

# Consultation response: Dispute resolution in England and Wales: call for evidence.

**Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.**

Which? welcomes the Ministry of Justice Call for Evidence on Dispute Resolution in England and Wales and the opportunity to provide evidence related to approved consumer Alternative Dispute Resolution (ADR) schemes. Our response is based on Which? investigations, a Which? review of information published by approved ADR providers in nine sectors in 2019/2020 and interviews with stakeholders<sup>1</sup> and a consumer survey conducted in 2021.

## Summary

ADR is an important part of the consumer enforcement regime and can provide consumers and businesses with an accessible and affordable alternative to court proceedings. ADR schemes can also play an important role in improving business practices which has a beneficial impact on consumers and responsible businesses.

Where ADR works well it gives consumers access to justice and compensation that they may have been denied had their only option been the more expensive and, for many consumers, daunting prospect of taking a company to court. Research shows that consumers who are able to access ADR, generally receive significantly more compensation compared to what they were offered before the ADR process.<sup>2</sup>

However, ADR is all too often not available to consumers or fails to meet their needs in other ways. As a result many consumers cannot seek redress or are frustrated by the process, leaving them exposed to harm and unable to confidently resolve their complaints. The following issues in particular need to be addressed:

**Large gaps in ADR provision** There are significant gaps in ADR provision including in key sectors such as aviation, some parts of the property sector, retail, motor and home

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<sup>1</sup> [Are Alternative Dispute Resolution Schemes Working for Consumers](#), Which? May 2021.

<sup>2</sup> Resolving consumer disputes: Alternative Dispute Resolution and the court system, Department for Business, Energy and Industrial Strategy, 2018

improvements. This is because the schemes in these sectors are voluntary and many businesses have chosen not to join.

**Low consumer awareness and substantial confusion** There are low levels of awareness amongst consumers about the availability of ADR<sup>3</sup> as well as substantial confusion about the overlapping and partial coverage of ADR in the UK.

**Inconsistent and limited oversight** The ADR Regulations 2015 created a legal framework for the oversight of approved ADR schemes by 'competent authorities'. However, competent authorities in regulated sectors tend to have enhanced powers and resources resulting in more effective oversight.

**Time taken to resolve a dispute.** The ADR process has built in delays from the start and the time allowed for resolving a dispute is unclear and exceeds most consumers expectations.

**Patchy compliance.** Although reliable data on compliance levels is difficult to come by, there is some evidence that compliance with ADR decisions in both regulated and non-regulated sectors is patchy.

**A lack of accountability and assurance about independence.** It is important that consumers and businesses trust ADR to provide an independent and fair process. Our research suggests some ADR schemes could do much more to demonstrate their independence.

**Multiple providers can cause unintended consequences.** Where there are multiple providers in a sector we are concerned that this can create pressure on providers to make decisions about processes and cases that favour businesses over consumers.

**Limited use of data to drive improvements.** ADR schemes have a large amount of rich data about performance and complaints that should be shared widely with businesses, regulators, other enforcement bodies and consumer advocacy groups as a tool to drive improvements in business practice, raising standards for all consumers.

## Introduction

ADR is an important part of the consumer enforcement regime and should provide consumers and businesses with an accessible and affordable alternative to court proceedings. It is typically used when the consumer and business have failed to resolve a dispute themselves through a complaints process and need the input of an independent third party. Ideally the process is free for the consumer and, in the case of arbitration, the business agrees to abide by the decision. In addition to resolving individual disputes, ADR schemes also have an important role in improving consumer markets by collecting data on

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<sup>3</sup> Modernising consumer markets Citizens Advice formal consultation response, Citizens Advice, 2018.

consumer issues and engaging businesses, consumer groups and regulators to drive improvements in business practices that benefit all consumers.

Consumers should always have the option of taking a case to court; however ADR should be a practical alternative, particularly at a time when the small claims courts are facing unprecedented delays with cases taking almost a year to come to trial.<sup>4</sup> These delays are partly the result of the COVID pandemic but the system was already suffering from long delays before the pandemic struck.

The intervention of a third party to help resolve a dispute between a business and a consumer is particularly important given the asymmetry in information and resources in some transactions. It may also become increasingly important in helping consumers address some of the complexity in modern transactions.

Where consumers are able to access ADR, most will receive significantly more compensation compared to what they were offered before the ADR process.<sup>5</sup> This is money they would not have received without ADR. However, ADR is all too often a confusing experience for consumers. As a result many consumers don't know how to seek redress or are put off by the complexity, leaving them exposed to harm and unable to confidently resolve their complaints.

