision, to which the providers of financial services are subject, mediation requires specialized knowledge of the financial markets and the applicable supervisory restrictions.
That said, only mediators with vast knowledge and experience in the financial sector can assist disputing parties in resolving financial disputes on a viable basis. For that reason, the Hellenic Financial ADR Center created a high-quality specialized financial training program for mediators, contributing also to

better financial literacy of the market. 70 accredited professional mediators from every part of the country successfully attended this program. These specialized mediators are included on the List of Financial Mediators of our Center.

2. Best practices for financial mediation

An independent Scientific Council, which comprises eminent High Court Judges, university professors and professional experts in ADR, advices the ADR Center on important issues and makes recommendations on how to improve the standards, ensuring the delivery of high-quality services by the Center.

The new mediation operation of the Hellenic Financial Ombudsman reflects a quick response to the demands of the market, but also represents the intention to create, gradually, an integrated ADR scheme specialized in financial markets.

A Committee was set up by Decision of the Minister of Justice at the end of last January, to review all the existing ADR legal framework and submit its proposals for further improvement.

MALTA Dr Reno Borg, Financial Arbiter

The Financial Arbiter was established by Act XVI of 2016. It was decided to use the name Arbiter rather than Ombudsman to avoid confusion with the Parliamentary Ombudsman; the latter recommends, but the Arbiter gives a binding decision. The Financial Arbiter has power to mediate, investigate and adjudicate complaints filed by a customer against a financial service provider. The primary functions of the Arbiter are to deal with complaints filed by eligible customers *through the means of mediation*, *where necessary*, by investigation and adjudication. Eligible customers are individuals or micro-businesses (up to €2m or employing 9 persons).

The initial stage is handled by Consumer Relations Officers, who deal with all customers and address queries and solve minor cases. They establish an early communication between customer and service provider. The idea is to nip a problem in the bud. It more difficult to achieve success when huge amounts of money are involved. Over 2000 minor cases have been solved in just two years. This process is not contemplated in the law.

The complaint process requires a complainant to contact the provider first, and needs a final letter, with 20 days to reply. The emphasis of the Arbiter is on mediation, which is obligatory for the Arbiter but voluntary for the parties. The information in a mediation remains private; the stage is separate from the investigation/adjudication stage, with physical separation of people involved. The mediator has control of the mediation procedure and may stop it if wished. An agreement is examined and approved by the Arbiter to ensure fairness, and formally registered, then becomes binding.

An oral hearing is obligatory by law, with at least one sitting. This can be a problem, given customers from all over the globe, but hearings have been by skype etc. Hearings are held in public, parties are not required to be assisted, and if they are not assisted the Arbiter is required to ensure that the procedure is fair. Principles of natural justice apply. Powers to enter and inspect any premises and to freeze provider's assets.

Similar cases can be collected, so as to treat intrinsically similar cases as one; collective action is taken where different customers file one case on the same subject matter. There are currently 55 cases on the same subject matter; moves faster.

The Arbiter shall regulate the proceedings as he thinks fit and proper in accordance with the rules of natural justice. There is no invalidity due to lack of formality. The Court has also given a wide margin of discretion to the Arbiter. The Arbiter bases decisions on what is Fair, Equitable, Reasonable in the particular circumstances, looking at substantial merits. He considers relevant laws, rules and regulations, and also guidelines issued by national and European Union supervisory authorities, and good industry practice. takes into consideration matters such as reasonable and legitimate expectations of consumers at the time of the transaction.

The Arbiter has a wide range of remedies, including:

- review, rectify, mitigate or change conduct;
- provide reasons or explanations for that conduct;
- change a practice relating to that conduct;
- pay an amount of compensation not exceeding €250,000;
- specifies period for performance;
- payment of interest;
- payment of costs of proceedings.

THE NETHERLANDS Carolien Pietjouw, Director, De Geschillencommissie

In the Netherlands, there are 4 ADR bodies and 1 ECC office. The four bodies are:

Kifid: financial services
Huurcommissie: rental contracts (mostly rent-controlled) housing
SKGZ: healthcare insurance
De Geschillencommissie (**DGC**): almost everything…

DGC has 80 consumer & business complaints boards, amongst which:

> 16 healthcare boards and 16 BtB (trade & industry) boards
> 1 **general** consumer complaint board: (residual) **ADR** > safety net
> 2 complaints offices > healthcare and day-care

- 600 professionals (chair people, members, experts, mediators)
- 45 professionals at our staff, new ICT-system 'digital, unless…..'
- annual budget around € 6 million

Complaints (intake and binding decisions)

	intake		decisions	
2017	4.850		2.229	
2018	4.744	-/- 2,5%	1.937	-/- 13%

Cases are decided by a Board which has 3 people, with a chair who is usually a judge.
Recent changes:

- In general, there has been consumer confusion because so many offices; a road map is essential
- A decrease in caseload, also experienced by formal courts, arbitration etc.
- At DGC, two main shifts are occurring in 2019: more emphasis on emotions and behaviour because most cases involve miscommunications, and focusing on providing earlier solutions (settlement & mediation). A toolbox is being created to make the change towards 2020.

The customer journey was examined in 2017, which led to lessons:

- **triage** and direction throughout the procedure (2.9 months is too long);
- the **sooner** a solution, the **better** – for consumer and entrepreneur
- overall in 2018: **43%** of the **new** complaints is settled by parties

This has produced promising swifter figures for 2018:

	Completed cases	Settled by parties	Settled by expert	
2017	6.126	1.330	220	31%
2018	5.916	1.247	190	30%

DGC was founded in 1970 as an initiative by private branches (trade associations) and has grown to 80 commissions. The branches play important roles:

> expertise in the board (designated commission members)
> experts: investigation, reports and settlements
> compliance guaranteed

DGC is the final piece in a working Quality System, which leads to joint effort and, not least, branches and entrepreneurs pick up the bill for procedure-costs.

Affiliation is not mandatory in most sectors, so when a trader is not a member of a trade association the only option is to use the Residual ADR but its membership cost is €495, which is a high entrance fee (too expensive). When it was considered to reduce the fee for non-members, the existing associations threatened to walk away. This is an as yet unsolved conundrum. For the moment, therefore, the conclusion is that Residual ADR is not working in the Netherlands.

FRANCE Dr Alexandre Biard

Since1 January 2016, all traders must sign up to a CDR scheme and then signpost consumers. Traders are free to select the CDR scheme of their choice (public, sectoral, private, etc.). CDR must be free of charge for consumers. CDR outcomes are not binding for consumers and traders.

No residual CDR scheme exists (an option was discussed in 2015, but finally discarded for budgetary reasons), so there is some reliance on *conseilliers de justice*.

France is unique in having a monitoring commission, the Commission d'Evaluation et de Contrôle de la Médiation de la Consommation (CECMC). It has a wide membership, chaired by a senior judge.

The CDR landscape is very fragmented. There was an initial plan in 2015 to give priority to public and sectoral CDR bodies, but it did not materialise in practice. The landscape comprises around 100 players:

- 2 public ombudsmen (energy, financial services);
- 43 in-house mediators (médiateur d'entreprise);
- 26 schemes linked to associations/professional organizations; and
- 23 other private entities of various forms.

Roughly 20% of all certified CDR bodies in the EU are located in France! Some new entrepreneurial private actors have been attracted, such as lawyers and retired professionals.
The preceding CDR landscape made the work of the CECMC much more difficult and lengthy than expected. 111 applications were received in total, and 93 certifications (several still ongoing); 8 applications were rejected (several resubmitted or abandoned); the CECMC undertook an in-depth assessment of all applications (11 applications requested up to 3 plenary meetings; 27 applications took up to 2 plenary meetings). Post-certification surveillance experience has been that 1 certification was temporally suspended. There is no full coverage yet: as at November 201817 economic sectors were still without schemes.

