

# Consultation response

## BIS: EU proposals on Alternative Dispute Resolution

### Overview

1. **The Panel welcomes the intention to give consumers access to ADR to resolve disputes with any trader, but this will only work if the participation of traders is also made mandatory. This would ensure fast and fair redress, act as a deterrent against poor practices and provide a more level playing field. In legal services, such a step would fill gaps in redress provision and accord with consumer expectations. It may also reduce calls to regulate activities not reserved to the profession – such as estate administration and general advice – in a more comprehensive fashion.**
2. **We are greatly alarmed that the Directive would appear to enable traders to file complaints against consumers. People will be less likely to complain about lawyers if they fear this could happen.**
3. **We support the proposed standards for ADR providers, which overlap strongly with recognised good practice in the UK. Ombudsman schemes are a superior form of ADR so any extension of redress in legal services should be implemented through the Legal Ombudsman.**
4. **The single competent authority should provide enhanced accountability for ADR schemes. The Office of Fair Trading would be a natural home for this role,**

but there would need to be co-ordination with sectoral regulators who perform an oversight role, as in legal services.
5. **Information requirements would help to break down barriers that discourage consumers from complaining. The draft proposals are welcome and would supplement first-tier complaint handling rules in the legal profession.**
6. **There is an opportunity for the UK to use the Directive to ensure more joined-up delivery of consumer redress to reflect the trend towards converged delivery of services across business sectors. Consumers are increasingly purchasing services in one-stop shops, but redress schemes remain delivered in regulatory silos. Market liberalisation reforms put legal services at the vanguard of these developments; the Panel would be happy to engage in such a process.**

### The proposals

7. **The European Union (EU) has published a draft Directive on alternative dispute resolution (ADR) for consumer disputes and a draft Regulation on online dispute resolution for consumer disputes. The Department for Business, Innovation and Skills has issued a call for evidence seeking views on the impacts of the legislative proposals on the UK to inform the UK negotiating position.**

8. The proposed Directive follows a series of research studies on ADR and a public consultation in January 2011. The justification is to further develop ADR in order to improve the functioning of the internal market. Weaknesses identified in current arrangements include gaps in coverage of ADR in some economic sectors and geographic level, lack of awareness and insufficient information preventing consumers and businesses from using ADR, and variable quality of ADR schemes. The key proposals in the draft Directive are as follows:

- All disputes between consumers and traders arising from the sale of goods or the provision of services can be submitted to an ADR scheme. Member States shall determine whether to make participation of traders in ADR schemes mandatory;
- Consumers should be able to find information on the ADR scheme in the main commercial documents provided by the trader and on the trader's website;
- Schemes must respect the quality principles of impartiality, transparency, effectiveness and fairness; and
- In each Member State, a competent authority will monitor the functioning of ADR schemes and will assess whether they respect the quality principles. Regular reports will be published on the development and functioning of schemes.

9. The Panel's comments are limited to those proposals that have the potential to affect consumers of legal services. We start by outlining relevant features of consumer redress in this market and then address key elements of the proposals. Our comments are restricted to the draft Directive on ADR. The scope of the draft Regulation is limited to cross-border disputes. Since cross-

border trade is not currently a key feature of the legal services market, we offer no comments at this stage.

## The Panel's response

### Relevant features of legal services

10. The Legal Ombudsman is the statutory redress scheme available to legal services consumers in England and Wales. There are some legal activities which are 'reserved' to authorised persons, such as solicitors and barristers. Authorised persons are subject to the Legal Ombudsman's jurisdiction for all legal activities they provide whether or not these are reserved. However, many other activities, such as will-writing or the provision of general legal advice are not regulated and thus can be provided by anyone. Non-reserved legal activities, where they are provided by unregulated businesses, fall outside of the Legal Ombudsman's jurisdiction, although there is provision in the Legal Services Act (yet to be switched on) for a voluntary jurisdiction. Another dimension is claims management where a complaints scheme, but without powers to award redress, is operated by the Claims Management Regulator, which is formally the Ministry of Justice. This may seem complex, but in fact the description above is a simplistic summary of a regulatory system which is even more complicated in reality.
11. The Legal Services Board (LSB) is the independent body responsible for overseeing the regulation of legal services in England and Wales. It has statutory responsibilities with respect to the Legal Ombudsman, which include appointments, approving budgets and setting performance

targets should these be necessary. Also of relevance, the LSB has made rules in relation to first-tier complaints-handling, which require providers to inform clients in writing at the time of engagement about their route to redress, including to the Legal Ombudsman should attempts to resolve a dispute at the first-tier be unsuccessful.