## Questions

### **1. Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?**

A recent Which? survey found that only 28% of respondents said they were likely to approach an Ombudsman or ADR provider if they were unable to resolve a dispute with a company and only 14% had actually used an ADR service to resolve a dispute.<sup>6</sup>

The main drivers of consumers' motivation and engagement in ADR are likely to be availability, awareness and whether the process meets consumers' expectations in terms of ease of use, the time required and trustworthiness.

**Availability:** Consumers' engagement with ADR is largely determined by the availability of ADR schemes. For example, ADR is generally available in regulated sectors as there are mandatory schemes in these sectors, however aviation stands out as a regulated sector where ADR is not mandatory and as a result a number of airlines have chosen not to belong

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<sup>4</sup> Small claims taking almost a year to come to trial, The Law Society Gazette, 2020

<sup>5</sup> Resolving consumer disputes: Alternative Dispute Resolution and the court system, Department for Business, Energy and Industrial Strategy, 2018.

<sup>6</sup> Unless otherwise referenced all figures from a recent Which? survey used in this response are from a survey conducted by Yonder, on behalf of Which? 2145 UK adults were surveyed online between 13<sup>th</sup> and 15<sup>th</sup> August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status.

to an ADR scheme. In unregulated sectors the availability of approved ADR schemes is much more patchy, difficult to navigate and ADR is often not available.

If ADR was more widely available in consumer sectors, research suggests that significantly more consumers would use the service. For example the recent government consultation on Reforming Competition and Consumer Policy<sup>7</sup>, evaluates sectors according to four criteria: the volume and value of consumer problems, the overall consumer experience and the structure of the market. This analysis highlights a number of sectors where it is not mandatory for companies to belong to an ADR scheme but where there are likely to be a higher than average number of disputes for example house and garden maintenance, vehicle maintenance and repair services, postal services and second hand cars.

**Awareness:** In a recent Which? survey around a quarter (23%) of consumers said that they were not aware of ADR and Ombudsman services and nearly half (46%) said that whilst they are aware of these services they wouldn't know how to use them.

Our answer to question 2 notes some of the issues that consumers experience in relation to the length of time required and trustworthiness.

In addition to the barriers that the general population have to overcome to access consumer ADR; the age, income and educational profile of people using consumer ADR<sup>8</sup> suggests that older people with higher educational qualifications and income tend to access ADR services more often. This underlines the importance of ensuring ADR is made more accessible to all consumers.

## **2. Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?**

There are a number of steps that could be taken to enable and motivate consumers to participate in dispute resolution services.

**Availability:** As noted above one of the main impediments to consumer engagement with ADR is the lack of ADR provision in some sectors. The most effective means to address these gaps is to make ADR mandatory for businesses in these sectors. We support the government's proposals in their consultation on the Reform of Competition and Consumer Policy<sup>9</sup> to introduce mandatory ADR in used car sales, used car maintenance and home improvements and would strongly recommend the introduction of mandatory ADR in the aviation sector, parts of the property sector that are not currently covered by mandatory ADR, and the holiday sector. In other sectors the government should encourage businesses to join ADR schemes with the option to make it mandatory if required.

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<sup>7</sup> [Reforming Competition and Consumer Policy](#), BEIS, October 2021.

<sup>8</sup> Resolving consumer disputes: alternative dispute resolution and the court system. Department for Business, Energy and Industrial Strategy, 2018.

<sup>9</sup> [Consultation on the Reform of Competition and Consumer Policy](#), BEIS, 2021.

**Awareness:** Consumer advice services provided by Citizens Advice, Which? and Resolver have an important role to play in making consumers aware of ADR schemes, however in the consumer sector the most effective means of informing consumers is likely to be better signposting by companies. This ensures consumers have the information they need at the time when they need it. In sectors where ADR is mandatory, regulators generally require companies to provide this information in their general communications and when consumers make a complaint to the company.

This approach also has the support of consumers. A Which? survey showed that half of consumers think that companies should include information about ADR in all customer communications (51%), the same percentage say that companies should include information in all communication relating to a complaint (51%). A further half (50%) say that companies should provide information about ADR on their website in the section about complaints. All in all, 84% of the sample have expectations that companies should include this information somehow.

This information could be supplemented by an independent portal with information about the ADR schemes that are available and how ADR works.

Currently companies are only required to provide information on their website and, following exhaustion of its internal complaints procedures, to inform the consumer on a 'durable medium' of the name and address of a competent ADR entity. However there is no requirement for the company to engage with this provider.