There is a general lack of awareness of CDR by consumers and traders. CDR is still rarely used: in 2017, 104.000 complaints were received by all CDR schemes, but only 40% were admissible.
From the perspective of consumers:

- there are persisting misunderstandings and confusion re CDR roles and procedures: High inadmissible complaint rates in several sectors:
  - (2017) postal services Ombudsman: 75% (of all complaints)
  - (2017) energy Ombudsman: 72% (of all complaints)
  - (2017) telecom Ombudsman: 58 % (of all complaints), (2018) 54%
- a 2017 study by the RATP médiatrice highlighted: 65% of respondents did not know that they had to contact the company beforehand, and 77% had not read the CDR Charter before reaching out to the Ombudsman.

From the perspective of traders:

- Many traders still do not sufficiently inform consumers about CDR;
- Several systematically refuse CDR (e.g. if CDR is not part of their insurance coverage)
- Persisting misunderstandings reroles of CDR (CDR still seen as consumer advocates);
- Trader compliance rates with CDR outcomes vary significantly according to sectors;
  - Usually high with public and sectoral CDR schemes; NB: Telecom Ombudsman: 93% of decisions followed by traders, but one trader only accepted 68% of decisions in 2017 (72% in 2018).

- Information on trader compliance rates not always clear for private CDR schemes

France has an architectural problem to solve, otherwise CDR will go nowhere.

Latest regulatory developments (February 2019) provide recent boosts for ADR and ODR. A new Act reforming the French Justice System (Projet de loi de programmation 2019-2022 et de réforme pour la justice) includes:

- Art.3: mandatory preliminary mediation/conciliation. This applies to certain types of disputes (e.g. disputes repayments of sums below a certain threshold). Articulation with CDR still needs to be clarified.
- Art.4: new certification scheme for ODR platforms.
    - The French ODR 'Far Wwwest': www.justice.cool,www.fastarbitre.fr, etc..
    - The creation of a voluntary certification scheme for ODR platforms;
    - ODR platforms must comply with several quality standards;
    - ODR platform cannot be based on AI/automated systems only, human intervention is required;
    - If platforms use automated systems they must inform parties and collect their consents;
    - Certification body: COFRAC (not Ministry of Justice)
    - All CDR certified by the CECMC will automatically benefit from this new trustmark

SPAIN Prof Dr Fernando Esteban de la Rosa

Recent implementation under Act 7/2017. Many Regions and Autonomous Authorities have competence, so there is a complex landscape. The ADR entities accredited so far

- 72 consumer arbitration boards, of which 9 have applied for accreditation …..

The landscape is dominated by public ADR entities. New ADR entities are envisaged for financial services and for airlines.
Consumer Mediation. ….
Consumer Arbitration is allowed
Treatment of reluctant traders

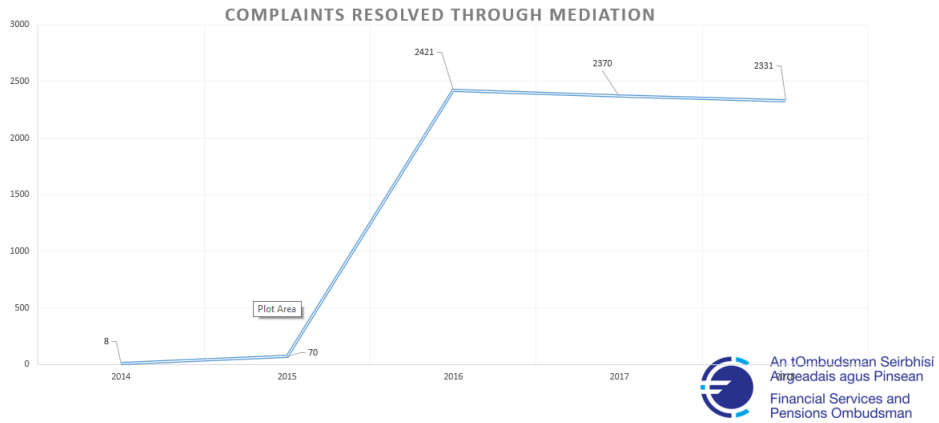
- General rule is voluntary ADR
- Some exceptions, eg telecom (but the ADR entity is not yet accredited)
- Mandatory and binding decisions in
    - Future financial
    - Future airlines

Consumer Arbitration Boards are now free of charge for both parties. An imaginative solution exists in Catalunia: if trader has a certain number of claims it has to receive and inspection, for which an inspection tax is levied!!

IRELAND Ger Dering, Financial Ombudsman

The Financial Services and Pensions Ombudsman have been merged.
There has been a major development in using mediation. A Strategic & Operational Review was undertaken in 2015. In the Stakeholder Survey, everyone said they wanted a faster, less formal, simpler dispute resolution service.

Powers binding on both parties without appeal.
Traders made three arguments: Previously, 99% of cases providers refused mediation. They said that they were right in the decision they had made, but it was pointed out that that was not always true. They claimed that they didn't have the manpower to engage in mediation, but (inconsistently) they still spent great time in processing formal cases. They were worried about making formal admissions.
Mediation was made the default option.
The graph shows the pleasing result: a clear and sustained increase in cases resolved through mediation.



Year	Total	Settlement	Clarification	Withdrawn or Outside Settlement
2018	2,331	1,294	920	115
2017	2,370	1,303	970	97
2016	2,421	1,370	1,008	43

Settlement cases are now stable, whereas there has been an increase in clarification, i.e. just an explanation without money changing hands.
The learning has been that: people and organisations will only engage in mediation when the fear and misunderstanding is removed.

A major problem used to exist with tracker mortgages. The Ombudsman has reported issues to the regulator, which helped them to intervene. 40,000 people returned to tracker mortgages: the Ombudsman system could not have dealt with these anything like as quickly. Cooperation was crucial.

GERMANY Dr Naomi Creutzfeldt, Westminster University

The major sectors covered are

- Insurance:
  - Versicherungsombudsmann e.V.;
  - Ombudsmann Private Kranken- und Pflegeversicherung
- Financial services (10 private, 2 more collective)
- Transport (Luftverkehrsgesetz (LuftVG)):
  - söp;
  - Schlichtungsstelle Luftverkehr beim Bundesamt für Justiz;
  - Regional 2
- Energy (§ 111b Energiewirtschaftsgesetz (EnWG)):
  - Schlichtungsstelle Energie
- Real estate:
  - Verbraucherschlichtungsstelle für Architekten-und Ingenieurleistungen;
  - Ombudsmann Immobilien IVD/VPB – Grunderwerb und Verwaltung
- Post and Telecoms (spezialgesetzlichen Regelungen § 18 Postgesetz (PostG) und § 47a Telekommunikationsgesetz (TKG))
  - Verbraucherschlichtungsstelle Telekommunikation der Bundesnetzagentur;
  - Schlichtungsstelle Post der Bundesnetzagentur
- Lawyers § 191f Bundesrechtsanwaltsordnung, (BRAO) der Rahmen für die Schlichtungsstelle der Rechtsanwaltschaft
  - Schlichtungsstelle der Rechtsanwaltschaft

- General
    - Allgemeine Verbraucherschlichtungsstelle am Zentrum für Schlichtung (in Kehl);
    - Allgemeine Anwaltliche Verbraucherschlichtungsstelle (NRW);
    - Außergerichtliche Streitbeilegungsstelle für Verbraucher und Unternehmer (Leipzig).

