



## BRIEFING PAPER

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# Alternative Dispute Resolution (ADR) and consumer disputes

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2. ADR Directive and ODR Regulation
3. Implementation of the ADR Directive in the UK
4. Seeking approval as a consumer ADR body in a non-regulated sector



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## Summary

### Summary

- Alternative Dispute Resolution (ADR) describes a range of methods, such as mediation, arbitration and conciliation.
- Usually these methods are a cheaper and quicker route for resolving a dispute than the alternative of beginning legal proceedings in court.
- In the past, there has been a diverse approach to ADR in the UK, with several different models in operation in different markets.
- ADR is mandatory in certain sectors where there is a high risk of consumer detriment. In other sectors, voluntary schemes operate which traders can choose to join and these are usually linked to trade associations.
- This Paper is predominantly concerned with consumer ADR (i.e. a dispute between a trader and a consumer).

The [EU Directive on Consumer ADR](#) and an EU Regulation on [Consumer Online Dispute Resolution](#)<sup>1</sup> were published in July 2013. The requirements of the Directive were implemented into UK law by two sets of regulation, laid in in March and June 2015:

- [The Alternative Dispute Resolution for Disputes \(Competent Authorities and Information\) Regulations 2015](#)
- [The Alternative Dispute Resolution for Consumer Disputes \(Amendment\) Regulations 2015](#)

These Regulations came into force on **9 July 2015**, except for the business information requirement which took effect from **1 October 2015**.

The Directive requires that the UK Government ensures that all consumer sectors have access to Alternative Dispute Resolution (ADR) bodies that have been audited against set quality criteria. In addition, the Directive requires that all trade associations who are approved ADR bodies present this information on their website in a clear and concise manner. Essential information to be given includes:

- The name of any network of bodies which facilitates cross-border ADR of which it is a member.
- The type of domestic disputes and cross-border disputes which it is competent to deal with, including any financial thresholds which apply.
- The procedural rules of the ADR procedure operated by it and the grounds on which it can refuse to deal with a dispute.

Under the new Regulations, if a trader fails to resolve a dispute directly with a consumer, the trader will be required to give the consumer the details of the relevant approved ADR body and indicate whether he/she intends to use it. **Nothing requires the trader to actually use the approved body or any other body.**

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<sup>1</sup> [Regulation \(EU\) No 524/2013](#) of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

# 1. Background

## 1.1 What is ADR?

A number of bodies across the UK and in Europe provide ADR as a low cost way to resolve contractual disputes. ADR describes a range of methods (see **Box 1** below) designed to avoid the need to go to court to enforce legal rights. These ADR methods can offer a cheaper, quicker and less formal way of resolving a dispute.

While ADR can be used in a number of different types of disputes, the [ADR Directive](#) (and the [ADR Regulations 2015](#) which implements the Directive in the UK) is only concerned with disputes that a consumer has with a business, following the purchase of goods, services or digital content.

### Box 1: Common forms of ADR

Common forms of ADR are:

- **mediation**, where an independent third party helps the disputing parties to come to a mutually acceptable outcome
- **arbitration**, where an independent third party considers the facts and takes a decision that's often binding on one or both parties
- **conciliation**, where parties to a dispute use a conciliator, who meets with the parties separately and together in an attempt to resolve their differences

## 1.2 Benefits of ADR in consumer disputes

According to the Government, ADR costs are between 1/8th and 1/3rd of the cost of going to court.<sup>2</sup> The European Commission have estimated that it only takes up to 90 days for most disputes referred to ADR to be resolved. ADR in the UK tends to be free for the consumer, as it is often funded through businesses paying membership fees, levies or case fees to the ADR provider.

Consumer Focus<sup>3</sup> (now disbanded) estimated that in 2012 out of 6.4 million consumer complaints made to business, two million were unresolved.<sup>4</sup> The court system can be a daunting and expensive prospect and so only a small fraction of these complaints actually reach the courts.

ADR can be a cheap and quick way of resolving a dispute.

Without ADR, a large number of consumer complaints may not get resolved.