12. The LSB oversees eight approved regulators who regulate the eight branches of the legal profession. Their codes of conduct include measures relating to complaints-handling. The approved regulators remain responsible for handling complaints alleging misconduct, whereas the Legal Ombudsman resolves complaints about poor service.
13. The Legal Services Consumer Panel is a statutory body providing independent advice to the LSB and others on the consumer interest on issues concerning the regulation of legal services. We have some statutory responsibilities in relation to the Legal Ombudsman, in particular the ability to trigger investigations into extending its jurisdiction and the compensation limit.

**Q1. What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?**

**Q2. Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?**

14. We have no specific comments on the estimates in the Impact Assessment, but more generally the Panel welcomes the intention to give all consumers access to ADR to resolve disputes with any trader. This would give consumers access to fast and fair redress, act as a deterrent against poor practices and provide a more level playing field between authorised persons and unregulated businesses in the market. In our sector, this would also match with consumer expectations that all legal services are regulated.<sup>1</sup> Consumers are unaware of the complex boundaries of legal services regulation until they experience a problem and try to find their way through the system; it is unsatisfactory that people are choosing unregulated legal businesses unaware of the differing levels of protection and under the false impression they can obtain compensation from an independent ombudsman if something goes wrong.
15. As previously mentioned, some legal activities are regulated but others are not. Analysis has shown that the reserved activities are not grounded in consumer protection considerations, but are rather an accident of history.<sup>2</sup> The definition of some reserved legal activities is narrowly drawn, again for historical reasons – for example, obtaining a grant of probate is reserved but wider probate and estate administration services are not. This has led to complex business structures which lack transparency and escape regulation. Currently, the only tool available to extend regulation, and thus secure mandatory access to the Legal Ombudsman for consumers, is to reserve more activities to the legal profession. However, reservation is a blunt tool which can unnecessarily

restrict competition and thereby limit consumer choice.

16. The draft Directive could help to resolve this situation as consumers would have a remedy should things go wrong but additional entry or other requirements on businesses would not need to be imposed unless otherwise this was justified. In short, if all consumers had access to the Legal Ombudsman, this would reduce calls to regulate firms more comprehensively. However, this would only work if the UK Government made participation by traders mandatory (see Question 9).

**Q3. Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?**

17. The call for evidence mentions the ability of many consumers to obtain redress through their card issuer if they make a transaction using a credit or debit card – the so-called ‘chargeback’ mechanism. This is a valuable route to redress, although it does not offer the full range of remedies – e.g. correcting work or apologising – that an ADR scheme can award. It is also voluntary for debit card providers and is not well publicised. The Panel is not aware of data on payment methods in legal services, but we have anecdotal evidence that use of cheques is likely to be more prevalent than in other markets. This situation can be exploited, for

example our work on will-writing includes cases where unregulated businesses visit people’s homes and immediately cash cheques and refuse to honour cooling-off periods. Therefore, chargeback is useful but an incomplete solution in legal services.

**Q4. What do you think of the proposed scope of the Directive? Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?**

18. The reserved legal activities are as follows:
- The exercise of a right of audience;
  - The conduct of litigation;
  - Reserved instrument activities, such as elements of conveyancing;
  - Probate activities;
  - Notarial activities; and
  - The administration of oaths
19. All other legal activities are unregulated and so may be provided by anyone. Thus there are many potential gaps in ADR in this sector, such as will-writing, powers of attorney, advice on matters such as divorce and employment disputes. In practice, most consumers use solicitors for legal transactions and so can access the Legal Ombudsman for any legal activity. However, unregulated businesses are gaining a foothold in some markets, for example will-writing companies prepare 10% of wills in England and Wales.<sup>3</sup>

20. We are greatly alarmed that the proposed Directive covers complaints filed by traders against consumers as well as complaints filed by consumers against traders. There is no precedent for this in the UK and we cannot see any rationale for the proposal. The research evidence shows that people feel intimidated by lawyers and lack confidence to complain. This situation would be made worse if consumers faced the prospect of their lawyer or, indeed, a lawyer representing another party in their case, filing a complaint about them. The proposal is a recipe for counter-claiming. We urge BIS to strongly resist this proposal.