  More recent development by 2020 there should be a single general ADR
- Other:
    - Online-Schlichter;
    - SCHUFA-Ombudsmann;
    - 130 Kfz-Schiedsstellen;
    - 53 Vermittlungsstellen (deutschen Handwerkskammern)

ADR offers a variation of procedures:

- **Facilitated settlement** – a moderated amicable agreement between the parties
- **Proposed solution** – ADR body proposes an evaluative non-binding agreement
    - VO (up to Euro 10.000)/ söp (ryanair)
- **Decision-making** – ADR body imposes a binding decision [NA]

Empirical evidence has been produced from the Creutzfeldt & Steffek project on behalf of the Ministry of Justice to look at residual ADR body in Kehl (2017-2020): interim report: http://dipbt.bundestag.de/dip21/btd/19/068/1906890.pdf. Some trends:

- Low response rate from businesses
- Level of cases not admissible. From April 2016 to Dec 2016, 33% of all cases were not admissable, 11% outside of remit. From Jan 2017 to Dec 2017: 20% of all cases not admissable, 8% were outside of remit.
- ADR bodies created an *informal network* to guide the consumer on the right path to redress.

61% were very happy w procedure; high satisfaction for businesses and consumers that more efficient etc than court.

UK Prof Dr Christopher Hodges

1. Developments in ADR Bodies

Various developments have occurred that continue the trend of extension of consumer redress through the adoption of Ombudsman mechanisms.

Motor Ombudsman

The trade association, the Society of Motor Manufacturers and Traders, established a captive ADR function, Motor Codes Ltd, in 2008, which was approved under the OFT's and later Chartered Trading Standards Institute's Consumer Codes Approval Scheme.[1] In 2016 an independent Motor Ombudsman was established, that took over the four schemes/codes:

- The Vehicle Sales Code
- The Vehicle Warranty Products Code
- The New Car Code
- The Service and Repair Code

In 2017 there were 1,851 Service and Repair Code consumer contacts, and a total of 42,553 contacts received from consumers and businesses. 61 final decisions were issued by the Ombudsman relating to the New Car Code.[2]

Railway Ombudsman

The Rail Ombudsman service was launched on 26th November 2018, provided by the Dispute Resolution Ombudsman, which originated in the early 1990s and had been the Furniture Ombudsman

[1] See C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 312-327.
[2] *Annual Report 2017* (Motor Ombudsman, 2018).

since 2007. The Rail Ombudsman service investigates unresolved consumer complaints about train companies and rail service providers who participate in it.

SMEs – v - Banks

1. Extension of jurisdiction of FOS
2. Proposed new Ombudsman process for Small Businesses.

Many SMEs suffered after the financial crash in 2008, and subsequently complained about how they were treated by banks. Some banks created voluntary dispute resolution schemes, such as Lloyds/HBOS[3] and RBS.[4]
Ongoing political pressure was maintained by an APPG, which pushed the creation of a Tribunal.[5]

The FCA consulted in 2018 on increasing the award limit for the Financial Ombudsman Service from £150,000 to £350,000, and making the limit index-linked in future years.[6] In March 2019 the FCA introduced rules that:[7]

(a) on 1 April 2019, the ombudsman service's £150,000 award limit will change to:
    a. £350,000 for complaints about acts or omissions by firms on or after 1 April 2019
    b. £160,000 for complaints about acts or omissions by firms before 1 April 2019, and which are referred to the ombudsman service after that date.
(b) from 1 April 2020 onwards, both award limits will be automatically adjusted on 1 April to ensure they keep pace with inflation, as measured by the Consumer Prices Index (CPI).

The FCA initially estimated that around 2,000 cases would fall into the newly increased band between £150,000 and £350,000, but it revised that estimate significantly downwards to 500 high value cases, of which three-quarters would be covered by the upper limit.[8] On this basis, the FCA estimated that the 'redress shortfall' above the current £150,000 limit was between £21.6 million and £47.6 million.

The FCA made a number of interesting comments. First, it rejected claims by financial services firms that they were disadvantaged by the fact that the FOS made decisions on the basis of what was 'fair and reasonable' rather than applying the law. The FCA pointed out that consumer and financial regulatory law required banks to act fairly. The FCA said that no-one had produced any case in which that complaint could be evidenced. Second, the FCA firmly rejected the courts as a means of meeting the needs of complainants, on grounds of cost (especially lawyers' costs) and delay.

Meanwhile, in response to the political debate, the financial services' association UK Finance in mid-2018 commissioned an independent review by Simon Walker CBE, supported by Professor Christopher Hodges and Professor Robert Blackburn. Based on Hodges' review,[9] Walker proposed a three-pronged response:

a) an Ombudsman model for SMEs based on the 'fair and reasonable' test;
b) a single pathway for SME assistance and claims hence giving the ability to aggregate data and feed it back to affect behaviour by both lenders and SMEs; and
c) a mechanism for SMEs to give voice to their deep psychological damage and to for leaders of the relevant banks to give a sincere apology, inspired by mediation and 'restorative justice'

[3] RBS scheme overseen by Sir William Blackburne in relation to customers of RBS' GRG activities, https://www.rbs.com/rbs/GRGComplaintsProcess.html
[4] Lloyds/HBOS scheme overseen by Professor Russel Griggs OBE,
[5] K Hollinrake MP, *Fair Business Banking for All. How to improve access to justice for businesses in financial services disputes* (Centre for Policy Studies, 2018).
[6] Consultation Paper (CP) 18/31.
[7] *Increasing the award limit for the Financial Ombudsman Service* (Financial Conduct Authority, March 2019), PS19/8.
[8] Ibid, para 1.28.
[9] C Hodges, *Mechanisms* (Centre for Socio-Legal Studies, 2018) at http://www.ukfinance.org.uk/review-into-the-complaints-and-alternative-dispute-resolution-adr-landscape-for-the-uks-sme-market.

techniques, aimed at giving closure to the past and a basis for agreement to the first two elements (an SME Ombudsman and the feedback loop).[10]

In December 2018, the banks agreed to the proposals, including establishment of an independent SME advisory council,[11] and the Economic Secretary to the Treasury indicated his approval of the package.[12]

Property Sector

The Government is in the middle of extensive reform of the regulation and redress arrangements in the property sector. The Government noted 'overwhelming evidence of the harm that some people experience, with claims that consumers could be overpaying for managing agents services by up to £1.4bn.'[13] In line with a commitment to create a new regulatory model for agents in the leasehold sector, in line with its commitment to regulate agents in the private rented sector,[14] in late 2018 the Housing Minister appointed a Working Party chaired by Lord Best to report on the regulation of property agents.

On 29 November 2017, the Secretary of State announced that there would be a consultation on establishing a single Housing Ombudsman.[15] In January 2019 a general vision for a new integrated 'service to cover all housing consumers including tenants and leaseholders of social and private rented housing as well as purchasers of new build homes and users of all residential property agents'.[16] The new structure would be constructed in stages, ideally involving voluntary action achieved with the agreement of relevant sectors, but against the threat of mandatory requirements from legislation if necessary.

The main pillar of the new approach would be a Housing Complaints Resolution Service that would provide a single point of access for all current and future schemes that offer redress and ADR, and provide advice and triage as a first stage. The redress landscape would include the existing Ombudsmen and others and fill in gaps through mandatory membership of a redress scheme by:

a) all freeholders of leasehold properties regardless of whether they employ a managing agent.
b) all Private Rented Sector landlords regardless of whether they employ an agent for full management services.
c) developers of new build homes – through a New Homes Ombudsman.
d) all residential park home site operators.
e) private providers of purpose-built student accommodation.

2. Continued Success of Regulatory Redress

The UK is a leader in developing redress achieved swiftly and with minimal cost to consumers through the intervention of regulatory authorities which have powers to order traders to make redress.[17] This continues to be a regular occurrence, and avoids the need for lawyers and collective litigation. The regulatory redress mechanism is closely connected to the involvement of consumer Ombudsmen, who often identify issues through their function of aggregating data on consumer markets from consumer complaints.

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[10] S Walker, Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market (2018), at http://www.ukfinance.org.uk/review-into-the-complaints-and-alternative-dispute-resolution-adr-landscape-for-the-uks-sme-market/

[11] Press release, 'Banking industry to fund new alternative dispute resolution (ADR) scheme for larger SMEs' UK Finance, 30 November 2018.

