Andrews & Arnold Ltd
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27th April 2017

Alternative Dispute Resolution

Dear Ofcom,

Please find below the response of Andrews & Arnold Ltd to your consultation on alternative dispute resolution.

About Andrews & Arnold

Andrews & Arnold is a small UK-based communications provider, offering high quality and specialised services to consumers and businesses throughout the UK. Andrews & Arnold provides broadband, mobile and VoIP services, as well as advanced routers and firewalls.

More information is available at http://aa.net.uk.

Andrews & Arnold's approach to customer service

Andrews & Arnold is currently a member of CISAS for ADR, and has previously been a member of (what was then) Otelo.

Andrews & Arnold places considerable emphasis on a high quality of customer experience. This goes beyond a mere contractual issue: it is fundamental to our reputation.

We have a published policy on broadband quality[1], and take speed and quality issues seriously. We monitor the performance of all broadband lines every second, and provide clear graphical, line-specific information to customers of any problems with their lines.[2] Customers are also offered a number of testing facilities through the customer control panel.

We provide customer support by email, phone, web chat and IRC, and provide detailed status updates of faults at https://aastatus.net.

Our dedicated support team is based in the United Kingdom, and is highly trained to solve problems rather than follow scripts.

[1] https://aa.net.uk/broadband-speed.html

[2] https://support.aa.net.uk/CQM_Graphs

As a result of these measures, disputes are rare, and ADR experiences even rarer. However, for the reasons set out below, the current approach to ADR remains of concern.

Summary of key points

Andrews & Arnold supports Ofcom's second option: "continue to approve both schemes but subject to either, or both, of them making changes to their rules and operations".

Andrews & Arnold considers that, in accordance with Ofcom's seven assessment criteria, the following changes should be made:

1. There must be a mechanism for appealing ADR decisions: the lack of this is fundamentally unfair to CPs

2. Mandatory use of ADR must be limited to customers and disputes within the scope of the Communications Act 2003

3. CPs must be able to recover from a consumer their costs incurred in responding to ADR where the adjudicator does not find in favour of the consumer

4. Andrews & Arnold is concerned that fees are unreasonably high, when compared with similar, perhaps even better, dispute resolution services, such as the County Court's small claims track. We feel that the cost of ADR to a CP should be reduced

5. The high fees, always borne by the CP, facilitate the blackmailing of CPs by customers for undue compensation. We propose a revised approach, to address this

6. There must be a formal, binding, definition of "dispute", with a prohibition on Schemes accepting cases for matters which are not valid disputes

We address these points in more detail below. We have attempted to position our points against one of the areas which Ofcom has said form the basis of the review but, inevitably, some of the points could sit under multiple headings — something which is insufficiently transparent is likely to have an adverse impact on fairness, for example.

Fairness

"appropriate points of review for cases"

Andrews & Arnold is concerned that the schemes currently approved by Ofcom lack of an appeals mechanism, whereby CPs can challenge decisions which are unreasonable or ultra vires.

For example, CISAS's rules provide that:

> "Adjudicators' decisions are final. They cannot be reviewed or appealed under any circumstances."[3]

[3] CISAS Scheme Rules, rule 4.5.6

Once an adjudicator has ruled, the CP is bound by that ruling, even if that ruling is manifestly unreasonable (e.g. the decision is inconsistent with evidence), procedurally improper or ultra vires (e.g. where the adjudicator has failed to adhere to the Scheme's rules).

By way of example, we have been required by an adjudicator to refund a customer for a service in respect of which the customer confirmed their satisfaction and their desire for it to continue, despite our presentation of clear evidence demonstrating this. The adjudicator's decision was that there was no breach of contract. This should have been the end of the matter: we delivered what we were obliged to deliver contractually, to the demonstrable satisfaction of the customer. However, despite a finding of fact in our favour, the adjudicator went on to require us to refund charges levied correctly on the customer, including charges which fell outside the scope of the dispute.

As a second example, CISAS's Scheme Rules require that the adjudicator "will make a decision that is in line with the … contracts between the company and the customer". OS:C has a similar rule, that "it shall be the duty of the Ombudsman … to have regard to the terms of any relevant contract".[4]

In the one case of ADR to which we have been a party, the adjudicator awarded the complainant a remedy far exceeding the reasonable limit agreed by the complainant in their contract with us: a decision which was in no way "in line with" the contractual position.

While a CP may make a "complaint about the quality of service" provided by the adjudicator in such an instance, this mechanism "cannot be used to challenge the content or outcome of an adjudicator's decision [or] the decision process adopted by an adjudicator"[5] and so does not provide appropriate recourse.

The only ground on which a CP can ask CISAS to amend a decision is that of a "minor clerical error",[6] leaving an unusual position where fixing typographical errors is prioritised over more substantive, non-clerical, errors.