**Free for consumers to use:** In a Which? survey a quarter (24%) of consumers say that they wouldn't be willing to pay a £10-£20 charge to file a complaint, rising to 32% of those in social class DE. It should also be noted that there is no evidence that ADR schemes are receiving a large number of frivolous claims that might justify the introduction of a nominal charge. In fact, a significant proportion of UK consumers are quite reluctant to make complaints.<sup>10</sup>

**Timetable:** The 8 week rule that prevents a consumer bringing a case to ADR, unless they have received a deadlock letter, is too long and risks discouraging consumers from seeking to resolve a complaint. A recent Which? survey found that 8 in 10 (81%) consumers think that a company should be given up to 4 weeks to handle a complaint before a consumer is allowed to take it to an ADR scheme. Within this group almost half (49%) would like to see the period to be 3 weeks or less.

The ADR regulations should also significantly reduce the time allowed for reaching a decision. Our survey found that nearly half (46%) of consumers think that less than 6 weeks is a reasonable length of time for the ADR scheme to reach a decision once they have received a complaint. It is important that this period should also include the time taken by the ADR scheme to complete the case file. ADR providers currently have different policies

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<sup>10</sup> [Consumer Action Monitor Report](#), Consumer Ombudsman, 2020.

on whether to include this period when they report, and this can give a misleading impression as to how long it takes to resolve a dispute. For example, figures from AviationADR suggest they take an average of 76 days to complete a case, however information provided in a review conducted on behalf of the CAA show that in 2019 it took an average of 50 days from a complaint being made to the full file being received. So from the point of view of the consumer the average time cases took was more like 126 days, rather than 76.<sup>11</sup>

If companies require extra time for longer complaints this should be requested and agreed by the ADR scheme in advance and records kept to identify if businesses are abusing the system by repeatedly asking for extra time. Longer deadlines may be allowed for sectors if there is a valid reason, for example where an independent assessment of work is required in order to inform a decision.

**Trust:** It is important that consumers and businesses trust ADR providers to provide an independent and fair process. A Which? Survey found that consumers are most likely to say that they would be reassured that a resolution scheme is unbiased, independent and can be held to account if the scheme had to meet national standards for consistency and fairness (64%) and if there were an independent body responsible for approving and reviewing each scheme (61%). This underlines the importance of strengthening the ADR regulations that set high standards and ensuring ADR schemes have effective competent authorities that are responsible for approving applications and monitoring standards.

Independent boards or committees can also play a critical role. For example the Motor Ombudsman has recently established an Independent Compliance Assessment Panel with clear rules on the duties and composition of the panel. Detailed reports and biographies of panel members are easily available on their website. A requirement that schemes are run by fit and proper persons will also guard against the misuse of schemes. Ultimately the competent authority should be responsible for ensuring the independence of all providers.

**3. Some evidence suggests that mandatory dispute resolution gateways, such as the Mediation Information & Assessment Meeting (MIAM), work well when they are part of the court process. Do you agree? Please provide evidence to support your response.**

Which? has not looked into the MIAM, however most, but not all, regulated consumer sectors in the UK have mandatory ADR. This requires companies to belong to an ADR scheme so that if a consumer has a dispute with a company in that sector they can take their dispute to ADR if they wish to. Although all consumers have the right to take their case to the small claims court, the availability of ADR should make this unnecessary in most cases. For example:

- Most regulated sectors, including financial services, energy and telecoms have one or two schemes available with membership mandatory for businesses in that sector. This ensures consumers have access to a scheme that can deal with most disputes.

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<sup>11</sup> <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=10219>

- In the rail sector, the industry regulator the Office of Rail and Road (ORR) introduced a licence condition in 2019 for train and station operators mandating membership of the ombudsman. Network Rail is also required to be a member.

However outside of most regulated sectors ADR provision can be patchy at best and as a result consumers are often required to go to a small claims court to resolve a dispute.