[12] Letter from J Glen MP to K Hollinrake MP, 3 December 2018.

[13] http://www.thisismoney.co.uk/money/mortgageshome/article-2055707/Leaseholders-overcharged-700mmanagement-fees-according-Which.html and http://www.telegraph.co.uk/property/news/leaseholdersovercharged-14bn-says-mp/

[14] *Protecting consumers in the letting and managing agent market. Call for Evidence* (Department for Communities and Local Government, 2017).

[15] *Building the homes we deserve* Speech by the Rt Hon Sajid Javid MP, Secretary of State, 29 November 2017

[16] *Strengthening Consumer Redress in the Housing Market. Summary of responses to the consultation and the Government's response* (Ministry of Housing, Communities & Local Government, 2019).

[17] C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018), ch 5.

3. The Consumer & ADR Landscape

Government Consumer Green Paper 2018

A 2018 Government Green Paper identified that key problems are lack of take-up in non-regulated sectors where ADR is not mandatory, low consumer awareness, and difficulties in making complaints.[18] It noted that having more than one provider per sector is not beneficial.[19]

Those are problems in relation to the *users* of ADR (consumers and traders) but some of the answers arise from the need to reform the *intermediaries*, namely the ADR system itself, its landscape and entities. Innovative solutions are being discussed for making ADR services attractive to SMEs so as to solve coverage and funding issues.

Some voices have urged the integration of the consumer Ombudsman landscape, with a single national Portal and information website. A Government White Paper is expected at some stage that will set out policy.

CEE Prof Alan Uzelac

It may be difficult to generalise about some 13 or 14 jurisdictions, 9 of them members of the EU and 11 of them members of NATO. There are two possible and contradictory approaches to ADR:

- It is not an interesting area, since it is not the area which brings innovations, not much to report – lagging behind the developments in Western Europe;
- It is the area which is of particular importance, exactly because it has an immense chance for improvement, much greater chance than the countries which have already started with a decent system of CADR.

The general situation on ADR in CEE countries is that it is very limited and undeveloped. The EU had a big chance to achieve a fresh start on ADR. There was the ability to soften the edge of *laissez faire* capitalism which was introduced after the fall of socialism, and which was generally neglecting consumer protection;

a) Many consumers in the re-discovered consumers' heaven fall as victims of the seductive consumerism; Long tradition of post-war and socialist austerity: craving for industrial products of the West; Return of wild capitalism: eager unmounting of socialist checks against overspending.
b) Result: poor protection, mounting debts.

But the opportunity was missed. There has been no precise diagnosis, no harmonisation, and no effectiveness in increasing consumer protection.

There is little information on the state of ADR in most CEE countries, no harmonisation of structures.

- Slovenia: some mediation by individual lawyers, some State agencies, one company;
- Hungary: territorial units of "conciliatory bodies" per counties;
- Poland: provincial trade inspectors, arbitration courts
- Bulgaria: conciliation committees
- Croatia: "old" providers of ADR – mediation centres at economic chambers masking their services as consumer ADR;
- Czechia: bar association as a consumer ADR body,
- Any Ombudsmen??

The States have the leadership role in promoting CADR (but there is little concrete support). There is little business support, participation or sectoral involvement in ADR. There has been failure to establish schemes that would be *de iure* or *de facto* **mandatory** for the businesses.

Examples from Croatia. Implementation 1,5 years was late. In July 2017, eight DR bodies appointed:

[18] *Modernising consumer markets: green paper* (Department for Business, Energy & Industrial Strategy, 2017), paras 144-152.
[19] ibid, para 152.

1. five OLD CENTRES got a modest financial subsidy: BUT no subsidy for NEW CENTRES and no subsidy for the only sectorial body (Mediation Centre at Croatian Insurance Bureau).
2. None of the best practices in consumer ADR were followed in the establishment of the new (old) landscape:
    a. NO: Sectorialization; Priority and virtual exclusivity; Mandatory use of CADR; Hybrid procedural nature; Unilateral and asymmetric structure; Regulatory impact of the DR process; Transparency and publicity
    b. Instead of creating a new environment adjusted to the specific requirements of the consumer dispute resolution, the created system has cloned the ineffective network of idle mediation centres.

Empirical evidence confirms the position. 368 initiated cases, 297 accepted, 136 cases successfully concluded. There are no statistics on individual providers or general trends. There is a lack of clarity on whether the process is binding or not! Conflicting statements are made about this, so consumers will be confused, but the statements never say that the outcome will be binding on traders only. There is certainly a failure for ADR to achieve a regulatory effect.

EU POLICY on Consumer Redress Landscape Christoph Decker, European Commission

New Deal for Consumers package proposed in April 2018, that includes proposals for an Omnibus Directive and a Directive on representative actions. The objective is to make enforcement more effective. The Omnibus has a Trialogue this Thursday. Commission's ambition to adopt in this legislature. The Representative Actions proposal builds on the Injunctions Directive and add collective redress. This is more controversial; the Romanian Presidency would like to see adoption in progress but adoption is uncertain.

The Communication proposes making current instruments more effective, and this is where ADR and ODR comes in. All MSs have implemented the important ADR/ODR package (except Iceland); there are 460 ADR entities notified by MSs plus Norway and Liechtenstein. The ODR platform started in 2016, with some positive aspects (108,000 complaints submitted, 8 million visits, number of cross-border cases is rising (currently 44%), top position between airlines and clothing and footwear) and some needing more work. The second Report confirmed a low number of complaints processed through the platform to an ADR entity, about 2%. But exit surveys show that 41% of parties reach a direct settlement. In the context of, say, the Swedish Consumer Complaints Board, in 41% of cases the case handlers decide in favour of the consumer. So the platform is not being used as conceived by the legislator but it is still contributing to communication between the parties and settlement of cases.

The platform has an improved homepage now, and 80% of users say they are satisfied. There is an intention to capitalise on the strengths of high consumer visits, to provide more information on consumer rights. The platform will be further developed in a series of waves, including: enable settling directly; directly address and ADR entity without there being a prior agreement; make the information more targeted; undertaking a study on the IT sustainability of the platform and propose IT technology to assist and signpost appropriate solutions. The Commission is consulting with academics and State stakeholders.

Ben Borsche, ECC-NET

More is needed to facilitate access to ADR. The ODR platform has the potential to overcome barriers to ADR, but to realise this potential the usability of the platform needs to be raised. Cross-border ADR is pretty rare. In Germany, only 1% of complaints were cross-border, in Austria 6,61% (R-ADR), and Netherlands 1,8% (R-ADR).

Various barriers exist to realising the cross-border potential: visibility, findability, language, lack of trader participation, and different admissibility criteria. There is a lack of trader participation. There are

various steps that the trader has to take: register, accept, and select ADR body. The platform can overcome these barriers: It provides for visibility, a single entry point, an automatic translation tool, consumer information etc.

The platform does not score well against the concept of 'usability' in ISO 9241-11 Ergonomics of human-system interaction – Part 11: Usability (updated March 2018). The ECC-NET has developed criteria that would provide a high level of usability. The assessment provides:

1. *Overcoming specific cross-border barriers* (visibility, findability, language): (+/-)
2. *Informing consumers as soon as possible* of trader participation and admissibility (-)
   Late and incomplete information
3. *No additional burden for traders* (beyond that of ADR procedure): (-)
   - Premature registration requirement
   - Late information on admissibility and costs
4. *Coherence between ODR* (preliminary procedure)/ *ADR* (main procedures): (-)
   - Different admissibility criteria
   - ODR: Problems and disputes/ ADR: Disputes
   - ODR: voluntary/ADR: partly obligatory

The ECC-NET made a series of proposals to improve the platform.

