

ANNEX B - Implementing the Alternative Dispute Resolution (ADR) Directive and Online Dispute Resolution (ODR) Regulation

The Department of Business Innovation and Skills issued a consultation into implementing the ADR and ODR Directive in March 2014. The consultation does not propose making any sweeping changes to the UK ADR landscape in the short term. The Gov't expect to implement a residual scheme to close up any gaps initially however they have also called for evidence for simplifying the landscape in the long term.

We expect OLC to respond to the call for evidence with a pretty substantial submission. LeO have been working hard in the background to push for a simplification of the landscape, potentially with them playing a central role.

Of greatest interest to us is the role of 'Competent Authority' because we oversee a regulated sector with a compulsory ADR scheme, with scope to also become a Competent Authority for schemes across the whole sector, especially if LeO widen their net.

A summary of the main points of the consultation is provided below:

Introduction

- The main objective of the Directive is to give European consumers greater access to redress should something go wrong with their purchase of goods or services. The Government (Gov't) are therefore seeking views on how to ensure ADR is available for any dispute regarding contractual obligations that a consumer has with a business. The ADR Directive is only concerned with consumer to business disputes (as opposed to business to consumer and business to business).
- The UK has to transpose the requirements of the ADR directive into national law by 9 July 2015. The **Online** dispute resolution (ODR) regulation will come into force automatically 6 months later on 9 January 2016
- The Gov't are assuming that a residual ADR scheme which would operate alongside existing schemes and deal with any dispute not currently covered would be the simplest way of fulfilling the Directive. However they are also specifically seeking views on:
 - Whether it would be better to have more than one ADR body operating as part of a residual ADR scheme.
 - Whether a particular operating model would work best.
 - How businesses could be encouraged to use a voluntary scheme.
 - An appropriate fee structure
- They are also using the consultation as an opportunity to explore the simplification of the ADR and so have asked for comments and evidence about the assumptions set out in the IA.

UK ADR landscape

- There are currently several different approaches to ADR in the UK. ADR is mandatory in certain sectors where there is a high potential for consumer detriment, with a single body acting as Ombudsman in some sectors, or several ADR bodies operating in other sectors in which case consumers have a choice of which ADR provider to sign up to.
- There are 70 ADR schemes listed in the consultation document, however it is expected that the number of ADR bodies that will be registered as compliant with the ADR Directive will be lower.
- A 2010 OFT study identified gaps in the provision of ADR in several retail sectors. BIS's 2011 call for evidence also identified gaps in passenger transport, construction, private parking, insolvency practices and vehicle repair.

Background to the ADR Directives and ODR Regulation

Making ADR available

- The Gov't will have to ensure that ADR, provided by a certified ADR body, is available for any dispute concerning contractual obligations between a consumer and a business. It does not make the use of ADR mandatory – it does not require the UK to force businesses or consumers to use ADR, but the Gov't must ensure ADR is available if both parties agree to use it.
- The Directive does not require the Gov't to force existing ADR providers to become certified ADR providers which comply with the requirements of the Directive however the UK is obliged to ensure comprehensive ADR coverage and ensure that ADR is provided by a certified ADR provider or providers in all sectors.
- The Directive does not give a consumer the right to force a business to use ADR, or to use a particular ADR provider. In a sector where ADR is not mandatory it will be up to the business to decide whether to use ADR for a particular dispute.

Requirements for ADR providers

- The Government has to ensure that certified UK ADR providers follow specific operational rules. The main operational rules are:
 1. The ADR procedure must be free of charge or available at a nominal fee for consumers.
 2. Disputes must be concluded within 90 days of receiving the complete complaint file. This timeframe can be extended in the case of highly complex disputes.
 3. ADR providers have three weeks from receiving a complaint file in which to inform the parties concerned if they are refusing to deal with a case.
 4. Individuals who oversee disputes must have the necessary expertise and be independent and impartial.
 5. ADR providers must make available specific information about their organisation, methods and cases they deal with, and provide annual activity reports.
 6. Consumers must have the option to submit a complaint (and supporting documentation) and to exchange information either online or offline.

The ODR Platform

- In the event of a contractual dispute arising from an online transaction. The ODR platform will channel any dispute to the relevant ADR scheme.

Information requirements for business

- All businesses will be required to signpost consumers to the certified ADR provider on their website and, if applicable, this must also be reflected in the terms and conditions of any sales or service contracts. All businesses that sell their goods or services online must also signpost to the ODR platform.
- In the event of an unresolved dispute, all businesses must provide information about an appropriate certified ADR provider/s to the consumer and advise whether they will use ADR in an attempt to settle the dispute. Businesses that operate in sectors where the use of ADR is voluntary will have to advise consumers whether or not they are willing to refer the complaint to an appropriate ADR body.