OS:C has a slightly more expansive approach to fixing errors, permitting a party to appeal based on "an error in fact or … new information which was not previously available"[7] but even this does not permit an appeal on the basis of procedural impropriety or ultra vires action.

When we attempted to raise with the adjudicator that the decision they had reached was inconsistent with the evidence provided to them, we were informed that reconsideration of the flawed decision was not permissible.

Thus, and entirely contrary to any notion of "fairness", an adjudicator is enabled to act in a manner inconsistent with the scheme rules, with no mechanism for a CP to appeal.

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[4] OS:C Scheme Rules, rule 9.9(e)

[5] CISAS Scheme Rules, rule 8.3

[6] CISAS Scheme Rules, rule 8.2

[7] https://www.ombudsman-services.org/docs/default-source/Factsheets/os-decision-factsheet.pdf?sfvrsn=0

The Schemes' rules, as currently approved by Ofcom, do not provide appropriate points of review for cases and, to ensure that the process is fair, there must be a mechanism by which an CP (or a consumer) can seek redress for such issues.

We note that neither the Communications Act 2003 nor the Universal Service directive precludes the right of appeal, and that Ofcom is empowered, by virtue of s52 Communications Act 2003, to require Schemes to permit appeals.

"schemes' procedures and decisions reached are fair and reasonable"

Eligibility to use ADR, and scope of complaints which can be brought to ADR

CISAS's rules go beyond the requirements of the Universal Service directive, in terms of both those who can access ADR and the scope of the disputes which can be brought to ADR.

While a CP may, for its own business reasons, wish to offer ADR to a broader range of customers or for a broader range of disputes than is required by statute, making it mandatory for a CP to accept these by virtue of them being part of the approved Scheme rules unfairly imposes a burden on CPs beyond that required by law.

Who can access ADR

There are two main differences between the CISAS rules and the General Conditions in terms of who can submit a dispute for resolution:

1.) The CISAS rules permit disputes to be brought by companies with up to 10 employees, whereas the GCs require a CP to extend ADR to a company with no more than 10 employees *or volunteers*; and

2.) The CISAS rules do not exclude a customer who is also a communications provider, which is out of the scope of the GCs.

We ask that Ofcom:

a.) ensures that all Scheme rules:

i.) refer explicitly to the requirement to count both employees and volunteers; and

ii.) explicitly exclude customers who are communications providers and

b.) makes it a requirement of the Scheme to verify the customer's eligibility to use ADR — in other words, to verify that they do not have more than the permitted number of employees and volunteers — before accepting a case.

We would support strongly requiring the scheme operator to reference the definitions in the Communications Act 2003 in their terms as to the parties that will be accepted for an ADR case.

Disputes which can be taken to ADR

In terms of the matters which can be taken to ADR, the scheme operated by CISAS goes beyond that required by the Universal Service directive and the Communications Act 2003. These both require that ADR must be available to cover disputes relating to "contractual conditions, or to the performance of a contract for the supply of an electronic communications network or service".

CISAS's rules permit a dispute to be brought in respect of "Bills; The quality of customer service received; Communication services provided to customers and any contracts or agreements made thereunder."

We ask Ofcom to ensure that all Scheme rules are consistent with the Communications Act 2003 and the General Conditions, and that references to "Bills" and "The quality of customer service received" should be removed.

To the extent that a billing dispute pertains to contractual conditions (e.g. a customer considers that they have been overcharged), this is covered by "contracts or agreements". Other matters relating to billing — for example, that the customer simply does not like the sum they have been charged — are not covered by the Communications Act 2003.

With reference to customer service, "quality of customer service" is inherently subjective: we consider that we provide excellent customer service, but a customer may feel that they should have received something which, in their opinion, would have been better. As perception of service is subjective, if a customer feels that they have had bad customer service, there is little a CP can do but agree that that is how the customer feels: since there is agreement, there is nothing to resolve through ADR.

As neither "bills" nor "poor customer service" is a requirement of ADR under the Communications Act 2003, we ask that Ofcom revises the bases under which a customer is permitted to bring an ADR complaint to just that covered by s52(2)(b) Communications Act:

> "unresolved disputes relating to contractual conditions, or to the performance of a contract for the supply of an electronic communications network or service."

Burden of costs incurred in responding to an ADR complaint

CISAS's Scheme Rules go beyond the legal prohibition on placing the cost of using ADR on the consumer, and prevent a CP from recovering from a consumer the cost of time and effort spent in responding to an unnecessary ADR referral. This acts as a further cost burden on a CP, and renders the scheme's procedure unfair.