FEEDBACK FROM THE SECTORAL MEETINGS

ENERGY Dr Maribel Canto-Lopes
Need to raise the visibility of ADR.[20] Problem of consumer apathy with a perception of little point in fighting against powerful companies. Also vulnerable consumers who do not know what to do, or where to go. Need to inform charities, social workers etc about ADR; need for simplified information.
Access to these services is important, particularly if we are talking about delivering justice

Feedback is fundamental for all. What changes in behaviour are needed?
Does the Regulator have more teeth-compared to the Ombudsman?
What is missing? Cooperation.
Solutions: more training in talking to consumers; awareness campaigns; energy brokers[21]; sectors need to know more about each other.

TELECOM Nina Lester
The group agreed to establish a network of Telecom ADRs in EU.

TRANSPORT Judith Turner
Looked at charging; competition of ADRs in a sector; process, eg light tough bringing parties together, early resolution, making recommendations (UK only one who makes binding decisions); how technology can help, eg assisted negotiation, or direct contact between parties, portals for managing complaints; main challenges (different transport sectors: common themes re forecasting, specific events & how schemes can respond to them); mandatory ADR; Travel-Net forum.

RESIDUAL Dr Alexandre Biard

[20] See summary by Marine Cornelis (NextEnergyConsumer) for ESCR Just Energy https://esrcjustenergy.wordpress.com/2019/03/22/consumer-adr-delivering-fairness-justice-for-consumers-businesses-markets/

[21] There is a belief that energy brokers are not part of a solution but more part of a problem. One of the members of our group was a Regulator and pointed out that, they do not have the competence to intervene when a consumer had a problem with an energy broker. Others of our members suggested that to open up access to ADR, it would be good if there was 'mandatory ADR participation' for energy brokers and also all bundled offers providers.

Many current challenges: the price for SMEs (NL problem, fees too high); incomplete files (v high in Belgium); misunderstandings, wrong expectations shared by many consumers; lack of expertise in sectors (construction); information problem for SMEs, they simply don't know they have to sign up.
Successful developments: single point of entry (Belgium); triage; signposting – how, EU single digital gateway;****

FINANCIAL SERVICES Geoffrey Bezzina
Challenges:
Fintech – the way consumers purchase products using mobile phone leads to expectation on same speed of redress; so is the current framework scalable? Or how can it be changed?
PSD2[22] – third party firms are now involved in the processing of transactions – are ADR bodies competent to deal with such third party firms? If not, do specialised ADR bodies need to be created to handle these? Does the whole redress system need a rethink as a result of innovative market offerings? What about unsolicited profiling of consumer data by online retailers for short-term credit purposes?
Financial education – ADRs produce a lot of information. To what extent should ADRs be in the business of educating consumers? To what extent should that function be undertaken by regulators, traders, ADRs (if at all) etc? If ADRs were to undertake such initiatives, to what extent would that impinge on ADRs' independence?
Procedure – It is often not possible to deliver outcomes within 90 days as required by the directive[23] as many cases are complex.
Effect of Brexit – Passporting of services from/to UK might create gaps in coverage for both home and host ADRs, a situation which should be addressed by the Commission.

Information to the public/regulators:
Depends on design – how can ADRs share intelligence with the regulator? Regulators and ADRs should engage but carefully manage flow of information, preserving the role of each institution's independence. Regulators may also suggest ways the ADR can improve. This will increase trust and consumers will be encouraged to refer cases to the ADR. *Examples:*
- The health insurance ADR in the Netherlands[24] can address potential systemic issues directly with a provider. Failure by the provider to act within three weeks requires the ADR to refer the matter to the regulator.
- In 99% of cases, banks accept recommendations issued by the banking ADR in Italy[25]. If not, the ADR publishes a name and shame list on its website. Panel can also recommend a change in behaviour.

Changes in behaviour:
Not easy to identify changes in behaviour and culture as a result of ADR actions. *However:*
- In Greece, it is evident that changes to some rules made by the regulator were the result of feedback from various stakeholders, including the ADR.
- In Malta, a financial provider decided to reach settlement as a result of decisions issued by the Arbiter and judgements by the Court of Appeal (which confirmed the Arbiter's decisions).
- In Italy, intermediaries agreed to be bound by an MoU following a number of decisions issued by the panel of arbiters regarding cases involving bonds secured by 1/5 of salary. Number of cases involving similar disputes has decreased as a result.

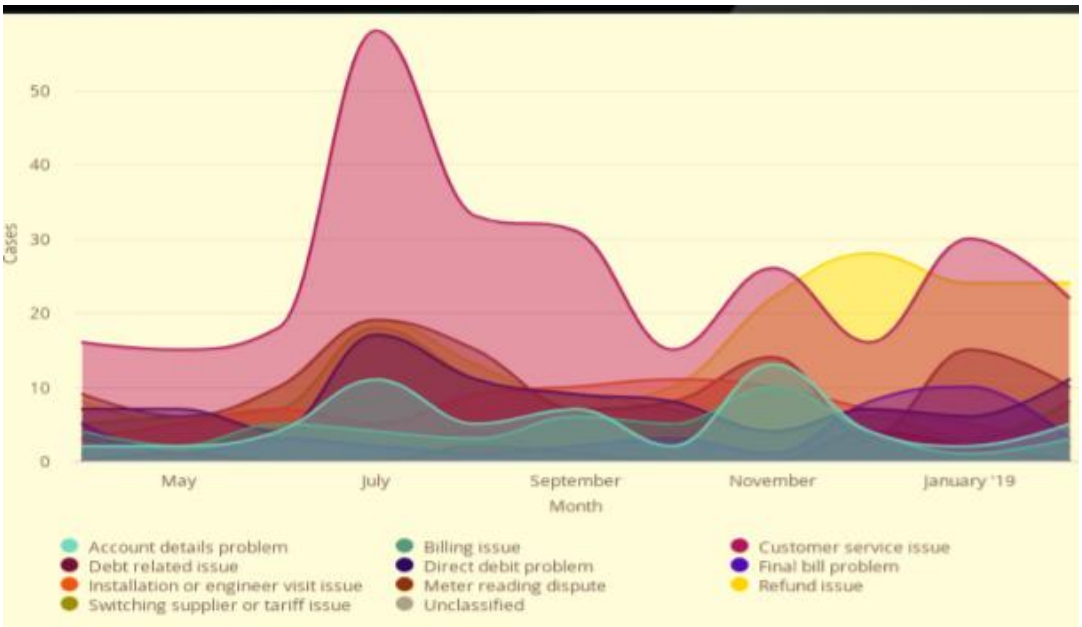
DAY 2, 19 March 2019

PRESENTATIONS

[22] Directive 2015/2366/EU on payment services in the internal market [2015] OJ L 337 (PSD2)
[23] Directive 2013/11/EU on alternative dispute resolution for consumer disputes [2013] OJ L 165 (Directive on consumer ADR)
[24] *Stichting Klachten en Geschillen Zorgverzekeringen* < https://www.skgz.nl/ >
[25] *Arbitro Bancario Finanziario* < https://www.arbitrobancariofinanziario.it >

RESOLVER James Walker

Resolver can deliver almost all of the functions on Chris' 'circular thinking' diagram (not sanctions). Resolver went live on 22 April 2014. Since then, it has assisted 20 million consumers, with recovery of £2 billion, and has had 140 million views of the platform. It is now live in Canada and India.
It is free, does no marketing, and does not sell the data. The platform explains rights and process to both complainants and companies. We have added a question on 'what is the impact to you?' so as to determine the severity of the complaint as felt by the complainant. We provide customer support, record everything, escalate cases to an Ombudsman and send a complete case package file.
Resolver will be established as a not-for-profit with a separate commercial company selling knowledge to companies on how to improve. It provides technical facilities to Ombudsman Services. An example of feedback was a meeting last week with Ofgem on data that indicates companies that show key traits of stress and may go bust. See the graph below of a company that did that. The main link spike shows the increase in complaints, showing that something is seriously wrong, followed by a fall to a plateau, which meant that consumers were giving up, followed by the rise of yellow which is complaints from people not receiving a refund, showing that the business is in serious financial problems.
We can identify which cases will go to the Ombudsman right at the start.
The question that we set ourselves was 'How do you change the result of resolution?'. We start at the beginning of the journey (rather than later once a legal claim has materialised) and help guide people through – rather than help that at the end.
We also help businesses to be better at what they do. We give them feedback on benchmarking against their peers; what they need to do. SMEs typically say they don't have complaints, but they do admit to having troublesome customers. They do not look for resolution or for delivering a better service. We aim to help SMEs run their business better.
We like to see consumers being fair in how they treat businesses, prevent things going wrong, make market work better, build trust.
We are having conversations with regional government on how to deliver better support to SMEs.



