



Consultation: *Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation (the Department for Business, Innovation and Skills)*

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Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation

1. Executive Summary

- 1.1 While the Consumer Council welcomes the Alternative Dispute Resolution (ADR) Directive, we have a number of concerns about the proposals made by BIS for its implementation in 2015. Given these concerns, and with consumer affairs devolved, we believe strongly that bespoke Northern Ireland legislation should be used to develop and implement a solution that meets local market conditions and consumer protection arrangements. This is particularly important because BIS's proposals, if implemented, could be regressive in terms of the protections currently available for consumers in a number of regulated markets, particularly energy and water consumers, in Northern Ireland. This would not be in keeping with the EU's stated aim to *"build on existing ADR procedures in the Member States."*
- 1.2 There are also some fundamental issues not dealt with explicitly by the consultation document. It is not clear what ADR process is to be followed. In the context of the Directive, ADR covers mediation and arbitration. However, it is not clear from the proposals whether a prescribed 'one size fits all' approach is intended (eg mediation followed by arbitration if agreement is not reached); whether ADR is viewed as a 'tool kit' of a range of interventions and approaches to be used depending on the nature of the dispute and the parties to a dispute's wishes; or whether it is for ADR providers to propose an approach for agreement by, for example, the competent authority and/or businesses within a sector.
- 1.3 It is also not clear how the key criterion for ADR providers of being *"independent and impartial"* is to be assessed and enforced. This is a critical issue in respect of arbitration if it is to be binding on all parties to a dispute. In particular, it needs to be clear what types of body will meet the criterion and how they should be constituted if they perform other functions, alongside ADR. Moreover, if businesses are directly funding ADR, can the provider ever be perceived as truly independent and impartial and, if so, how can they be protected so that they can maintain this level of trust, particularly if businesses or sectors can choose which ADR provider they wish to use and if they can change provider.

1.4 Beyond these fundamental issues, there are a number of key differences to the proposals put forward by BIS that we wish to see implemented for consumers in Northern Ireland. These are as follows:

- ADR should be compulsory for businesses where the consumer wishes to use it – this is currently the position in a number of regulated markets, eg energy, postal services and water. Furthermore, if it is made voluntary in other markets, the Consumer Council’s research suggests that take-up is likely to be low.
- Vulnerable consumers should be allowed to use ADR without having to first exhaust a business' own internal complaints mechanism. As a complaints handling body, the Consumer Council represents vulnerable consumers in several regulated markets through the initial stage of their complaint and it would appear appropriate that this is taken forward through the ADR framework, rather than as two separate processes.
- All consumers should be allowed to use ADR in the event of undue delay within a business' own internal complaints mechanism.
- ADR should be available for 'business to business' disputes where one business is in effect a consumer of another business' services (eg where, as now, a business has a complaint about water charges or services they should be able to continue to use the Consumer Council's complaint handling mechanism).
- There should be no lower limit on the value of a complaint before the consumer is allowed to use ADR.
- There should be an appeal mechanism, both for consumers that are denied access to the ADR mechanism and for arbitral decisions made by the ADR provider in certain specified circumstances.
- There should be an effective enforcement mechanism for agreements and decisions made through ADR.

- 1.5 In relation to the infrastructure to implement ADR effectively and efficiently in Northern Ireland the Consumer Council recommends this should, where feasible, build on the current consumer protection framework without the need to establish new bodies.

2. Introduction

- 2.1 This paper sets out the Consumer Council for Northern Ireland's response to the consultation document *Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation*, which was published by BIS in March 2014.
- 2.2 The ADR Directive requires EU member states to put in place a comprehensive framework of ADR services for dealing with consumer complaints in all sectors **by July 2015**. ADR, in the context of the Directive covers mediation (where an independent third party helps the parties to a dispute reach a mutually acceptable outcome) and arbitration (where an independent third party considers the facts and makes a decision) as a means of resolving matters without recourse to the formal legal system.
- 2.3 Alongside the Directive, EU member states must also implement the Online Dispute Resolution (ODR) Regulation, which automatically comes into force **in January 2016**. This is to provide an online platform to deal with disputes in respect of online transactions and facilitate access to ADR providers.