<sup>2</sup> ['Government response to the consultation on implementing the Alternative Dispute and the Online Dispute Resolution Regulation'](#), Department for Business, Innovation & Skills, November 2014, [online] (accessed 18 May 2017)

<sup>3</sup> Consumer Futures (formerly Consumer Focus), an executive non-departmental public body of BIS, represented consumers across regulated markets. It was abolished on 1 April 2014, with all its functions transferred to other bodies ([Citizens Advice](#), [Citizens Advice Scotland](#) and [General Consumer Council for Northern Ireland](#))

<sup>4</sup> "Consumer Detriment 2012", Consumer Focus (now disbanded) [not online]

## 5 Alternative Dispute Resolution (ADR) and consumer disputes

Feedback from consumers who have used ADR tends to be positive, and a European Commission survey indicates that 82% of businesses who have used ADR would use it again.<sup>5</sup>

Often decisions by the ADR body are not legally binding on either party, but a trader might have agreed to be bound by the decision as part of any membership agreement of a particular scheme. In most cases where both parties have agreed to use ADR, traders will voluntarily follow the decision of the ADR body. If the consumer is unhappy about the decision reached (assuming the ADR decision is not legally binding), the consumer will retain the right to take the trader to court.

Consumers and businesses like ADR.

Often, ADR decisions are not legally binding on the consumer.

### 1.3 UK ADR Landscape

According to the [Department for Business Innovation and Skills](#) (BIS) (now BEIS), there is a diverse or patchy approach to ADR in the UK, with several different models in operation.<sup>6</sup>

ADR is mandatory in certain sectors where there is a high risk of consumer detriment or complex disputes, with a single public body operating as an ombudsman in some of these sectors (e.g. financial services, legal services), and several private ADR bodies operating in others (e.g. telecommunications and estate agents). In this latter category, businesses have to refer unresolved complaints to an ADR provider, but they have a choice of which ADR provider they sign up to use.

There are already several large and well-established ADR schemes in regulated sectors. These include: financial services, energy and telecoms.

Outside the regulated sectors, many businesses are already members of voluntary ADR schemes. Such schemes are often linked to membership of trade associations which businesses can choose to join. Sometimes there are several voluntary ADR schemes which operate in the same sector. BIS (now BEIS) gives the example of glazing installers who can choose to join either [The Glazing Arbitration Scheme](#) (TGAS), the [Double Glazing and Conservatory Ombudsman Scheme](#) or become a member of the [Glazing and Glass Federation](#), who will refer disputes involving their members to an independent ADR scheme. However, some glazing installers may choose not to belong to any of these voluntary schemes, resulting in only partial provision of ADR in this sector.

Voluntary ADR schemes in non-regulated sectors.

In addition, there are several small independent ADR bodies who offer mediation services, often at a local level. However, although these services are available to consumers they mainly focus on commercial or family disputes.

Small independent ADR bodies, provide mediation services at a local level.

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<sup>5</sup> [‘Government response to the consultation on implementing the Alternative Dispute and the Online Dispute Resolution Regulation’](#), Department for Business, Innovation & Skills, November 2014, [online] (accessed 18 May 2017)

<sup>6</sup> *Ibid*

## 2. ADR Directive and ODR Regulation

### 2.1 Background

[Directive 2013/11/EU](#) on alternative dispute resolution (the ADR Directive) and [Regulation \(EU\) No. 524/2013](#) on online disputes (the ODR Regulation) were published in the EU Official Journal on 18 June 2013. The aim of the legislation is to provide in every Member State a fast, cheap and informal way for consumers to settle disputes with traders out of court, through the intervention of an approved ADR entity (such as an arbitrator, conciliator, mediator, ombudsman, or complaints board). Approved entities will be listed by competent authorities within each Member State and by the European Commission.

The European Commission initially proposed this legislation in November 2011, with the publication of a Communication on ADR for consumer disputes alongside a draft ADR directive<sup>7</sup> and a draft ODR Regulation.<sup>8</sup> The Commission argued at the time that a substantial proportion of consumers encounter problems when buying goods and services in the internal market, estimating that 20 per cent of consumers suffered detriment in 2010.<sup>9</sup> According to the Commission, problems with purchased goods or services often go unresolved because access to ADR across the EU is inconsistent and inadequate.<sup>10</sup>

The [ADR Directive](#) had to be transposed into UK law by **9 July 2015**.<sup>11</sup> The [Online Dispute Resolution \(ODR\) Regulation](#) came into force 6 months later on **9 January 2016** (although the requirements relating to the creation of an ODR contact point was applied in advance).

It is important to note that the Directive is limited in scope to consumer disputes (see **Box 2** below).