OMBUDSMAN SERVICES David Pilling

Ombudsman Services uses data and insights to be more pro active in resolving problems early on. It tries to improve access for consumers and help businesses to put things right quickly.

OS has implemented a Transformation Programme. It has changed brand, processes, being a people business, without jargon, responding to consumers' requests for speed so using online first, and has simplified the website simplified. It has gone through the entire customer journey, and identified pain points so as to remove or reduce them. It has a new case management system provided by Resolver [OS holds the data], which is very simple to use. OS has worked with companies to shift across to the new system. Transparency has increased. The system helps manage expectations, gives timelines. The result is that more people are getting onto the system. It is geared to facilitating early case resolution. It is providing better access to the data.
70% of traffic is now by web (it was formerly 70% by phone).
Data and insight drives working with companies to help them improve, and working with regulators, academics, consumer advocacy bodies etc. For example, in the energy sector, there is tripartite working with regulator Ofgem and Citizens Advice, in which data is shared and an action plan is agreed on who will do what in working with the relevant company, and who will act to reduce consumer detriment. OS also uses the economic stress model for companies, to avoid liquidation. The model can work out which other companies might fit best to take over the customer base if needed.
A great deal of use is made of text analytics, in answering: Which risk areas? Is there vulnerability? Traditional flags would suggest 3-5% of customers are vulnerable. But OS thinks 40% of customers have some aspect of vulnerability, and is working on how to use this information.

Dr Felix Steffek AI IN CONSUMER ADR

Report of the case study: Case Crunch Lawyer Challenge, October 2017. Students organised a competition of AI versus commercial lawyers in London. Cases were provided by FOS on PPI. The facts were presented to participants, not the decision. 750 predictions were made of the outcomes of the complaint. The accuracy was: AI 87%, lawyers 62%. Time: lawyers spent 30 minutes per case, AI took a few seconds. Costs: lawyers would charge perhaps 3 figure sums, AI cost is minimal.
The BBC reported the event as: 'The robot lawyers are here – and they're winning'. In fact, the competition was about accuracy, although reported differently.
Various other AI prediction accuracy studies are compared:

- Ruger et al 2004: AI v 83 legal experts, US Supreme Court decisions 2002-2003, only 6 meta-factors, no facts, no law. AI 75%, experts 59%
- Katz 2017 replicated, more meta factors 1816-2015. AI 70%
- Aletras 2016, ECHR 600 decisions, facts and limited law, Support Vector Machine. AI (facts only) 79%; AI (plus information, eg law); lower accuracy.

Steffek's findings on certainty on where AI works well

- Technical cases if (1) clear and simple legal question (2) many cases (3) similar cases with clear patterns.
- Complex cases if (1) wide discretion, (2) technical legal knowledge less relevant, (3) meta-factors more relevant. Experts' technical knowledge not so useful; because of wide discretion, ideology relevant. Meta factors where AI successful.

Issues with the research:

- There is nothing normative here, it is just about the accuracy of prediction. Chances, risks and options.
- Cost-efficiency has driven ADR. Question of imbalance of one side can predict outcome but other cannot.
- Do we prefer human error or machine error?

Professor Riikka Koulu, Helsinki University

1. The debates are not really about AI. AI has changed and it is better to talk about digital technologies. We should be talking about functionalities – what are we using the technology for?
2. It is not right to juxtapose human versus machine; it should be both. The first question is what we want to achieve, and we should then ask what tools we need to achieve this. This is about connecting

people. Ritualism is a factor. On the role that data plays in consumer ADR: there is an issue of who owns the data; 'if a service is free, then you are the product' eg Google, Facebook; how do we want to respond to the fact that data no longer belongs to the consumers; find the right balance between humans and machines.

3. Technology is not neutral. There is a lot of discussion on algorhythms. It is said that they can repeat human biases, but there is some potential here, as it is useful to recognise the fact that biases exist and then reveal the existence of biases in human action. Every information system has parameters decided at the start on what type of data it contains.
4. A little can go a long way. David Pilling described legal design, to change our language and culture taking into consideration end users. It is a huge cultural shift – intended to support the people who benefit from these services. Idea of continuous user testing.

Audience Questions

How much does accuracy matter when decisions are made on a basis of 'fair and reasonable'?
The aim is to predict the outcome, whether fair or not. User side or provider side?

Delivering Fairness in the modern world Caroline Wayman, Financial Ombudsman Service

Changes in casework volumes over time:

- 1.6m PPI cases by 2018; these did not start as predictable cases but became more predictable over time with a combination of human and decision-making tools. Compensation bill reported to be around £36bn
- Payday loans, some vulnerable consumers
- Scams and frauds – deciding what is fair; lot of complex scams based on social engineering
- System failure (IT outage by TSB) – what is fair in those circumstances?

There are currently 400,000 cases a year; 4,500 staff are anticipated at end 2019. It is a legal requirement to make decisions on what is fair and reasonable in the circumstances. The courts have provided some rulings on this:

- *R (Heather Moor and Edgecom Ltd) v* [2008] CA decided that the Ombudsman was free to depart from the law but if he does so he should say so in his decisions and explain why
- *R (BBA) v Financial Ombudsman Service* [2011]

It is unusual to depart from the law; usually only when the law is out of date.
The broader legal position on fairness (eg Consumer Credit Act's unfair relationship test). We do ask what would a court do in these circumstances?
Are outcomes right or wrong? No, not binary answers, there is a range of outcomes. Important how people feel about the outcome. Fairness is not a static concept, it is fluid, and we have to identify what society thinks – eg some used to consider it ok to use child chimney-sweeps. Views of society are very relevant, and it is important to keep in touch with the views of society.
How do we ensure we have the right framework to calibrate fairness properly?
The problem of avoiding existing in a bubble. The FOS gets out across the country to meet people.

Judges reportedly saying 'who are the Beatles?' or 'what is this McDonalds?'
SRA regulator research of attitudes of the profession on issues of conduct.
GMC research on patients' views of doctors.

Ensuring we are in the real world, that our day-to-day experience is rich and varied.
Supported by formal research, engagement, conversation
Subject to internal debate/discussion/challenge
External calibration? Crowd source??
How do we keep legitimacy to decide? Not by closing ourselves off.
Being open to continually challenge ourselves.
Ensure that people think they have been treated fairly and understand and accept as much as possible of the outcome.
FSA decision to adopt a complaints-led approach to PPI in 2008. FOS wrote to highlight the possible wider implications of that approach and whether regulatory action should be considered.

Lessons learned from PPI applied to cases about fee paying bank accounts, identified instances of mis-selling; around 75% uphold rate; insight shared with industry, regulator, CMCs; banks changed their complaint approaches, uphold rate now around 15%.