3. About the Consumer Council

- 3.1 The Consumer Council is an independent consumer organisation, working to bring about change to benefit Northern Ireland consumers. Our aim is to **make the consumer voice heard and make it count**.

- 3.2 We have a statutory remit to promote and safeguard the interests of consumers and have specific functions in relation to energy, water, transport and food. These include considering consumer complaints and enquiries, carrying out research and educating and informing consumers. In addition, from April 2014, we have taken on responsibility for representing consumers in respect of postal services in Northern Ireland.
- 3.3 The Consumer Council is also a designated body for the purposes of supercomplaints, which means we can refer any consumer affairs goods and services issue to the Competition and Markets Authority if we feel that the market may be harming consumers' best interests. In addition, we have 'supercomplainant' status for financial services, with powers to bring supercomplaints on financial matters to the Financial Conduct Authority.
- 3.4 In taking forward our broad statutory remit we are informed by and representative of consumers in Northern Ireland. We work to bring about change to benefit consumers by making their voice heard and making it count. To represent consumers in the best way we can, we listen to them and produce robust evidence to put their priorities at the heart of all we do.

4. The Consumer Council's current complaints handling role

- 4.1 The Consumer Council has a dedicated team, Consumer Support, which assists consumers with their complaints and enquiries in our statutory areas of transport, natural gas, electricity, coal, water and postal services. We also provide a signposting service to consumers who contact us about issues outside of these areas.
- 4.2 Our service is free to consumers, and independent and impartial. We make every effort to obtain fair and realistic outcomes for the consumers who contact us. Our service is provided both to individuals and businesses who may be consumers of other businesses' services.
- 4.3 In 2013–14 we handled around 3,500 enquiries and complaints and secured almost £½ million in redress for consumers. A breakdown of these contacts is set out **Appendix 1**.

- 4.4 The Consumer Council is already a designated complaints handling body in respect of certain transport and energy matters covered by EU law within Northern Ireland. We handle complaints under Regulation EC 1107/2006 (access to air travel); we are also authorised to handle complaints by the Department for Transport and the Civil Aviation Authority under Regulation EC 261/2004 (flight delays, cancellations and denied boarding) and by the Department for Transport for Maritime Passenger Rights (Regulation EU 1177/2010).
- 4.5 In terms of energy, the IME3 provisions on complaints handling are set out under Directives 2009/72/EC and 2009/73/EC of 13 July 2009 concerning common rules for the internal market in electricity and gas. Article 3 in Chapter II states the following: *“Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.”*
- 4.6 DETI’s *Decision Paper on the Implementation of the EU Third Internal Energy Package*, published in 2011, stated that:
- “Respondents noted that the existing arrangements to resolve consumer complaints generally worked well and this was confirmed by the Utility Regulator. In the vast majority of cases, the CCNI can resolve consumer complaints in co-operation with the energy companies and the arrangements operate effectively to resolve the majority of disputes satisfactorily. Respondents also were on balance in favour that any changes should be effected under the current structures.”*
- 4.7 The Consumer Council notes that the preamble to the Directive states that its intention is to:
- “.....build on existing ADR procedures in the Member States and respect their legal traditions. Both existing and newly established properly functioning dispute resolution entities that comply with the quality requirements set out in this Directive should be considered as ‘ADR entities’ within the meaning of this Directive.”*

and

“This Directive should not preclude the functioning of existing dispute resolution entities operating within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers’ and traders’ interests.”

- 4.8 The Consumer Council would be content to continue to act as an ADR provider under this Directive, provided that the concerns about the proposals for implementation outlined in this consultation response are addressed.