- The aviation sector stands out among regulated sectors for not having mandated membership of an Ombudsman scheme. The impact of this was starkly illustrated when Ryanair withdrew from AviationADR after the scheme made decisions the airline did not like. RyanAir rejoined AviationADR in June 2021 after the CAA made changes to the ADR regulations. Other airlines have also decided not to be members of an ADR scheme, leaving millions without access to ADR.<sup>12</sup> The CAA has recognised 'participation in ADR is still well short of the CAA's ultimate goal, which is for full coverage across the sector, and as a result a significant proportion of consumers are still not covered by ADR'.<sup>13</sup>
- In the property and lettings sector ADR is only mandatory for some providers such as estate agents, letting agents and property managers. The requirement is enforced by local authorities who can impose a fine of up to £5,000. However this is a large, complex sector where there are many businesses trading, and their activities are not always easily defined creating confusion for local authorities and consumers. It is notable that Ombudsman Services withdrew from this market stating 'Redress in the housing sector is a really confusing picture for all involved.. ... We are ceasing what we're currently doing in the housing sector ... Rather than continue to offer a broken solution to a broken market'.<sup>14</sup>
- In other non-regulated sectors, there are often a number of different ADR providers but membership is not mandatory, resulting in a confusing and potentially frustrating experience for consumers. Voluntary membership often means that ADR is not available to consumers. This is a particular concern in key sectors where transactions are often high value and complex including home improvements, retail, and car sales and repairs. The Consumer Ombudsman is one of the ADR providers offering services in sectors where participation is voluntary. They received 5,600 complaints in 2017, but businesses agreed to participate in only 6% of cases.

## **5. Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?**

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<sup>12</sup> Airlines including Jet2 (over 14 million passengers in 2019), Aer Lingus (11.6 million passengers in 2019), Emirates and Ryanair (152 million passengers in 2019) have chosen not to be part of these ADR schemes. RyanAir rejoined AviationADR in 2021.

<sup>13</sup> Consumer complaints handling and ADR: CAA policy statement and notice of approval criteria for applicant ADR bodies, Civil Aviation Authority, 2016.

<sup>14</sup> New dialogue launched into Ombudsman for housing, Ombudsman Services, 2018.

Although consumers should always have the option of taking their case to court this is unlikely to be their preference due to the financial costs and time involved. Research conducted by BEIS in 2018 found that the most common reason given by consumers who took their dispute to court rather than using ADR was that the trader refused to participate (70% of consumers who didn't use ADR beforehand).<sup>15</sup> Many more consumers will have simply dropped their case, rather than taking a business to court.

**6. In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?**

In answer to question 2 we highlighted the need for companies to signpost the availability of ADR in their general communications and when a consumer raises a complaint. In regulated sectors this is often made a requirement. In some cases this includes detailed requirements about how information is communicated to consumers including the wording that should be used.

The availability of ADR that is free to the consumer and a process that is easier to follow than if the case is taken to court are also incentives for the consumer to resolve their dispute outside of the court system.

**8. Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?**

It is difficult to compare outcomes, however in a recent Which? survey only 11% of respondents said they would consider making a claim against a company using a small claims court if they were unable to resolve the complaint with the company. This compares with 28% who said they would contact an Ombudsman.

A clear majority of respondents also indicated that they would be unwilling to pay a significant fee in order to escalate the complaint with 24% saying they would not be willing to pay any fee at all. These results suggest that, in these cases, ADR is offering consumers a route to justice that would not be available through the court system.

Which? does sometimes hear of cases where consumers were not satisfied with the outcome of the ADR process and chose to take the case to court where they received a judgement in their favour.

**9. Do you have evidence of where settlements reached in dispute resolution processes were more or less likely to fully resolve the problem and help avoid further problems in future?**

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<sup>15</sup> Resolving Consumer Disputes. Alternative Dispute Resolution and the Court System, Department for Business, Energy and Industrial Strategy, 2018.

Consumer ADR schemes could have an important role in avoiding future disputes if they were required to share the data they collect about consumer complaints and make recommendations to help businesses resolve complaints themselves or address recurring issues that are leading to disputes.

The ADR Regulations<sup>16</sup> require schemes to publish specific information and recommendations to help companies in that sector identify and address problems in their industry. However, several ADR providers are failing to meet even this basic requirement.

This demonstrates that the ADR regulations are neither detailed enough nor consistently enforced to deliver the sort of reporting that could be used to drive improvements. This leaves it to individual regulators and competent authorities to mandate or agree enhanced reporting requirements that go beyond these minimum requirements.

In addition to the publishing of data, some sectors have developed forums through which the ADR scheme, the regulator, consumer groups and businesses can analyse the data and discuss remedies. The following examples highlight good practice in this area.