We note that the United Kingdom has gold-plated the requirement of the common regulatory framework, fettering Ofcom's discretion: the requirement under the Universal Service directive (as amended) is for an ADR procedure which is "inexpensive"[8], but this has been implemented in the Communications Act as a requirement that domestic and small business customers must be able to "to use the procedures free of charge".[9] We note that a nominal charge for access to

[8] 2002/22/EC, article 8(4)(b)

[9] Communications Act 2003, s54(2)(c)

ADR would also be compatible with The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.[10]

Regretfully, we accept that, without Parliamentary intervention, Ofcom cannot permit a Scheme to impose a charge on a consumer for the *use* of ADR.

However, CISAS's rules go further than this statutory restriction, and limit a CP's recovery from the other party of costs incurred in responding to ADR, even when the outcome is in the CP's favour.

Rule 6.3 provides that:

> "The customer and the company must pay their own costs of preparing their cases. By using CISAS, each party agrees not to take any legal action against the other to recover such costs."

This goes far beyond making it "free of charge" to use the scheme and, as such, is not a limitation required by the legal framework.

Forcing a CP to engage with ADR and then burdening a CP not only with the cost of the ADR itself but with the inability to recover its own costs in the event that the ADR referral is unfounded or resolved in the CP's favour is an unfair and unnecessary aspect of the Scheme rules, and should be removed.

Efficiency

"fee structures"

Andrews & Arnold has significant concerns about the fee structures underpinning the ADR mechanisms, on the basis that the fees are unreasonably high, and are borne by the CP in all circumstances.

This leads to undue pressure being placed on the CP to award compensation or other redress, well beyond that to which a customer is entitled under their contract, or else be taken to — and have to pay for — ADR.

The fees associated with ADR are disproportionately high

Irrespective of which party must bear the cost, the fees associated with ADR are disproportionality high.

Currently, we pay a "retainer fee" of £75 each year merely to belong to the ADR Scheme, with additional fees for various actions.

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[10] Paragraph 6(b)(ii) to Schedule 3, The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

The Case Fee, for example, is payable for a dispute in which an adjudicator is appointed, and is roughly ten times that of the fee for the use of the consumer-friendly "money claim online" service.[11]

It is hard to see how such a high fee is acceptable.

The high fees are used by consumers as a bargaining position

Where a consumer knows that a CP will face a substantial fee for dealing with an ADR case, even where that case is entirely without merit, the consumer is afforded a substantial degree of bargaining power: they can insist that, either their demands are met, or else they will take the matter to ADR, forcing the CP to pay the unwarranted ADR fee.

As long as the dispute could be characterised as falling within the scope of the ADR scheme, the CP is placed in an unenviable position: compensate a consumer beyond what is reasonable or required under the contract, or suffer an unfair cost.

Where a consumer is asking for something less than the cost of ADR, from a business perspective, paying the consumer is the expedient recourse.

This is not an example of "efficiency", but rather of the regulatory framework enabling blackmail.

We consider that there is a simple solution to this: if a customer and a CP reach deadlock, the customer can refer the unresolved dispute to ADR. If the dispute falls outside the scope of ADR, it is rejected, as is the case today.

If, however, the ADR scheme operator considers that the dispute falls within the scope of ADR, it then considers — before going to full adjudication — whether there is a case to answer.

If, on the basis of the evidence available, the scheme provider considers that there is a case to answer, the CP is given a measure of reassurance that the customer is not simply using ADR as a form of blackmail. The CP should then be able to settle the dispute (including paying the customer such sums as the customer is entitled under their contract, where appropriate), without incurring an ADR charge. (Currently, we would face a charge of over £100 for entering into a settlement at this point.)

This approach would provide an efficient and effective barrier against inappropriate threats by a complainant to take a CP to ADR, and encourage the settlement of disputes between the parties where an independent third party has opined that there is a legitimate dispute to be resolved. It would also provide Ofcom with greater transparency about the dispute resolution process and the nature of disputes: figures would be readily available to show the circumstances under which a CP chooses to settle a dispute, versus requiring adjudication.

Constraining the ability to use the ADR as a form of blackmail is particularly important given Ofcom's proposed "automatic compensation" framework. If a customer is informed that they are entitled to compensation, they may well decide that, rather than accept the sum on offer, they

[11] https://www.gov.uk/make-court-claim-for-money/court-fees

will ask their CP to pay out more, or else argue that the failure to do so is inadequate customer service and insist on taking the matter to ADR. Permitting a customer to demand compensation beyond their entitlement under the automatic compensation framework, or permitting such a demand to be accepted for ADR, would undermine the work which Ofcom has done is setting the scope of the automatic compensation framework, and the levels of compensation available.

"the extent to which their processes … are efficient"

In addition to our concerns over the unnecessarily high cost of ADR, we consider that, in failing to offer telephone-based mediation, similar to that offered by the small claims track of the country court, ADR is a less efficient mechanism for the resolution of disputes.

We would suggest that this is considered as a mandatory mechanism for attempting to resolve disputes at an early stage.