#### **Box 2: Limitations of the ADR Directive:**

- The ADR Directive only covers disputes concerning contractual obligations between a consumer and a business.
- Disputes such as discrimination claims and disputes between businesses fall outside the scope of the Directive.

<sup>7</sup> [European Commission Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending regulation \(EC\) No. 2006/2004 and Directive 2009/22/EC \(Directive on consumer ADR\)](#), Com(2011) 793 final

<sup>8</sup> "New legislation on Alternative and Online Dispute Resolution (ADR and ODR)", European Commission website, [not online]

<sup>9</sup> '[Consumer Empowerment](#)', [Eurobarometer 342](#), p.169, European Commission, April 2011 [online] (accessed 18 May 2017)

<sup>10</sup> Department for Business, Innovation and Skills, '[Call for evidence on EU proposals on Alternative Dispute Resolution](#)', December 2011, page 2, [online] (accessed 18 May 2017)

<sup>11</sup> Article 25 of the [ADR Directive](#)

## 2.2 Requirements of the ADR Directive

In a nutshell, the ADR Directive requires Member States to create their own ADR systems, with their own approved ADR entities (see **Box 3** below). It also requires Member States to designate a competent authority in charge of monitoring the functioning and development of ADR schemes established in its territory.<sup>12</sup>

It is the role of ADR entities to propose or impose a solution or facilitate an amicable solution by bringing the parties together. In fulfilling this function, ADR entities must ensure minimum quality standards in relation to domestic and cross-border contractual disputes between traders established in the EU and consumers resident in the EU.

In addition, the Directive requires all businesses to inform consumers about an ADR scheme that meets the standards of the ADR Directive. Businesses also have to specify whether or not they intend to use the scheme should a dispute arise. Businesses have to do this on their websites (if they have one), in their general terms and conditions and in relevant invoices and on receipts.<sup>13</sup>

### **Box 3: The principal obligation on the UK Government under the Directive:**

The principal obligation on the UK Government under the Directive is to ensure that ADR, provided by a certified ADR body, is available for any dispute concerning contractual obligations between a consumer and a business, **although the use of ADR is not mandatory under the Directive.**

The term ADR and the processes that the Directive need to be approved by the competent authority (CA), include all processes that are aimed at resolving the consumer's complaints. It is not limited to formal mediation, conciliation, adjudication processes etc. Nor is it limited to Ombudsman services.

There are a number of qualifying points:

- The Directive does **not** make the use of ADR mandatory – businesses or consumers cannot be forced to use ADR, but the Government must ensure ADR is available if both parties agree to use it.
- Business-to-business disputes are not covered by the Directive, nor are disputes initiated by a business against a consumer.
- Further exclusions apply to health services and public providers of education.
- An ADR provider remains free to consider disputes that are outside the scope of the Directive.
- **The Directive does not give a consumer the right to force a business to use ADR, or to use a particular ADR provider.** In sectors where the use of ADR is not compulsory it is for the business to decide whether to use ADR for a particular dispute.

The Directive does **not** require the Government to force existing ADR providers to become certified ADR providers. However, in order to discharge its obligation of ensuring comprehensive ADR coverage, the Government must ensure that ADR by a certified ADR provider is available in all sectors. It follows from this that if an existing ADR provider decides not to become certified, they will find that an

<sup>12</sup> Article 25 of the [ADR Directive](#), paragraph 30

<sup>13</sup> Article 25 of the [ADR Directive](#), paragraph 33

alternative certified ADR provider will be available for disputes in that sector, and businesses and consumers will be signposted towards the certified ADR provider.

It is important to note that there are some **regulated sectors** in the UK where the use of ADR is already mandatory (for example, financial service providers must allow the [Financial Ombudsman Service](#) to handle any unresolved complaints). According to BIS, this will remain the case.<sup>14</sup>

Under the ADR Directive, the Government has to ensure that certified UK ADT providers follow specific operational rules (see **Box 4** below).

#### Box 4: Operational rules for approved ADR providers

- The ADR procedure must be free of charge or available at a nominal fee to consumers.
- ADR providers have **3 weeks** from receiving a complaint file in which to inform the parties concerned if they are refusing to deal with a case.
- 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.
- Individuals who oversee disputes must have the necessary expertise and be independent and impartial.
- ADR providers must make available specific information about their organisation, methods and cases they deal with, and provide annual activity reports.
- Consumers must have the option to submit a complaint (and supporting documentation) and to exchange information either online or offline.

