



ISPA response to BIS implementing Alternative Dispute Resolution Directive

About ISPA

The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA membership includes small, medium and large Internet service providers (ISPs), cable companies, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members.

Introduction

ISPA represents a large variety of companies that provide internet services, including communication service providers (CSPs) who are covered by a mandatory ADR scheme, either CISAS or OS:C. ISPA has a close relationship with CISAS, having helped establish the organisation, and offers free membership to members for which we pay an annual fee. ISPA also operates a complaints procedure where members of the public can resolve a complaint with a member company after they have exhausted the company's complaint system and before proceeding to ADR. As such we are well qualified to comment on this area.

ISPA is supportive of ADR in principle as an important means of offering an easy-to-use service for consumers to resolve complaints. We are also supportive of the general stance adopted by Government in implementing the Directive to keep the impact on business low.

However, we have concerns with how the ADR process is working in practice in the CSP sector. In summary, evidence from our members suggests that the current ADR system:

- Makes it too easy for savvy consumers to play the system - ADR fees are often far greater than the costs of settling complaints and complainants can unfairly pressure a provider into accepting an unjustified claim by threatening to go to ADR.
- Fails to ensure that vexatious complaints are robustly rejected by ADR providers
- Requires providers to pay ADR case fees for complaints that have no chance of being successful.

Overall, ADR is associated with substantial costs for providers. Whilst we accept that ADR needs to be accessible to consumers we suggest several ways to address the imbalance of a system that is weighted against providers (often small or medium sized businesses) who play a fundamental role in delivering broadband across the UK and supporting economic growth by providing broadband access at often very low costs.¹ ADR should be a measure of last resort that ensures that consumers have an avenue for pursuing cases where customer communication has broken down. ADR is rightly stacked in favour of the consumer but it should not create an environment where CSPs have to be fearful of being threatened with ADR by a small set of consumers pursuing vexatious claims.

¹ Monthly subscription costs for consumer broadband services can be below £10 (excluding line rental) which makes an ADR case of £355 (+ VAT), in the case of CISAS, appear to be disproportionate.

Response to questions

As an association representing a sector where ADR is already mandatory, we have only provided responses to questions we feel relevant to our members and sector. We generally feel that a sector-by-sector approach is a sensible one for Government to take, including on areas like awareness raising and a preference for several bodies rather than a single body for residual ADR. Specific sectors covered by mandatory ADR, such as telecommunications, should be ring-fenced and excluded from residual ADR schemes so that consumers have clarity over which ADR provider to use.

Better signposting for consumers – a complaints “helpdesk”

Q10. In light of the other requirements in the ADR Directive which are intended to assist consumers, would a consumer-facing complaints helpdesk be beneficial?

Q11. Do you have any comments on the type of service it should provide and the extent to which it should examine the enquiries it receives?

Q12. Rather than attempt to create a new service, which existing service or body is best placed to provide this function?

Q13. How could a helpdesk be funded?

General awareness-raising of the availability of ADR is important and beneficial. Rather than a one-size-fits-all approach through a helpdesk across a variety of industries operating under residual and mandatory schemes, each sector should take the responsibility of awareness raising. In the communications sector, ISPA members have worked to raise awareness in recent times, with changes including publication on customer bills of how to access ADR and a reduced length of time to access schemes. This has, in part, seen the use of ADR increase in our sector. ISPA's complaints service also includes signposting to ADR providers and providing advice on complaints as a signposting services. We are aware that there are many other associations operate something similar.

There is also a danger of replicating existing work in this area and there are a number of consumer organisations that already perform an important awareness-raising function. This ranges from high-profile consumer organisations – Which? and Citizens Advice Bureaux – through to specific user help sites for different industries. Government would need to review where the deficiencies are sector-by-sector to understand the gaps before any further work is undertaken to take forward a complaints helpdesk.

ADR is already a cost to business. As we argue further on in our response, we believe the current system lacks efficacy so would not want to see additional costs involved in operating a helpdesk placed on industry without further justification and analysis.

Appointing a competent authority

Q14. Do you agree that regulators should act as competent authorities for the ADR schemes that operate in their sectors?

We see no reason why regulators should not be the competent authorities and agree that different regulators in different sectors, possessing the necessary expertise, should do so.

Q15. How should the fees paid by ADR providers to a competent authority be determined? Should the size of the fee depend on the size of the ADR provider (for example turnover or number of cases dealt with) or based on other factors?

n/a

Procedural rules for refusing disputes

Q16. Do you agree that the Government should allow UK ADR providers to use all of the procedural rules listed in Article 5(4) of the ADR Directive to reject inappropriate disputes? If not, please explain your reasons.