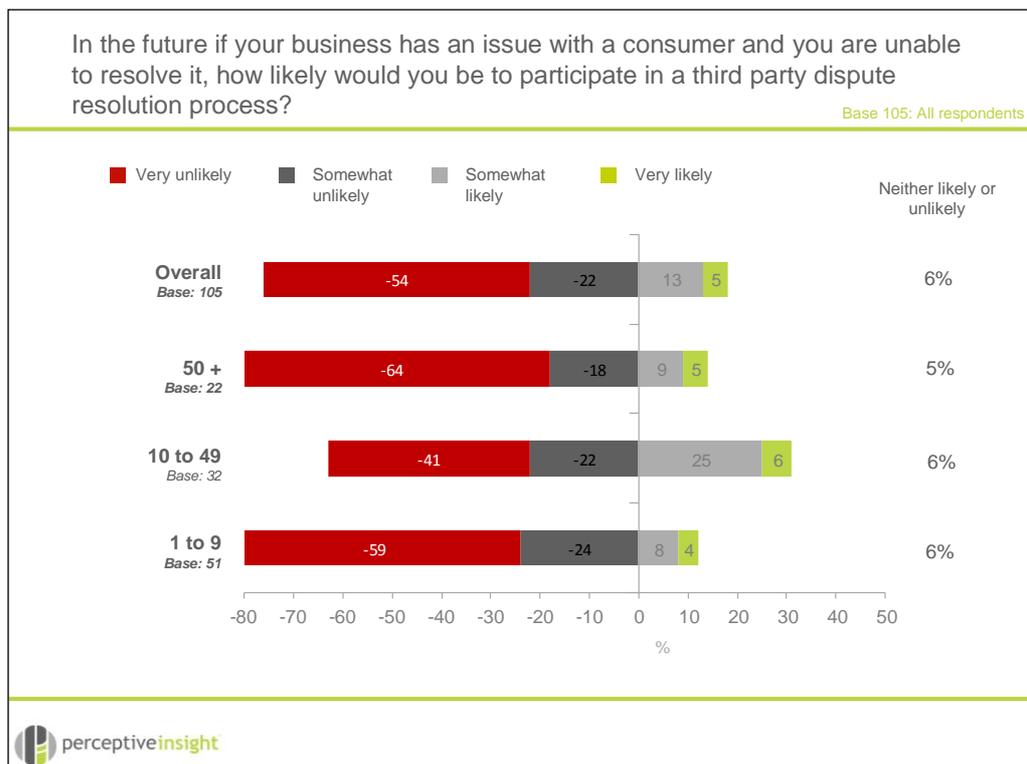
5. ADR for every consumer dispute

- 5.1 At the outset, it would be helpful to make clear whether the ADR process itself is intended to be a single, uniform approach regardless of the nature of the dispute or sector (ie ‘one size fits all’), a ‘tool kit’ of a range of interventions can that be used by an ADR provider depending on the circumstances of the dispute and the wishes of the parties (eg mediation or arbitration, a mediation process followed by arbitration if agreement is not reached within a specified time period, or including other forms of ADR such as neutral evaluation) or whether it will be left to the ADR provider to propose an approach to be agreed by the competent authority (and/or the sector or individual businesses). This has implications for the role of the competent authority (see section 7 below).
- 5.2 The Consumer Council notes that the ADR Directive does not make the use of ADR mandatory, but that ADR must be made available if both parties to a dispute wish to use it. We also note the evidence presented by BIS that *“a commitment to using ADR [is] a selling point”* for businesses. Given the clear link between good customer service and increased competitiveness, the Consumer Council believes that the use of ADR should be compulsory for a business where the consumer wishes to use it. In this way, increased take-up of ADR should help drive improvements in the economy.

Furthermore, we believe this approach will increase the likelihood of achieving the Directive’s aim of “strengthen[ing] consumers’ confidence in the internal market”.

5.3 There is already an element of compulsion on energy and water service providers within the Consumer Council’s current complaints handling role. Both the *Energy (Northern Ireland) Order 2003* and the *Water and Sewerage Services (Northern Ireland) Order 2006* give the Consumer Council powers to investigate disputes and to direct service providers to provide information to us. Legislative proposals that do not compel service providers to engage in ADR, at least in those markets where it is already a requirement, will therefore be regressive and not in keeping with the spirit of the Directive, which seeks to “build on existing ADR procedures”.