Importantly, certified ADR providers are permitted to follow certain procedural rules which will allow them to refuse to deal with unsuitable disputes. For example, where the consumer has not attempted to resolve the complaint directly with the business first.

## 2.3 Requirements of the ODR Regulation

The [ADR Directive](#) is supplemented by the [ODR Regulation](#). Under this Regulation, the European Commission has established an online platform (the ODR platform). This is a free, interactive website through which both traders and consumers can initiate ADR in relation to contractual disputes concerning online sales or service transactions.

The ODR platform does not seek to resolve the dispute itself. Instead, it channels such disputes to a relevant ADR scheme (assuming both parties agree). An electronic case management tool is available to ADR providers, should they choose to use it.

Consumers are increasingly active online and across national boundaries.

The ODR Regulation aims to help consumers across Europe to get greater access to redress, should something go wrong with goods or services bought in other member states, without having to resort to legal action.

<sup>14</sup> [‘Government response to the consultation on implementing the Alternative Dispute and the Online Dispute Resolution Regulation’](#), Department for Business, Innovation & Skills, November 2014, [online] (accessed 13 October 2015)

## 3. Implementation of the ADR Directive in the UK

### 3.1 BIS consultation

In March 2014, BIS published a consultation document, "[Alternative Dispute Resolution for Consumers: Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation](#)".<sup>15</sup> In this paper the Government sought views on the various issues that had to be addressed in order to implement the ADR and ODR legislation, including:

- How to ensure that ADR is widely available
- How a competent authority scheme will operate
- Setting up an ODR contact point to assist with online disputes
- Helping businesses comply with the information requirements
- Whether rationalisation of the ADR landscape is necessary

The Government published its [response](#) to the consultation in November 2014.<sup>16</sup> In this document the Government said that it would:

- allow certified ADR providers to use the full set of criteria in Article 5(4) of the ADR Directive as grounds on which they could refuse to deal with inappropriate disputes;
- allow certified ADR providers to make decisions that are binding; and
- apply an eight-week extension to the six-year window an individual has to initiate litigation, should an ADR process be on-going at the time the six year window expires

Significantly, the Government said that it would not categorise in-house mediation as an appropriate ADR process when implementing the ADR Directive.

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<sup>15</sup> "[Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation](#)", Department for Business, Innovation and Skills, March 2014, [online] (accessed 18 May 2017)

<sup>16</sup> '[Government response to the consultation on implementing the Alternative Dispute and the Online Dispute Resolution Regulation](#)', Department for Business, Innovation & Skills, November 2014, [online] (accessed 18 May 2017)

## 3.2 Alternative Dispute Resolution Regulations 2015

The requirements of the Directive were implemented into UK law by two sets of regulation, laid in in March and June 2015:

- [The Alternative Dispute Resolution for Disputes \(Competent Authorities and Information\) Regulations 2015](#).
- [The Alternative Dispute Resolution for Consumer Disputes \(Amendment\) Regulations 2015](#)

These Regulations (known as the 'ADR Regulations 2015') came into force on **9 July 2015**, except for the business information requirement, which took effect from **1 October 2015**.

### Box 5: The remit of the new ADR Regulations 2015

The [ADR Regulations 2015](#) set out the legal requirements for:

- the ADR approval process (or 'certification'),
- the information requirements for traders, and
- the appointment of Competent Authorities

As outlined in **Box 5** above, the Regulations provide for bodies to provide ADR services for both domestic and cross-border disputes. In particular, they:

- set the standards that ADR scheme applicants must meet in order to achieve certification; and
- establish competent authorities to certify ADR schemes

In the regulated sectors, the regulators will act as the competent authority. For example:

- [Ofgem](#)
- [Financial Conduct Authority](#) (FCA)
- [Civil Aviation Authority](#) (CAA)

In all other areas the Secretary of State will be the generic competent authority and has appointed the [Chartered Trading Standards Institute](#) (CTSI) to carry out these functions on his behalf.

Importantly, the new Regulations place an information requirement on businesses selling to consumers. Specifically, traders are required to give consumers information about an ADR organisation who could help them. This legal information requirement to be 'triggered' when the trader cannot resolve a consumer dispute using their own internal processes. The ADR referral can only be made to an approved ADR; this means a body that has been checked and certified to ensure the independence, quality and accessibility of the service it provides.