- The Financial Ombudsman Service has a statutory duty to disclose information to the FCA that in the opinion of FOS 'would or might be of assistance to the FCA in advancing one or more of the FCA's operational objectives'.<sup>17</sup> It's important to note that this statutory tie-in to the regulator's operational objective is key as one of the FCA's objectives to 'protect consumers'.
- In the energy sector, a tripartite agreement between the Ombudsman, Citizens Advice and Ofgem has created a process of sharing data to identify market trends.<sup>18</sup> While this arrangement is part of a formal agreement between the players involved, and seems to work well because the Energy Ombudsman (Ombudsman Services) is the single ADR provider in the sector, there is no reason why this could not be adopted for other sectors.
- The Motor Ombudsman publishes detailed case studies on its website covering new cars, sales, service and repair and vehicle warranty disputes. This helps deliver transparency and learning for consumers and businesses. Its independent Complaints Assessment Panel, includes Citizens Advice and other independent consumer representatives and produces a 56-page annual report with detailed data analysis and a list of areas identified for improvement in the sector.
- The National Conciliation Service provides some of the most detailed and helpful annual activity reports of all approved schemes in the non-regulated sectors with not only details of complaints data but also of work to raise public and industry awareness of ADR, areas of improvement and areas where complaints indicate systematic and serious problems for consumers.
- The report that CDRL provides to the CAA identifies systematic and significant problems for consumers and makes some clear recommendations for improvement.

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<sup>16</sup> The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, Reg 11(2) and (3), UK Government, 2015.

<sup>17</sup> Financial Services and Markets Act s232A, UK Government, 2000.

<sup>18</sup> How Citizens Advice monitors energy company performance, Citizens Advice, 2018.

## 10. How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?

The European Commission produced a report in 2019 on the application of the Directive on alternative dispute resolution for consumer disputes online dispute resolution for consumer disputes that includes some case studies on how EU countries implemented the directive.<sup>19</sup> The UK International Consumer Centre will also have some insight as to the operation of dispute resolution mechanisms in other countries.<sup>20</sup>

Within the UK the publication of operational statistics and the results of customer satisfaction surveys conducted by the ADR scheme can give an indication of a scheme's performance. It is important that customer surveys seek responses from customers who have had their case considered and those that weren't. Collecting data on the age, income, educational qualifications and other relevant characteristics can also help to identify if a service is meeting different needs.

- Good examples include The Motor Ombudsman Scheme (TMO) that publishes the results of an annual survey of consumers and businesses measuring awareness and satisfaction of the services that the TMO provides. The Property Ombudsman also publishes the results of a regular consumer survey.
- The Rail Ombudsman is a relatively new service and publishes annual 'consumer experience' reports.<sup>21</sup> Although the results were poor in a number of key areas, it does demonstrate how monitoring effectiveness is an important way to identify where further work is urgently needed.
- In contrast, we could not find any results of recent consumer surveys from ADR schemes in the aviation sector. The Aviation Adjudication Scheme has not published the results of any surveys and AviationADR has only published very basic information in graph form from past surveys, but none recently.<sup>22</sup>

It is important that consumers and producers trust ADR schemes to provide an independent and fair process. It is therefore crucial that ADR schemes work hard and transparently to make sure that the risks of perceived or actual bias are removed or at least minimised. In

<sup>19</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, European Commission, 2019

<sup>20</sup> [www.ukecc.net](http://www.ukecc.net)

<sup>21</sup> Consumer Experience Report, The Rail Ombudsman, 2019. For example, of customers whose cases were dealt with by the Ombudsman 37% rated their experience as 'Fairly / Very Poor'. Only 53% rated the Ombudsman's understanding of the complaint as 'Good / Very Good'. And on key indicators only 49% found the Ombudsman 'Impartial', 46% 'Fair', and 43% 'Balanced in its decisions'. There was also significant dissatisfaction that too many complaints were outside the Ombudsman's remit

<sup>22</sup> Aviation ADR Passenger Feedback, Aviation ADR, 2019.

answer to question 13 we also raise concerns about the impact of competition in sectors with multiple ADR providers and whether this puts pressure on providers to find cases in the companies' favour.

The ADR Regulations do not specifically require approved bodies to have an oversight board with independent representation within its structure, and only require specific representation of consumer interests and trader interests when the ADR provider uses a particular operating model, which most do not have. As a result, most ADR schemes are not required to have any formal independent input. Two examples of good practice include:

- The Motor Ombudsman (TMO) has an Independent Compliance Assessment Panel (ICAP) which meets twice a year to discuss cases covering its four Codes of Practice. Only a quarter of individuals on the Panel may be employed within the automotive sector. Biographies of those on the panel are published. The Panel is designed to 'verify that the outcomes and final decisions reached by the adjudicators and ombudsman respectively are fair, reasonable and impartial.' The ICAP reports annually and its reports are easy to find from the TMO website home page. They include an overview of the cases that have been reviewed by the Panel, a performance summary, results of consumer satisfaction surveys, and comments from ICAP members. It also includes a list of areas identified for improvement.
- The Property Redress Scheme (PRS) has an 'Advisory Council' which it says can advise on all matters relating to the running of the scheme and refer matters to the Head of Redress and the PRS Board. The Council members are listed in the PRS Annual Report. This contains biographies which ensures transparency about whether they have a consumer advocacy background and whether they are independent of the sector. While the Annual Report does include a number of case studies it does not give any detail about specific activities or decisions made by the Council.<sup>23</sup>

**11. What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.**

In the consumer sector, making ADR mandatory and requiring companies to clearly signpost the availability of ADR is likely to be the most effective way to increase the uptake of dispute resolution processes. As highlighted in answer to question 1 there is analysis that suggests that there are a number of sectors with relatively high value transactions and a high number of complaints where ADR could play a valuable role in resolving disputes. The government has recently proposed to introduce mandatory ADR in used car sales, used car servicing and home improvement sectors and this has the potential to deliver significant benefits for consumers. However, there are a number of other sectors where mandatory ADR should be introduced including filling gaps in ADR provision in the property sector and the holiday booking sector.

The aviation sector particularly stands out as a regulated sector that does not have mandated membership of an ADR scheme. The impact of this was starkly illustrated when

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<sup>23</sup> Annual Report, The Property Redress Scheme, 2019.

Ryanair withdrew from AviationADR after the scheme made decisions the airline did not like. Other airlines have also decided not to be members of an ADR scheme, leaving millions without access to ADR.<sup>24</sup>

The failure of ADR in this sector is also illustrated by the number of consumers who are bringing cases to court. In 2020 Which? investigated the number of consumer airline disputes that were being taken to court and found that one claims management company had more than 3,200 cases issued against two airlines. The same solicitors said it had another 6,000 cases against the same airlines that it hasn't brought to court because there are already so many cases waiting. We understand the Ministry of Justice set aside additional resources to cope with the number of cases and brought in paper court hearings to speed up the process, however one airline refused to accept this and continued to demand that their cases were heard in person.<sup>25</sup>

More broadly there is a strong case for ADR to be available in all consumer sectors and the government should be looking to increase ADR provision by encouraging companies to join ADR schemes whilst reserving the right to make ADR mandatory where necessary.

### **13. Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?**

Which? is concerned that there may be negative impacts and unintended consequences where there is more than one ADR provider in a sector and therefore, where the government has introduced mandatory ADR or where businesses are establishing a voluntary scheme, they should either require that there is a single ADR provider for that sector or work towards that position. Due to the particular characteristics of ADR, we believe a single ADR provider is more likely to result in a service with high standards that works for both businesses and consumers. This position is explained in more detail below.

The market for ADR is characterised by having providers on the supply side and firms on the demand side. Although consumers use ADR services when in dispute with a firm, they do not form part of the market. The demand for ADR can therefore be described as 'unilateral' in the sense that consumers have to use the provider chosen by the firm, and as such they do not form part of the demand for which suppliers will compete.<sup>26</sup>

Effective competition in any market has the potential to reduce costs and improve service. However, in the case of multiple ADR schemes with unilateral demand it is not clear that reduced costs or improved service for firms would translate into better outcomes for

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<sup>24</sup> Airlines including Jet2 (over 14 million passengers in 2019), Aer Lingus (11.6 million passengers in 2019), Emirates and Ryanair (152 million passengers in 2019) have chosen not to be part of these ADR schemes.

<sup>25</sup> Airlines on trial How EasyJet, RyanAir and Tui are losing in front of judges but still beating the system, May 2020, Which?

<sup>26</sup> The ideas of unilateral and bilateral demand are explored in detail in Wagner (2013), [Dispute resolution as a product: competition between Civil Justice Systems](#)

consumers. Indeed there is good reason to suggest that in a situation where the goals of the claimant and the firm are by their nature in opposition, competition which seeks to attract firms could lead to worse outcomes for consumers.