21. The draft Directive excludes businesses and other types of person from making complaints to the ADR scheme. The Legal Ombudsman may accept complaints from certain small businesses, small charities and clubs and associations. The Panel represents a range of consumers, including such smaller consumers. We agree that the focus of the Directive should be individual consumers, but other persons also lack buying power in their dealings with lawyers. The Directive should not preclude the Legal Ombudsman from continuing to include such persons from its jurisdiction.

22. The Legal Ombudsman is funded by the legal profession and thus requires no public subsidy. This could continue if participation by traders was made mandatory as the Legal Ombudsman could take traders who refused to pay case fees to court. There is already case law that refusal to cooperate with the Legal Ombudsman's investigations may be treated as contempt of court and carry a hefty fine or imprisonment.

**Q5. What do you think of the standards/ requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?**

23. The Legal Services Act requires the Legal Ombudsman to "have regard to any principles appearing to it to represent the best practice of those who administer ombudsman schemes". In practice, the British and Irish Ombudsmen Association (BIOA) is looked to as the standard-setting body for ombudsmen, albeit this is a voluntary membership organisation. It has established six good governance principles: independence; openness and transparency; accountability; integrity; clarity of purpose; and effectiveness. It has also published a guide on principles for complaint-handling.<sup>4</sup> There is a strong read-across between the BIOA principles and those in the draft Directive. We do not object to any of the detailed standards in the Directive, although they might benefit from being more outcome-focused and less prescriptive.

24. We are concerned by need to "ensure the absence of [pressure on ADR schemes] where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member" (Recital 17). Of course, such pressure must

be avoided, but this need not occur with the correct governance arrangements. The idea of case fees – the “polluter pays” principle – is a key element of the Legal Services Act. Private sector ombudsman schemes are not a common in the EU so the statement is understandable, but it risks unintended consequences. The Directive should not interfere with the well-held principle in the UK that industry should bear the cost of its own regulation, including the cost of ADR.

25. The draft Directive envisages different types of ADR scheme. Our response naturally focuses on the Legal Ombudsman, as this is the single statutory scheme in the sector. We consider that ombudsmen offer a superior form of dispute resolution as they are free of charge to consumers, their decisions are binding, they follow the BIOA principles and, most importantly, an explicit part of their role is to use the intelligence from complaints to help raise standards in their industry sector. The EU envisages that Member States extend the jurisdiction of existing ADR schemes where possible. We support this sentiment and encourage the UK Government to ensure any extension of redress to other legal services is carried out through the Legal Ombudsman.
26. We do see potential for UK ADR providers to provide their services to non-UK businesses. In the legal services sector, some of the approved regulators already regulate international practice in some respects. The market liberalisation reforms in legal services – alternative business structures (ABS) – may result in businesses headquartered overseas being licensed to provide reserved legal activities. Two major

US businesses focusing on online delivery – LegalZoom and Rocket Lawyer – have already signalled their intention to do this. Should their applications be successful, like all ABS firms, they will be subject to the Legal Ombudsman’s jurisdiction.

**Q6. What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?**

27. The Panel welcomes the concept of a single competent authority in the UK to provide enhanced accountability for ADR schemes and enable benchmarking across different schemes. The Office of Fair Trading would be a natural home for such a role given its current focus and functions, which include approving ADR schemes in the estate agency sector. Of course, this depends on the outcome of the BIS consumer landscape review.
28. As previously mentioned, the LSB has a statutory oversight role in legal services, as is the case in other sectors like financial services and communications. It will be important to preserve the oversight role provided by sectoral regulators and ensure that they and the Competent Authority work well together and do not duplicate effort.