Lewis Shand Smith

Trust is the key issue. What is it that builds trust in an ombudsman scheme?
LSS is chair of the group setting up a new scheme re SMEs and bankers. 90% of such cases will go to the FOS but a new scheme is being created to respond to a small cohort. There will also be an SME advisory council to look at trends, data etc.
Note the recent *APPG Report on consumer protection.* Trust is not necessarily high at present; people do not always say they will use the Omb again.
There are many questions! But the main principles are:

1. Transparency. Accessibility. Reporting; FOS produces every case with an Omb decision; OS produces comparative table of energy suppliers.
2. Information. Need to be feeding back constantly.
3. Governance. Especially if not set up by statute; seen to be independent; what kind of governing body; how funded in such a way to separate functions of decisions; how include the voice of the sector without undue influence; how listen to consumer(s) to influence decisions;
4. Digitisation. Currently topical. How use algorhythms. Companies have data as well as Ombudsman, so what is the role of the Ombudsman in analysing it? Is the data set unique. Put human resource to support people who need it – vulnerable - may be more expensive but more effective.
5. Accountability. Statutory underpinning assists with politicians, ministers, Department, companies, consumers. APPG Report mentions: restriction on title; membership should be mandatory; decisions should be enforceable; fit and proper approved persons test.

Conclusion: transparency is as important as trust.
Ombudsland was a land that belonged to the Crown; Ombuds was someone with powers conferred by the Crown.

Dr John Sorabji

Looking at the issues for this panel on Trust through the specific question posed on access to justice for vulnerable users. Two preliminary questions arise here:

- What do I mean by access to justice
- What is a vulnerable user

First, I adopt the following definition: access to justice to mean that whatever processes, procedures, systems are put in place to enable individuals to resolve disputes – they must be practical and effective. They must not therefore be too complex. (Byrom, N (2019) "Developing the detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice" at 16[26])
Absence of complexity is something that we are not good at achieving. It is inherent in our civil procedures. And it is unfortunately inherent in our dispute resolution processes generally. I want to return to that point in a moment.

Second, vulnerability. On one level I could say that we are all vulnerable – or potentially vulnerable. Vulnerability is a question of the view from here – the situation you find yourself in at any particular time.
An individual who is confident and capable in one situation, who is exposed to work-placed harassment or bullying, or who has suffered financial loss, or who has suffered a personal injury etc, is likely to be

[26] https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf

vulnerable when placed in the context of a mediation, litigation or resolution via an Ombudsman scheme.

Research considered by Engel (Engel, *The Myth of the Litigious Society* (Univ of Chicago, 2016)) demonstrates that exposure to events, behaviour or actions that give rise to legal disputes can and do have a significant on how we respond to the world, to other people – and inevitably then to any available dispute resolution process.

My starting point then is, as was noted by The Advocates Gateway (cited in Byrom N. ibid at 11)

"Any one single definition of vulnerability based on age, incapacity, impairment or medical condition may not reflect the nature of vulnerability that a particular individual may face at different times and in different environments. . . .(ATC The Advocates Gateway, 2017)

More specifically, with increased digitisation of process we need to be acutely aware of the fact noted by JUSTICE last year that:

> over 11 million adults in the UK lack basic digital skills such as being able to complete online forms and relocate websites (Justice (2018), cited in Byrom N ibid at 11).

And that in particular certain groups within society were at the greatest risk of what could be described as 'digital exclusion': older adults, those who are disabled, those who are based in rural areas with low broadband coverage and lack of access to physical services where they can access internet enabled devices, those in care homes, those who are detained, those who are homeless, those on low incomes and young people who are both on low incomes and left school before the age of sixteen (Justice (2018), cited in Byrom N ibid at 11).

My starting point then is what measures are necessary to meet the needs of access to justice for the vulnerable

- If Ombudsman schemes, just as our court systems, are to secure access to justice – they are going to have to become far more acutely aware of the different forms of vulnerability that consumers, users, litigants have than previously.

That awareness may well have to be such as to ensure that our systems are less complex than at present – even our simplest systems may not be simply enough for some forms of vulnerability – and complexity reduces transparency and accountability just as it does accessibility

Equally, and this is something that Professor Hodges will no doubt talk about later today – the nature and relationship of our systems must itself become less complex.

Complexity was noted to be a matter of acute concern where Ombudsman were concerned earlier this year.

In evidence to the All Party Parliamentary Group on Consumer Protection - Local Government and Social Care Ombudsman said this

> '*The current system is little more than a consumer maze... fragmented and lacking in coherence' caused by the fact that 'the ombudsman sector has tended to be developed in an incremental and ad-hoc fashion, rather than informed by principle'*. (APPG Report at 14[27])

The Ombudsman Association went on to describe the overall picture, as a 'combination of having multiple competing redress schemes whilst at the same time having gaps in coverage' (APPG Report at 14).

An incoherent, fragmented, consumer maze, gap-laden environment is less than ideal landscape for the vulnerable to navigate – multiplying complexity and difficulties in accessing justice such that 'lumping it' is going to be built into the system. A bad as the courts in the 19th century prior to their rationalisation in the 1870s.

Such incoherence is not necessarily a bad thing at the start of a sector's development – William James' buzzing, blooming confusion – the lack of structure, is a good starting point – it breeds innovation, it enables what works to evolve, and what doesn't to fall by the way side – but it isn't a proper approach for a mature or maturing system – principle needs to be applied – and here that would be design principle.

And where access through that maze may require digital access, vulnerability may meet vulnerability.

[27] https://images6.moneysavingexpert.com/images/documents/Ombudsman%20report.pdf

All too often individuals with one form of vulnerability will have more than one: digital exclusion plus lack of access plus poor health plus the psychological effects of the issue that was the index incident behind their need to seek effective access to justice.
It could be said that the present landscape is hardly one that ought to inspire trust at a systemic level – no matter how well individual Ombudsman schemes can and do resolve disputes, provide effective access, and inspire trust.

Where might we go from here
To improve access to justice for the vulnerable I think we need to consider a number of potential reforms. In outline:

- Simplify the landscape. A single Ombudsman for each sector.
- But that should be part of the story. Those Ombudsman should form part of an integrated whole – so there are no gaps. And they should form an integrated whole with the justice system. Lewis Shand Smith has referred to Ombudsman as part of the justice system (APPG Report at 11). They are:
    - o Trading Standards
    - o Citizens Advice
    - o ADR providers

And the two should be integrated together. If we have rightly moved away from the idea that access to justice is access to a court. So we should in terms of the design and structure of our justice system.
They should be integrated into a single whole – albeit with complementary functions and roles to play
And they could and should be also integrated with:
We need to think in terms of a coherent and holistic approach to access

- There should be a single portal. This is not a new idea. The court reform programme was initially to design one for its component parts. There should be a single point of access to all parts of the expanded justice system. And it is one the APPG recommended. It should not be a recommendation or aspiration. And it should go beyond Ombudsman. There needs to be a generally applicable single point of entry.
- The revised system must be consciously designed to meet the needs of the vulnerable – and must be alive to the fact of different and often multiple vulnerabilities.
  Different approaches will need to be incorporated into the system – digital access for some, assisted digital access for others, face-to-face access and assistance for yet others. And different forms of each of those, as and to the extent that is necessary for their vulnerability.
  Unless we do this, we will continue to have a system or systems that do may well fail to provide the means for effective participation by users – in the absence of which trust, confidence and user satisfaction is unlikely to follow.
  I am not convinced we have done this or are doing it. To the extent that we are, the focus may not be broad or deep enough.
  And we must not let an increased focus on digital access to become another barrier.
  We must consider how we can embed access in social hubs – in communities – so that digital, human-assisted digital, and human-only advice, assistance and accessibility are embedded into our communities – a point recently raised by Sir Ernest Ryder, the Senior President of Tribunals[28] - and here we must be realistic in identifying what our social hubs might be and are: doctors' surgeries, dentist surgeries, supermarkets, shopping centres, sports facilities – places where people actually go day-to-day – where the venue is not itself a barrier.
- It must be transparent and accountable both to its users and to the public at large. They are prerequisites for building a system that people trust, in terms of its processes and its results.