Firms' incentives with ADR provision are to minimise their costs. In the case of consumer disputes and ADR, these costs comprise two parts:

- The total amount of redress paid to consumers in settled disputes
- The handling cost per case

This is confirmed in some of the empirical research, which finds evidence of ADR schemes competing both on efficiency and bias.<sup>27</sup>

**Impact on case decisions:** In sectors where firms are able to choose which ADR provider they use, there is an incentive for them to choose a provider that they perceive to be more sympathetic to their case. There is evidence of this 'forum shopping' behaviour taking place in civil justice systems where one side of a legal case is able to choose the court in which it is heard.<sup>28</sup> While there appears to be little research on this phenomenon in consumer ADR systems, our analysis of the aviation industry, where there are two competing providers, suggests there may be cause for concern. For example, when easyJet moved from the Aviation Adjudication Scheme to AviationADR, the number of cases involving easyJet that were upheld fell from an average of 79% in the last six quarters it was a member of the Aviation Adjudication Scheme to 51% in the first six quarters it was a member of Aviation ADR.<sup>29</sup>

**Impact on cost/efficiency:** ADR schemes should be seeking to find a fair outcome for both the consumer and the firm, at a reasonable cost to both parties. The simplest way to avoid incentives that undermine these objectives is to have a single provider of ADR in an industry, appointed by a competitive process run by an authority representing both the consumer and business interest. Such a process could be run by sector regulators, the CMA or BEIS itself. By appointing a provider through a competitive process, there will also be incentives for the appointed provider to run an efficient service.<sup>30</sup>

A single provider would also deliver benefits in relation to:

- **Gathering intelligence.** A single provider will be much better placed to gather data and insight on the whole sector and engage with stakeholders in order to improve standards.
- **Consumer awareness.** Awareness is a critical issue in relation to ADR with only about 20% of people aware of the term.<sup>31</sup> Increasing awareness of ADR will support

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<sup>27</sup> [Market for Private Dispute Resolution Services - An Empirical Re-Assessment of ICANN-UDRP Performance](#), Mich. Telecomm. & Tech. L. Rev. 285 (2005)

<sup>28</sup> [Dispute resolution as a product: competition between Civil Justice Systems](#)

<sup>29</sup> Airline Data, Civil Aviation Authority website, accessed Mar 2021.

<sup>30</sup> Such a system was also advocated by Citizens Advice, Queen Margaret University and University of Westminster in [Confusion, gaps, and overlaps](#), 2017.

<sup>31</sup> Modernising consumer markets Citizens Advice formal consultation response, Citizens Advice, 2018.

the use of ADR and increase the value of ADR membership for companies, as membership will provide assurance and build trust for potential customers. It is much easier to promote a single brand, such as the Financial Ombudsman Service, than it is to promote multiple brands.

**14. Do you have evidence of how frequently dispute resolution settlements are complied with, or not? In situations where the agreement was not complied with, how was that resolved?**

Levels of compliance with ADR decisions and the availability of follow-up enforcement mechanisms are key indicators of the effectiveness of any ADR scheme. Although reliable data is difficult to come by, there is some evidence that compliance with ADR decisions in both regulated and non-regulated sectors is patchy. A study for BEIS reported 84% of consumers who used a range of approved and non approved ADR schemes said that the decision was either fully or partially implemented.<sup>32</sup>

In non-regulated sectors the ultimate sanction available for non-compliance is to suspend the business from membership of the scheme. As an enforcement tool against businesses in sectors where ADR is not mandatory, or where there are multiple schemes, this allows a non-compliant business to move to another ADR provider (whether approved or not) or to simply withdraw from offering any ADR at all. Neither outcome results in the consumer receiving the compensation they are due. To resolve this issue, it should be possible to enforce an ADR decision through court just as if it had been a decision from a small claims court.

Which?'s review of consumer ADR in nine sectors found:

- Ombudsman schemes generally have better systems for enforcement. For example, for a small fee consumers can ask the court to allow a decision by the Financial Ombudsman Service to have the effect of a court order. Decisions by 'Ombudsman Services: Communications' and 'The Energy Ombudsman' are enforceable as member firms sign a deed poll with Ombudsman Services, which gives consumers the right to benefit from that contract and enforce the contract in the English courts.<sup>52</sup>
- In non regulated sectors, ADR schemes generally rely on suspension or expulsion from the scheme or trading body in order to enforce compliance. However in sectors where membership is not compulsory, or where there are multiple ADR schemes, this may not be effective. For example the Property Redress Scheme reported low levels of compliance with awards in lettings complaints (66%). The reason it gives is that there were 'several members who have had multiple disputes and failed to comply with the decisions we have issued'. It states that two members were expelled from the scheme as a result, however this does not mean that the consumers who brought the complaints received any redress.
- The Independent Complaints Assessment Panel report produced by the Motor Ombudsman explains the 'penalty points' system it operates for non-compliance with

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<sup>32</sup> Resolving consumer disputes: Alternative Dispute Resolution and the courts system. Department for Business, Energy and Industrial Strategy, 2018.

details of any members expelled from the scheme.