**Q7. Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?**

**Q8. What would be the costs to businesses of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses, and, in particular, for small or medium businesses?**

29. The LSB has recently introduced rules requiring authorised persons to inform consumers about first-tier complaint procedures and their right of access to the Legal Ombudsman.<sup>5</sup> It is too early to know whether these rules have made a difference to consumers' propensity to complain. However, we do have research indicating that only half of consumers would feel confident in making a complaint about a lawyer and 35% of dissatisfied clients do nothing about the situation; in fact, only 13% of dissatisfied clients make a formal complaint to their lawyer.<sup>6</sup>
30. Therefore, we would encourage information requirements as a means of breaking down barriers to complaining. The draft Directive would go beyond the LSB's signposting rules by requiring information on websites and in a wider range of documentation. The Consumer Panel would welcome this.

**Q9. Do you have any other comments on the proposed Directive?**

**Mandatory participation by traders**

31. The Directive does not require businesses to be bound by the outcomes of any ADR procedure but it is also without prejudice to any national rules making the participation of traders in such procedures mandatory or their outcome binding on traders.
32. The Directive should not give such discretion to Member States. In any case, we urge the UK Government to signal now that it would be minded to make participation by traders mandatory. It would be very confusing to say to consumers that they have a right to complain to an ADR scheme but the trader is not bound by the outcome – people may well consider it is not worth the time and stress. Given consumers reasonable assumptions that all legal services are regulated, we do not think it viable to rely on consumers to exercise choice between traders on these grounds, especially as people use legal services rarely and lack knowledge of the law. Moreover, less scrupulous traders, who would be likely to receive proportionately more complaints, are least likely to voluntarily participate in a redress scheme. Without this measure, the Directive would add little value to the voluntary jurisdiction provisions in the Legal Services Act.

**Joining-up redress schemes**

33. Finally, our submission has alluded to the complex regulatory landscape in legal services. Of course, legal businesses are not the only organisations providing legal services to the public, for example banks

offer will-writing services and in this case the ADR scheme which consumers must use is the Financial Ombudsman Service. Furthermore, the ABS reforms enable businesses to join together to deliver bundled legal and non-legal services in one-stop shops, e.g. a complete home moving service. Such convergence, also seen in other parts of the economy, cuts across structures of regulation in which there are separate regulators and redress mechanisms in individual markets.

34. This is confusing for consumers as they may have to contend with multiple redress schemes, each with its own rules and systems, in what appears to them as a single service, e.g. moving home. There is welcome work behind-the-scenes to promote cooperation between ombudsman schemes, but it is arguable that such measures will only ever 'paper over the cracks'. The EU Directive provides a unique opportunity for the Government to consider more radical options, such as a single entry portal or even mergers between schemes. Some key differences in approach create barriers, such as regulation of activity in financial services as opposed to regulation of entity in legal services, but we do not think these are insurmountable.

35. These considerations need not influence the UK's negotiating position on the draft Directive, but the implementation timescale is quite short and so it should be starting discussions with other departments now in order to be ready when the time comes. As the legal services reforms are in the vanguard of multi-disciplinary practice, we would welcome the opportunity, alongside

others organisations inside and outside of the sector, to take this thinking forwards.

## January 2012

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<sup>1</sup> Legal Services Consumer Panel, *Quality in Legal Services*, November 2010.

<sup>2</sup> Legal Services Board, *Enhancing consumer protection, reducing regulatory restrictions*, July 2011.

<sup>3</sup> Legal Services Consumer Panel, *Regulating will-writing*, July 2011.

<sup>4</sup> [www.bioa.org.uk](http://www.bioa.org.uk)

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[http://www.legalservicesboard.org.uk/Projects/pdf/10\\_05\\_24\\_Isb\\_signposting\\_requirement\\_and\\_guidance\\_Decision\\_document.pdf](http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_Isb_signposting_requirement_and_guidance_Decision_document.pdf)

<sup>6</sup> Legal Services Consumer Panel, *Consumer Impact Report 2011*,