5.4 Importantly, as can be seen from the chart below, research on business proficiency conducted by the Consumer Council, which underpinned our report, *Back to Business* (published in January 2014), shows that very few businesses would voluntarily use ADR to resolve complaints.



- 5.5 However, even with an element of compulsion, considerable and concerted effort will be needed by consumer and business representative bodies to educate and inform consumers and service providers of the availability and merits of ADR to ensure reasonable levels of take-up. We also note the point made by the Legal Services Consumer Panel in its report, *Benchmarking the Legal Ombudsman*, published in November 2013, that “a higher public profile [for ADR services] would build consumer confidence and help to deter poor industry practice.”
- 5.6 We agree with BIS’s analysis that there is currently insufficient ADR provision to meet the requirement to make ADR available for every consumer dispute and that a ‘residual ADR scheme’ would be the simplest way of addressing the gaps. However, we would argue that a single UK-wide scheme is not necessarily the most appropriate mechanism. Rather, the Consumer Council proposes that Northern Ireland consumers and businesses would be best served by access to an ADR provider that understands the operation of local markets and is known and trusted by consumers and businesses in Northern Ireland. In this way, take-up of ADR can be maximised, which is the aim of the Directive and government policy.
- 5.7 While *Article 2* of the ADR Directive excludes “disputes between traders”, the Consumer Council is concerned that BIS appears to be excluding businesses acting as consumers of other businesses’ services from coverage. Currently the Consumer Council successfully provides complaint handling services to both individual members of the public and businesses and would wish to see this support continuing. This is particularly important in Northern Ireland where a majority of businesses are small and medium sized enterprises who may not be able to access legal or other forms of support to resolve disputes. The Consumer Council’s research published in *Back to Business* found that only a third were aware of a trade association which represented and dealt with problems for their industry/business type.

- 5.8 The consultation document seeks views on whether claim and settlement values should have upper and lower limits between which ADR will be available. The Consumer Council believes strongly that there should be no lower limit. In our experience, often all a complainant wants is an apology from a business and ADR is an ideal platform to secure this level of redress and changes to systems and policies. Furthermore, we are conscious that in respect of the current ADR mechanism for disputes involving postal services, the values of these tend to be relatively low and may fall below such a threshold if it is decided to set one and therefore such a proposal risks undermining the current Postal Redress Service (POSTRS). Again, this could potentially be a regressive measure, at odds with the spirit of the Directive.
- 5.9 We would support the setting of an upper limit, as currently applies in some sectors (eg financial services and telecommunications) if there is evidence that the absence of a cap on the level of compensation payable is likely to deter the take-up of ADR. This would be unlikely to be an issue if its use is made mandatory for businesses.
- 5.10 The Consumer Council agrees that ADR should be provided free at the point of use for consumers and that service providers should fund the provision of the ADR mechanism in some way. Currently, much of the Consumer Council's complaint handling is funded from industry levies and we believe that this approach should continue in regulated sectors. However, the funding of ADR in other sectors needs careful consideration to ensure that this does not compromise the independence and impartiality of ADR providers. If businesses directly fund ADR provision, and particularly if they are able to choose between ADR providers, then this could have implications for the level of trust that consumers will place in ADR. Furthermore, measures may need to be put in place to protect ADR providers from undue influence being placed on them by businesses because of the commercial nature of the transactions between them.

6. Better signposting for consumers – a complaints “helpdesk”

- 6.1 The Consumer Council agrees that a complaints helpdesk will be important in ensuring that consumers and businesses receive guidance in respect of complaints resolution and are signposted to the appropriate ADR provider. Currently, the Consumer Council, the Trading Standards Service (through its Consumerline) and local advice centres all provide such a service to consumers in Northern Ireland. The Consumer Council sees no reason why these bodies should not also signpost consumers to the appropriate ADR provider for their complaint, without the need for an additional body.
- 6.2 Such a helpdesk would be a valuable source of intelligence on the types of consumer issues being raised and awareness of ADR. Therefore, it would be important that the helpdesk is housed within, or has a relationship with, a public body with responsibility for policy development in respect of consumer rights and consumer education. In this way, guidance on how to address recurrent problems could be published. Depending on issues of confidentiality, it may also be appropriate for this body to pass on information about unlawful practices and/or ‘repeat offenders’ to the Trading Standards Service who may wish to investigate matters.