- Our review of the responses ADR schemes provide under ADR regulations found that schemes generally record high levels of compliance, however some schemes did not give figures and only referred to the mechanism for taking action against non-compliant businesses. A survey of 200 consumers that had used approved and non approved ADR schemes found that in 84% of cases the decision was either fully or partially implemented.<sup>33</sup>

## **21. Do you have evidence to demonstrate whether the current system is transparent enough to enable parties to make informed choices about the type of service and provider that is right for them?**

Please see our response to question 13. Which? has significant concerns about sectors in which there are multiple ADR providers. In these circumstances companies can choose which ADR scheme they join, however consumers have to use whichever scheme the company has chosen. We are concerned that this can put pressure on providers to reduce costs in the companies favour and potentially find in favour of the company rather than the consumer.

Although it may be possible to create a system whereby the consumer chooses the ADR scheme they wish to use, businesses could legitimately raise the same issues around bias. It is also questionable as to whether a consumer would be in a good position to choose a provider or whether this would be introducing an additional complication to what should be a straightforward and accessible process.

If authorities are keen to introduce some competition into the process they could potentially introduce a tendering process.

## **24. Do you have evidence on the impact of the level of fees charged for the resolution process?**

Most approved consumer ADR schemes are free for the consumer, however a small number of providers are charging a nominal fee. Which? survey results suggest that any move to introduce fees is likely to have a significant impact on the number of consumers that use ADR to resolve disputes. Our survey also suggests that even a nominal fee would discourage a significant number of consumers from bringing a case to ADR. Almost a quarter (24%) say that they would not pay a fee in any circumstances and significant numbers would not pay a fee if the transaction was less than £200.

It should be noted that there is no evidence of consumers making frivolous claims so a charge cannot be justified on these grounds. In fact, there is a strong business argument for encouraging consumers to engage with ADR processes as the alternatives may be more damaging and costly for the company in the long term. Our survey suggests that consumers

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<sup>33</sup> Resolving consumer disputes: Alternative Dispute Resolution and the courts system. Department for Business, Energy, Industrial Strategy, 2018.

are currently unlikely to escalate a complaint and are more likely to stop using the company (47%) voice their dissatisfaction to friends and family (40%), give negative feedback in a customer care survey (38%) or leave a bad review on social media (34%). None of these responses is in the interests of the company.

Whilst setting a lower limit for the value of claims is reasonable, this should not be set too high as the impact of a failed purchase can vary significantly according to the circumstances, and consumers shouldn't be denied the opportunity to resolve the issue to the satisfaction of both sides.

### **31. Do you have any evidence on how protected characteristics and socio-demographic differences impact upon interactions with dispute resolution processes?**

As noted above, in addition to the barriers that the general population have to overcome to access consumer ADR; the age, income and educational profile of people using consumer ADR<sup>34</sup> suggests that older people with higher educational qualifications and income tend to access ADR services more often. This underlines the importance of ensuring ADR is made more accessible to all consumers.

#### **Additional evidence Please share additional evidence in relation to dispute resolution, not covered by the questions above, that you would like to be considered as part of this Call for Evidence.**

As consumption in the UK changes and develops, it is important that ADR evolves to meet consumers' needs. This is particularly important in relation to cross border purchases where consumers have very limited consumer rights. In 2018 27% of the goods that UK consumers purchased online were ordered from outside of the UK, with 16% of the goods purchased outside the EU and 11% from EU countries.<sup>35</sup>

Cross border dispute resolution is still relatively new, and faces a number of obstacles including different standards and regulations in the sending and receiving countries as well as practical obstacles such as language. However there are some positive examples that the UK government can build on including the EU Online Dispute Resolution platform, which provides a channel through which consumers and traders in the EU can discuss complaints and if necessary identify an ADR provider. However following the UK's departure from the EU, UK consumers no longer have access to this platform. The UK International Consumer Centre has maintained partnerships with EU countries and is developing partnerships with consumer centres in other countries. The centre can offer advice and guidance and where a partnership exists the consumer centre may be able to contact the company directly.

### **Which? October 2021**

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<sup>34</sup> Resolving consumer disputes: alternative dispute resolution and the court system. Department for Business, Energy and Industrial Strategy, 2018.

<sup>35</sup> Global ecommerce markets: the United Kingdom, B2C Europe, 2020



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