Yes, we strongly agree that Government should allow UK ADR providers to use all of the procedural rules listed in Article 5(4) of the ADR Directive to reject inappropriate disputes. As the consultation paper acknowledges, ADR providers receive a significant amount of irrelevant queries.

As a sector operating under a mandatory ADR system, a number of the grounds for refusing applications are already in operation. Even so the experience of our members is that frivolous and vexatious complaints are still being accepted by ADR providers at a great and unfair cost to business. We would therefore urge the Government to look further at strengthening the rules for refusing disputes.

For instance, once a complaint is submitted to an ADR provider it has to be analysed by an adjudicator. This comes with an associated case fee of several hundred pounds regardless of whether or not the case is successful. The large case fee, far higher than fees to access the Small Claims Court, often acts as a disincentive for our members to want to utilise ADR. It is often far cheaper to settle a dispute with a customer even though the CSP is confident that there are certain to win the adjudication as the complaint is vexatious or misleading.

The first ground for refusing to deal with disputes - the consumer has made no attempt to resolve the complaint – should be strengthened to include the customer not following the complaint process before proceeding to ADR. To give certainty to CSPs it should be mandatory for complainants to have exhausted the company complaint process first. Some kind of formal process to register a complaint to give CSPs visibility of complaints would help in this regard.

In addition to the procedural rules contained in the Directive, we feel Government should go further and consider clarifying the rules for refusing disputes. One example would be to remove poor customer service as a criterion that allows consumer to bring a complaint to ADR. ADR currently allows consumers (even if they have not yet signed a contract) to bring complaints against a CSP on the grounds of 'poor customer service'. While it is in our members' interest to deliver excellent customer service in order to keep existing and win new customers, we would argue that the provision of good customer service falls outside of the main services supplied by a CSP and is not covered by contracts (this is particularly the case for prospective customers). In the case of poor customer service, there are already other avenues for voicing complaints such as online forums, websites, social media and word of mouth and the inclusion of 'poor customer service' in the ADR process allows consumers to play the system. Even if consumers have no grounds to bring a complaint on the basis of services disruptions or similar, 'poor customer service', which is a highly subjective measure, provides a fall-back option and thus leaves the ADR system open to abuse. Therefore, we recommend that 'poor customer service' should be considered when an ADR provider is making an adjudication and determining levels of compensation, but in and of itself should not be a sole ground for proceeding to ADR.

ISPA members would welcome further clarity from Government on what the pre-specified value of the claim and time limit is likely to be

We expand upon these points further in Question 31.

Online Dispute Resolution Contact Point

Q18. Do you agree that the ODR contact point should only be required to assist with cross border disputes involving a UK consumer or UK business?

Yes.

Q19. Should the ODR contact point be allowed to assist with domestic complaints on a case-by-case basis?

No. Existing ADR would cover this.

Binding decisions

Q23. Do you agree that the UK should allow certified ADR providers to make decisions that are binding? If you disagree can you please explain why?

Yes, we agree. We feel that once a decision has gone to ADR consumers should not be able to pursue it via other legal routes.

Applying the ODR Regulation to disputes initiated by business

Q24. Do you agree that the ODR Regulation should only apply to disputes initiated by a consumer, and should not apply to disputes initiated by a business? If not, can you please explain why?

Yes, we agree and is in keeping with the current system. Business-to-business services are often covered by Service Level Agreements and contracts.

Call for evidence on simplifying the provision of ADR

Q25. Would the benefits of simplifying the ADR landscape over the longer-term outweigh the costs? Who would the costs and benefits fall to?

It is not clear if the benefits of simplifying the landscape over the longer-term would outweigh the costs. As the UK ADR landscape has evolved over time, taking account of the various sectors it operates in, we do not see the need for significant change, such as making it mandatory.

It would have an impact on the various ADR providers in existence and would be a significant challenge to bring them under one umbrella. If reform is needed it should be on a sector-by-sector basis following further research and understanding of the need for reform. Our sector is covered by two ADR providers overseen by a regulator and is already adequately covered.

General points

Q31. Are there any other issues or areas on which you would like to comment? If so, we would welcome your views.

Government says it wants to ensure that costs and burdens on businesses are “kept to a minimum” whilst still maintaining a high level of consumer protection. The current situation in the communications sector means that costs and burden on business are not being kept to a minimum. By adding an additional level of protection for CSPs, the overall fairness of the system will be improved. ISPA members have fundamental concerns with the overall efficacy and fairness of the ADR procedure. Our concerns are:

- The unfairness of our members having to pay a case fee of several hundred pounds for cases accepted by an ADR provider. This has resulted in a broken system where CSPs are often forced to resolve complaints before going to ADR, even when the complaint is not justified and the CSP is confident of being vindicated. This is because the cost of letting an unjustified complaint go to ADR is often far greater than the amount being disputed.