7. Appointing a competent authority

- 7.1 Clearly the role of the competent authority in certifying and quality managing the work of ADR providers is a crucial one. Given that consumer representation is devolved in Northern Ireland, we would argue that this function should be managed locally to oversee the local provision of ADR where feasible.
- 7.2 While there may be merit in regulators taking on this role for their sector, this might not be appropriate for Northern Ireland where, arguably, a single competent authority might be more efficient and ensure consistent practice across sectors. Otherwise, an organisation such as the Consumer Council that provides complaint handling services across several sectors may find itself working to different quality standards, which risks inefficiencies.

8. Procedural rules for refusing disputes

- 8.1 The Consumer Council has some reservations about the proposed application of the grounds for ADR providers refusing to handle disputes, as set out in the Directive. We believe safeguards should be put in place in respect of the criterion for barring cases where *“the consumer has made no attempt, in the first instance, to resolve the complaint directly with the business”*. While it is clearly right that a service provider should have the opportunity to address a complaint in the first instance and learn from any shortcomings, vulnerable consumers might require additional support with the handling of their complaint and therefore should have access to the ADR provider from the outset. The need for such protection is already recognised in the complaints handling processes that the Consumer Council deals with.
- 8.2 We are also aware of the risk that some service providers might take an unreasonable amount of time to deal with a dispute internally, or put in place cumbersome processes, which might deter complainants from continuing to pursue their complaint. We therefore recommend that a reasonable time limit is placed on the handling of complaints internally before the complainant has the right to refer the matter to ADR (such a provision will only be effective if ADR is mandatory on the service provider).
- 8.3 Also, for the reasons outlined in paragraph 5.8, the Consumer Council does not believe that a minimum pre-specified value of a claim should prevent a matter being pursued by a complainant through ADR.
- 8.4 Lastly, the Consumer Council would like to see, as an added safeguard, a mechanism for a complainant to appeal a decision by an ADR provider not to handle their complaint. This appeal function might usefully be provided by the competent authority (see section 13).

9. Information requirements

- 9.1 The Consumer Council agrees strongly that the availability of ADR and the contact details of the relevant provider should be publicised clearly by service providers as a matter of course, before any dispute occurs.

10. Online Dispute Resolution Contact Point

- 10.1 The Consumer Council recommends that the proposed arrangements for the ODR Contact Point are reconsidered. BIS proposes that this deals only with disputes involving online purchases where the parties are in different EU countries. However, we are concerned that it will not always be apparent to consumers where the service provider is based.
- 10.2 Furthermore, we see merit in the ODR Contact Point being housed within the complaints helpdesk, which presumably will be dealing with enquiries made online, by telephone and through written correspondence. This would help rationalise the number of bodies involved in the delivery of ADR from the outset and should help ensure that those consumers wishing to make a complaint about an online purchase are referred to the appropriate ADR provider.

11. Impact on limitation and prescription periods

- 11.1 The Consumer Council is not aware of specific legislation that contains time limits for bringing cases to court that would need to be amended to facilitate the proposed eight week extension to the current six year time limit. However, we note that Northern Ireland legislation implementing the EU Mediation Directive requires amendment.

12. Scope of ADR: in-house mediation

- 12.1 The Consumer Council agrees strongly that ‘in-house’ mediation should not form part of implementation of the UK’s obligations under the Directive. No matter how professionally delivered, it will not be perceived by consumers as being independent and impartial and risks undermining the credibility of ADR. However, there is no reason why in-house mediation should not form part of a service provider’s initial process for handling a complaint raised with it in the first instance, as long as it is made clear that the consumer has the right to refer the dispute to an independent ADR provider if the matter has not been resolved satisfactorily.