The historian Corelli Barnett once drew the conclusion that the English were drawn to making a fetish of the ad hoc – of not considering design on the basis of clear principles by experts, and not considering reform on a principled basis or on a radical basis (See C Barnett, *The Audit of War*, 1986). We have approached design and development of Ombudsman, ADR and courts on the basis of the ad hoc so far – we need to move away from that.

[28] (UCL, 14 March 2019).

Whatever the validity of other conclusions Barnett in his historical analysis may have drawn, there is something to this. The concern must be that we will continue to develop Ombudsman schemes, Consumer ADR processes, and our court system without sufficient clarity, consistency or coherence.
And if we do that – to what extent are we going to deliver a simple, properly and practically accessible system of justice for the vulnerable – remembering that to a certain extent disputes render each of us, and through that society in general, vulnerable. And what then for trust?

Augusta Maciuleviciute (BEUC)

Predominant issue from consumer associations is the independence of ADR bodies. Lack of trust that decisions will favour consumers.
Lithuania; Telecom is good; Bank of Lithuania is more preoccupied with stability of financial institutions so it interprets the law in favour of providers. Appeals to Court are unsuccessful because expertise of the Bank is highly regarded by courts.
Problem of trust in ADR bodies throughout CEE countries. Also France issue of in-house mediateurs. Issue is not just of objective independence but also perception of independence.
Transparency and information could play a large part in improving the situation. The information has to be *delivered* to consumers. Not just in an annual report.

THOUGHTS OF SCHOLARS ON LEADING ISSUES

Prof Dr Xandra Kramer

Research at Erasmus School of Law evolves around ERC project on access to justice in Europe, focusing on digitisation, privatisation, self-representation and court specialisation, aiming at an integrated approach within Europe and in connection with national and global dispute resolution systems. Two researchers are working on ADR/ODR (see also presentation Alexandre Baird). Two focal issues are the importance of tailoring procedures to the different disputes/needs and signposting to secure and connect the best pathways. Focusing on connection courts and ADR, at the EU level it is important that for consumers the ESCP and the ADR/ODR regulations and platform are connected, while within the ESCP the settlement option should be reinforced. This has also been brought to the attention of the Commission and will hopefully be picked up. For businesses the EP Expedited settlement resolution is interesting and the Commission is following up on this. Facilitating settlement and connecting to the EBB and bridging Consumer and Business ADR/ODR and litigation also important. The ELI-ENCJ and the ongoing soft law project ELI-Unidroit European Rules of Civil Procedure also offer models for this. In the Netherlands, a good example of signposting and integrating different pathways is the ODR platform Uitelkaar.nl (hosted by Justice42, under the heading of the *Rechtwijzer* project that was much broader, but is largely discontinued due to a lack of funding). The Dutch judiciary website refers divorcing couples to this website, that offers online guidance to prepare the necessary documents together and includes (online or face to face) mediation if necessary, as well as review by a lawyer before filing. The system is not wholly satisfactory though and has technical shortcomings. The Dutch *e-Court*, a private initiative for debt collection is currently discontinued due to problems of lacking transparency among others. Some of its achievements (in particular how to reach debtors) are however taken up in improving debt collection in court procedures.

Dr Alexandre Biard

The world is changing quickly, and is a laboratory, so we should find out what works, share experiences and adopt what works and not what does not work
Three issues:

1. Strengthening the quality of consumer ADR. Additional standards adopted by the Gambling Commission 2018 (Additional requirements for protecting vulnerable consumers; Requirement to create ‘effective procedures’ for making complaints against the services of CDR providers, etc.) Lack of perception of quality by consumers (BEIS 2018 study). What kind of information is needed to strengthen trust? Information is used for promoting rather than informing.

2. Raising awareness and improving the information flow. ADR is a powerful tool, provided traders comply. A general advertising campaign is not necessarily the best approach. Study with the Belgian Consumer Mediation Service shows that most consumers found CMS from the internet – not from traders! EU regulation 2018 on single gateway.
3. Establishing bridges between formal and informal justice. Competent authorities as potential bridges between formal and informal justice? Referral of primary rulings to CA which then disseminates?

Prof Dr Pablo Cortes

Are competent authorities effective? Important factors are resources and number of certified ADRs. Issues are lack of coordination amongst CAs and lack of enforcement on information requirements (Commission Report found only 30% compliance). CAA has contacted all airlines and asked them to prove how they notify.

Should differences in ADR models be permitted? There are various advantages and disadvantages, including confusion, forum shopping, race to the bottom, lack of efficiency and economies of scale.

Landscape issues: what issues need research? Argument that should be mandatory, especially in regulated sectors; need to close gaps. See UK report *Resolving consumer disputes: alternative dispute resolution and the court system*.

Note the development of the Online Court, which is not connected to ADR but in effect may be the residual body.

How to integrate the SDR landscape? Confusing picture, although emerging specialised ADR. Traders need incentives to opt into ADR, maybe with penalties through an Online Court requirement to use ADR.

Prof Dr Fernando Esteban de la Rosa

Should differences in ADR models be permitted? The Directive does not attempt to transform the national models as such (it says "the development should build on existing ADR procedures in the Member States and respect their legal traditions").

The new functions for ADR entities introduced by the Directive raise the possibility of moving towards a new ADR structure. ADR entities *must* maintain a website, make annual reports, ensure that the ADR procedure is available and easily accessible online, and communicate some relevant information every two years to CAs. The traditional consumer arbitration boards in Spain and Portugal, for example, need to be transformed because they are not fulfilling these requirements. There is an implicit but clear mandate in the ADR Directive to produce important transformations in the traditional ADR structure in every Member State.

Some cross-border issues arise and need more effective European coordination: mandatory participation of traders before DR entities; difficulties with the principle of liberty; the face-to-face requirement may be betrayed by online access; scope of application of the ODR regime in Member States; the language of the consumer arbitration agreement.

Proposing criteria for ADR structure transformation:

1. Crisis of the principle of territoriality of the ADR structure
2. The principle of speciality of the ADR entity
3. The customs/habits of consumers and traders
4. Incentives for agreeing
5. Identifying the best ADR entities to use the whole potential of ODR (regulators and ombudsmen schemes).

Some remarks regarding better functioning of the ODR platform. Admit disputes offline into the scope of the ODR platform. Online traders should be obliged to register at the EU ODR platform.

THE RELATIONSHIP BETWEEN COURTS AND ADR

Diana Wallis

At EU level, mediation and ADR have developed along parallel separate tracks. Mediation comes under Justice and so is cross-border. ADR comes from market regulation and so is internal to Member States.

There is a mis-match between these two approaches. European judges have recognised that we do not have a holistic system – there are gaps, and people do not know where to go. The position is currently a minefield.
The ENCJ and ELI established a joint project that produced a Report on how courts should react in considering or referring cases to ADR. It sets out 21 principles. We still need a roadmap, based on visibility and trust etc.

Prof Dr Christopher Hodges

Reported on the main findings of his review of all major types of dispute resolution in England & Wales. He argued that it is time to face a number of realities after some decades of experimentation and continuous reform.
The adversarial model of dispute resolution is no longer effective in delivering justice for most disputes involving consumers, citizens and SMEs. It cannot be afforded, it takes too long, and it drives people apart rather than together. An investigative model responds to all these issues. It can also contribute more than current forms do to the circulation of data and intervention to improve behaviour, culture, performance and outcomes.

It is time to focus on ensuring that pathways are as simple as possible and that they provide relevant techniques within an integral pathway at the right time. Pathways should also be easily identifiable by users. There is currently too much choice and confusion. The landscape needs to be rationalised. The Australians concluded 10 years ago 'We're paying for all this and we need to ensure that it works and we are not paying for things that do not work or confuse people'. They were right and we should adopt that policy!

We should regard all elements as part of a *single system* – rather than different and uncoordinated systems. This would lead to integrating courts, tribunals, ADR, Ombuds and other structures.