Alternatively, we invite Ofcom to consider whether it would be possible legally to approve the small claims track as an ADR scheme, where the CP agrees to pay the initial filing fee. In our experience, the small claims track provides a fast, efficient, and user-friendly means of resolving disputes, including through the provision of phone-based mediation, at a far more reasonable cost than the current ADR schemes.

Transparency

"the extent to which decisions and the decision-making processes are clear to consumers and to CPs"

We do not consider that CISAS's Scheme Rules are sufficiently transparent:

There is no definition of "dispute"

There is no definition of "dispute" within the rules and it is our experience that Scheme providers have been willing to accept for ADR situations where no there is no "dispute" to resolve.

For example, where a customer has complained that they have received bad service, and the CP has agreed that this is the case, there is no dispute.

Similarly, where a customer has agreed that no compensation is available for "poor customer service", there is no dispute to resolve, and no opportunity for compensation to be due.

For example, we were required to go to ADR in respect of a customer who had asked to be let out of a contract, without penalty. We agreed to this, and did so, even though we would have been within our legal rights to have insisted on an early termination payment. However, the customer still chose to take us to ADR, despite there being no dispute to resolve, and the Scheme refused to discontinue the case.

Limiting ADR to the resolution of bona fide disputes is in keeping with the framework from which the ADR requirement is derived: the provisions in the Universal Service directive are very clearly for the handling of "unresolved disputes".

This is particularly important since there is a difference between a "dispute" and a "complaint". As currently drafted, The Ofcom Approved Code of Practice for Complaints Handling does not define a "dispute".[12]

Instead, it requires a CP to notify a complainant of their right to go to ADR in respect of a "Complaint".[13] As "Complaint" is defined broadly, and includes "an expression of dissatisfaction made by a customer", it is far broader than the notion of a "dispute" within the common regulatory framework, such that the CP appears to be required to notify a complainant of the right to use ADR in the event of a mere expression of dissatisfaction, even though ADR should not be available in such a situation.

As such, we urge Ofcom to amend Scheme rules to ensure that "dispute" is defined and framed appropriately, and that Schemes are specifically prohibited from admitting complaints which fall outside this definition.

It is unclear when the eight week period for a "dispute" begins

Under The Ofcom Approved Code of Practice for Complaints Handling, a CP is required to notify a customer that ADR can be accessed "eight weeks after a Complaint was first made to the CP".

Leaving aside the disconnect between a "Complaint" and an ADR-admissible "unresolved dispute", the framework is insufficiently precise as to when the eight week period is initiated. For example, a customer may provide feedback on how a particular process or service could be improved, asking for a response. Alternatively, they may have a general gripe which, at that point, is not clearly either a complaint or an unresolved dispute.

We consider that a CP should be permitted to set out, in a clear, accessible policy, the point at which it will consider a communication to be a formal complaint, thereby triggering the eight week period. This would provide clarity and certainty to both CP and complainant, and would create a fixed point of reference for the ADR scheme provider to use to determine whether ADR has become available for any given unresolved dispute.

Accountability

As currently proposed, Ofcom's assessment of "accountability" appears to be limited to just whether each scheme's KPIs are reasonable.

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[12] However, as noted above, even if "dispute" were defined, there appears to be nothing to stop a Scheme provider from deciding to accept something which does not meet that definition, if they wish to do so. We would urge this to be addressed to, to ensure that all actors — consumers, CPs and adjudicators — stick to the agreed, transparent framework, and do not have discretion to go beyond its parameters.

[13] Paragraph 4 of The Ofcom Approved Code of Practice for Complaints Handling

This is a very limited scope of review, and we urge Ofcom to take a more expansive approach.

The most important issue from an accountability perspective is tied in closely with the lack of an appeals framework for decisions, discussed above. Without the ability to seek review and amendment of decisions, there is no accountability for unreasonable, erroneous or ultra vires decisions.

In addition, the framework is set in such a way that, even when faced with the most egregious decision, a CP is strongly incentivised not to ignore or refuse to comply with it: it appears from previous responses submitted to Ofcom[14] that, if a CP refuses to comply with a decision, the Scheme provider may evict the CP from the scheme, thereby rendering the CP in breach of the General Conditions until it rejoins. When coupled with the exchange of information between the Scheme providers, working to ensure that a CP cannot rejoin a scheme until they have complied with the imposed remedy, a CP is left with no real choice.

The outcome is thus that a scheme can impose arbitrary, capricious outcomes, with no framework for appeal, forcing a CP to choose between satisfying an unfair, ultra vires remedy, or being in breach of the General Conditions.

Requiring an appeals mechanism would go a long way to remedying this situation.

[14] A2.12, page 9, of Ofcom's "Review of Alternative Dispute Resolution Schemes: Call for Inputs", October 2010