13. Binding decisions

- 13.1 The Consumer Council agrees that decisions made by ADR providers should be binding on both parties and that this should apply to all disputes not simply “*if this model suits [a] particular sector*” as suggested in the consultation document. However, as a safeguard, there should be an appeal mechanism.
- 13.2 While we recognise that the non-judicial nature of ADR means that decisions should be final and binding, there should be an opportunity to appeal in certain prescribed circumstances in the interests of natural justice. We draw your attention to the test of ‘Substantial Injustice’ as defined in the Report of the Departmental Advisory Committee on Arbitration Law – the official guide to the Arbitration Act 1996, which states:

“The test of a substantial injustice is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action.”

It continues:

“Having chosen arbitration the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice.”

- 13.3 The option of an appeal might also be appropriate where the arbitral decision may have somehow contravened human rights or European Community law.
- 13.4 We propose that any appeal mechanism is provided by the relevant competent authority.
- 13.5 The consultation document is silent on the enforcement of agreements and decisions made to resolve disputes under the ADR Directive. Clearly effective legal enforcement is crucial to the success of ADR and the legal remedies should be made clear and be accessible to all parties to disputes.

14. Applying the ODR Regulation to disputes initiated by businesses

- 14.1 The Consumer Council agrees with BIS’s proposal that the use of ODR Regulation (and indeed the ADR Directive) should not extend to disputes initiated by businesses against consumers.

15. Simplifying the provision of ADR

- 15.1 The consultation document seeks views on a longer term strategy to simplify the ADR landscape. The document notes, *“Some consumers find that their particular dispute may be covered by multiple ADR providers and it is not always clear to the consumer who to go to for help.”* The Consumer Council agrees. We believe that, rather than this being a longer term aspiration, implementation of the ADR Directive should build on existing arrangements rather than introduce new structures or bodies.

15.2 As noted in section 5, making ADR mandatory on businesses would in itself simplify matters, so that consumers and businesses would know that all unresolved disputes could be resolved through ADR. We do not believe that this proposal should be a longer term aspiration, as highlighted in the consultation document, but a practical measure that can and should be implemented from the outset. Failing this, there should be no regression where ADR is currently mandatory.

16. Bespoke legislation for Northern Ireland

16.1 It is the Consumer Council's understanding that the UK is planning to implement the ADR Directive through Regulations made under the European Communities Act 1972. Given that these Regulations will likely require amendment of primary legislation that cuts across several Northern Ireland government departments, NI Executive agreement will be necessary. However, the Consumer Council believes that, given the differences in the consumer protection landscape and regulated markets between Northern Ireland and Great Britain, Northern Ireland specific legislation should be used to implement the ADR Directive here. This would enable the Northern Ireland Assembly to shape the legislation to meet the needs of the local economy and enhance the proposals made by BIS along the lines outlined above.

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Appendix 1

Consumer Council for Northern Ireland

Enquiries and Complaints Handled in 2013–14

Nature of Complaint	Enquiry	Stage 1 Investigation	Stage 1 Referral	Stage 2 Complaint	Total
Air	560	8	4	225	797
Bus	89	11	18	30	148
Electricity	1,231	31	31	50	1,343
Ferry	10	1	0	2	13
Natural Gas	184	8	3	6	201
Other Energy	30	0	0	0	30
Rail	9	0	8	10	27
Water	282	33	17	41	373
General	542	0	0	0	542
Grand Total	2,937	92	81	364	3,474

An **Enquiry** is a request for information or advice about any of the areas we cover within our remit.

A **Stage 1 Investigation** is an instance where the consumer has not yet contacted the service provider; however the CCNI believes it is in the consumer's best interests if we raise the complaint on their behalf (for example, if the consumer is vulnerable).

A **Stage 1 Referral** is when the consumer has not contacted the service provider in the first instance to give them the opportunity to resolve their complaint. The complaint is therefore forwarded to the service provider directly and they are asked to respond to the consumer as per their complaints procedure.

A **Stage 2 Complaint** is where the consumer has contacted the service provider but they remain dissatisfied with the response received or they are yet to receive a response after a reasonable period of time has elapsed.



The Consumer Council

Making the consumer voice heard and making it count

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