The Proposals

- Gov't looking at a few options to ensure that they fulfil their obligations under the directive.
 1. **Do nothing** – This is not enough to ensure ADR is available for all consumer disputes. Although ADR schemes exist which can consider disputes from a range of sectors they would not have the capacity to deal with the expected increase in disputes across all sectors covered by the directive.
 2. **Residual ADR** – Introducing a residual scheme would be the simplest way of addressing any gaps in provision. The Gov't could set up a residual ADR scheme to operate alongside existing ADR schemes. This approach would fulfil the Gov'ts obligations and provide greater access to redress for consumers. Single or multiple residual bodies could be established, the competition offered by having multiple bodies is likely to keep fees down.
 3. **Compulsory ADR** - The directive does not oblige the gov't to force businesses to use ADR so this would go beyond their obligations. Making ADR mandatory for every business would come at a considerable cost to businesses, therefore they are not proposing to make any ADR scheme voluntary.
 4. **Operating model for ADR** – The Gov't envisages a model similar to the Ombudsman model. An appropriate minimum and maximum claim limit and maximum financial penalty would have to be set for a residual ADR, taking into account the broad range of sectors it would cover.
 5. **Encouraging use of ADR** – this presents a challenge because not all businesses are obliged to provide ADR. It is hoped that the information requirements which businesses will need to comply with will encourage greater use of ADR.
 6. **Fees** – Anticipate that the most feasible model would be one where an annual fee is charged in addition to a case fee. This would make it easier to predict the number of cases and cover fixed fees.

Competent Authorities

- The UK must designate one or more 'competent authorities' to maintain and monitor a list of certified ADR providers.
- The function of a Competent Authority (CA) will be to assess whether bodies wishing to qualify as a certified ADR provider meet the requirement of the Directive. The CA must then monitor and maintain a list of certified ADR providers and notify any changes to the list to the European Commission. If a CA needs to remove a ADR provider from its list then it must ensure that there is another suitable provider able to handle disputes that the previous body dealt with.
- The Gov't have concluded that it would be preferable for the UK to have more than one CA. If the ADR landscape remains the same as now then they envisage a small number of current regulators who oversee a regulated sector with an ADR scheme to act as the competent authority for their sectors. However there will also be a need for a CA to monitor the residual ADR schemes if this is brought into existence, and the Gov't is currently finalising arrangements for this.

Information requirements for businesses

- Both the ADR Directive and ODR Regulations impose information requirements that businesses will have to comply with:
 1. Any business that is obliged by legislation or membership of a trade association or has otherwise committed to use a certified ADR provider must provide information about that provider on their website and terms and conditions of any sales or service contracts.

2. If a business is unable to resolve a consumer's complaint, it must, irrespective of whether they are obliged to or intend to use a certified ADR provider, provide information 'on paper or another durable medium', about an appropriate ADR provider who can handle the dispute. They must also advise whether they intend to use this provider in an attempt to settle the dispute.
3. All businesses that provide goods or services online will have to provide a link to the ODR platform.
4. Online businesses that are obliged to or committed to using ADR will have to go further and inform consumers about the ODR platform, providing a link on their websites, e-mails and any applicable terms and conditions. Online 'Market -places' will have to provide a link to the ODR platform.

Limitation and prescription periods

- The directive requires that parties who are engaged in an ADR processes are not prevented from initiating litigation just because the deadline for launching it has passed while both parties are engaged in the process. In the UK a claimant has 6 years from the date of the breach to bring a claim, and the Gov't will have to extend this window where an ADR process has started, but is still on-going when the 6 year time period terminates.
- The Gov't intends on applying an eight week extension after the end of the ADR process to bring a claim to court (in line with the mediation directive). Equivalent amendments will need to be made to the legislation of Scotland and N. Ireland and any sector specific legislation.

Call for evidence

- The Gov't also need to explore whether longer-term and broader reforms of the UK's ADR landscape are necessary and if so, when and how they would be achievable. They do not intend on achieving any major simplification by the deadline for the implementation of the ADR directive and the Gov't does not have sufficient evidence or analysis about the benefits of simplification and business weighed up against the costs to business and to tax payers. They are therefore calling for evidence on a broader simplification of the ADR landscape and seeking views on some of the issues that reform brings to light.
- There are currently 70 different ADR schemes operating in the UK. Some consumers will find that their dispute will be covered by multiple ADR providers and it is not always clear where a consumer should go for help. Stakeholders have suggested that a simplified ADR landscape would prevent problems where it is difficult to determine who the most appropriate ADR provider is. This could be achieved by:
 - Creating a single umbrella ADR scheme
 - Rationalising the number of schemes so that only one or a few exist
- The ultimate aim would be to help increase awareness and overall take up of ADR. Change would require primary legislation and may have significant impact on existing ADR providers. In addition a key issue to consider would be whether to make the use of ADR compulsory for business. This would be the clearest system to operate but would come at a significant cost estimated in the region of £18-£38.5m.