- More could be done to clear up and clarify how ADR providers can accept or reject applications, such as whether a complaint was vexatious, and other ways complaints can be rejected or accepted.
- Evidence from our members suggests that consumers are able to use the threat of taking a complaint to ADR and the associated case fee that comes with it to force ISPs to settle, even though the ISP is very likely to have the case found in its favour (please see case study 2).

Having argued that the system too often leads to ISPs having to pay a case fee far in excess of the amount in dispute, we propose that Government should explore the possibility of requiring ADR providers to build in a review process for complaints. This process would ensure that vexatious complaints are weeded out and only genuine complaints are taken through to ADR.

Alongside this, Government should consider the possibility of a small fee to be levied on consumers who use the service, refundable if the complaint is successful. This is in line with the process followed by the Small Claims Court, where the losing party pays. This is also in line with the Directive itself which allows for a nominal charge. Recent changes to the employment tribunal system have seen individuals who use the tribunal having to pay a cost to do so rather than the taxpayer. Fees to access the small claims court and to review examination grades are also in place. As part of the Digital Economy Act, Ofcom planned to include a £20 appeals fee for those accused of online copyright infringement to deter vexatious appeals. Consumers having to pay an appeal fee is not without precedent. Whilst this goes against the 2003 Communications Act, which established the framework for ADR in our sector, we feel Government should at least explore the same principle here.

One solution based on this, which keeps the principle of a free-to-access service for consumers and reduces significant wasted ADR fees and resources, could be the following system:

- *Step 1:*
A complaint is received by the ADR provider from a customer. An initial assessment review is made of the complaint to ascertain whether it is vexatious/misleading or genuine. This is free for consumers and CSPs would be charged a small fee so that the ADR provider is remunerated for the first stage sifting process.

If a complaint is found to be genuine it proceeds to full ADR and the CSP pays the full case fee minus the amount already paid to the ADR provider.
- *Step 2:*
If the initial assessment finds that the complaint's validity can be challenged, the customer could still access ADR but only by paying a small, fee of £20, refundable if ultimately successful. The reasoning behind this would be to deter vexatious complaints.

If the customer pays the fee and takes the claim to full ADR, any fees incurred in Step 1 would be discounted from the main case fee.
- *Step 3:*
The normal ADR adjudication runs its course. If the customer had to pay any fees to take the case forward the £20 fee would be refunded if the dispute is found in their favour. If unsuccessful the £20 fee would not be refunded.

To ensure a level-playing field we also feel that there should be more rigorous enforcement of ADR provision so that those that offer ADR services all follow the same rules.

As case study 2 sets out, the cost of case fees and compensation is completely out of kilter with the amount internet and telephony services cost. There should be some focus from Government to try and limit the amount of compensation available. If compensation is being sought for a lack of connectivity it should be line with the actual cost of the service.

Case Study 1: illogical adjudications

Context

An end users' modem is damaged by lightning and needs replacing, The device is owned by the end user and has not been provided by the ISP. As a sign of goodwill and dedication to customer service, the ISP provides that end user with a loan modem. After a further lighting strike, the loan device also breaks down. The ISP does not provide another loan modem but also does not pursue the customer for cost of providing the broken loan unit.

Case

The end user takes the ISP to ADR as the provider on the grounds of "poor customer service". By not providing another replacement the customer is able to argue that it is 'poor service' even if they have no contractual right to have a replacement. The ISP is now in a position of being blackmailed into replacing the modem & the customer could still go to ADR claiming poor customer service.

Ruling

ADR rules in favour of the consumer who is awarded

- £500 compensation for poor customer service
- The costs of a new modem
- Including the ADR fee of £355 (+VAT) the ISP is left with total costs of approximately £1000 for a router.

Case Study 2: lack of screening process

Context

A customer had an issue with a large CSP over a charge for a 30p mobile call cost.

Case

The customer had 2 previous ADR disputes rejected (each time requesting £2000 and £500 compensation) and sought ADR for a third time over the call cost and £500 in 'lump sum' compensation. The CP offered to refund the cost of the call (30p) as a goodwill gesture.

Ruling

CISAS adjudication found no evidence had been provided in support of the customer's claim or any evidence of poor customer service and therefore no breach. The CP was still forced to pay £426.00 (£1278 in total if the first two unsuccessful adjudications are taken into account) in CISAS fees.