A certified ADR provider can be used in respect of both online and offline disputes. Only in very limited circumstances can an ADR provider refuse to deal with a consumer who initiates a complaint.

## 11 Alternative Dispute Resolution (ADR) and consumer disputes

It is important to note that the Regulations do not make participation in ADR schemes mandatory for traders. The Regulations do require almost all businesses which sell directly to consumers to point the consumer to a certified ADR scheme – where they cannot resolve a dispute in-house – and declare whether or not they intend to use that scheme.

The Regulations also require that ADR providers wishing to gain certification must meet certain standards with regard to independence, impartiality, and quality of expertise (see below).

The Regulations do not make participation in ADR schemes mandatory for traders

## 4. Seeking approval as a consumer ADR body in a non-regulated sector

### 4.1 What is ADR approval?

Nearly all ADR organisations can apply for approval and also many organisations that perhaps do not consider themselves an ADR provider.

To gain ADR approval, an ADR body must apply to one or more of the relevant UK Competent Authorities for the types of transactions it deals with or that have been assigned to it in particular (see **Box 6** below).

The [Chartered Trading Standards Institute](#) (CTSI) operates as the Competent Authority across all non-regulated sectors. This is the arrangement for England and Wales, Scotland and Northern Ireland. In brief, its role covers the following aspects:

- auditing ADT bodies;
- creating and hosting a website publishing details of all approved ADR bodies; and
- fulfilment of a number of reporting requirements to the EU Commission (in effect, approved bodies supply performance information to the relevant competent authority who then pass it on to the CTSI as the single point of contact for collating and passing information to the EU Commission)

In regulated sectors, the regulators operate as the Competent Authority (see **Box 6** below).

Non-regulated sectors

Regulated sectors have their own specific Competent Authority

#### Box 6: Who are the Competent Authorities in the UK?

The following bodies are competent authorities in respect of their regulated sector:

- The [Financial Conduct Authority](#) (FCA), particularly in relation to the Financial Ombudsman Service);
- [Legal Services Board](#) in particular in relation to the Office for Legal complaints;
- [Civil Aviation Authority](#) (CAA);
- [Gambling Commission](#);
- [Gas and Electricity Markets Authority](#) (Ofgem);
- [Office of Communications](#) (Ofcom); and
- The lead enforcement authority for the purposes of the [Estate Agents Act 1979](#)

Where the dispute transaction falls outside the remit of these Competent Authorities (and for the services of the [Pensions Ombudsman](#) in particular) then the Secretary of State is the relevant Competent Authority. However, the Secretary of State has delegated responsibilities for dealing with applications and approval in its role as Competent Authority to the [CTSI](#).

The [CTSI](#) will also act for the Secretary of State, as the single point of contact for all the UK Competent Authorities.

## 4.2 What activities need to be approved?

### Box 7: What activities need to be approved/audited?

- The term ADR and the processes that the Directive need to be approved by the competent authority (CA), include all processes that are aimed at resolving the consumer's complaints.
- It is not limited to formal mediation, conciliation, adjudication processes etc. Nor is it limited to Ombudsman services.
- It is possible that an applicant body carries out several activities some of which may be capable of approval under the Regulations. For example, a body may have separate processes in place for dealing with consumer complaints and with disputes between traders. In this case the first process can be approved and the second, for the purposes of the competent authority, can be ignored.
- Even if a body carries out informal ADR, then it should be approved by a competent authority.

## 4.3 How does the approval process work?

### Box 8: Audit requirement

The [EU Directive on consumer ADR](#) requires that the UK government ensures that all consumer sectors have access to ADR bodies that have been audited against the Directive's quality criteria.

Guidelines on how to become an approved consumer ADR provider are available on the [CTSI website](#).

In brief, once a body has sent their initial application to CTSI, a named auditor will be appointed to assess the application. The role of the auditor is to work with the organisation to answer any concerns it may have about meeting the requirements to be certified. Changes may need to be made to the organisation, its policies or procedures.

Approval auditing is carried out over a 3 year cycle:

- Year 1 – will see a full audit against all the provisions of the CTSI guidance
- Years 2 and 3 – will see a lesser audit to ensure continuance of approval
- Year 4 – will see the cycle start again with organisations needing to again seek a full audit

In effect, the approval process creates an ongoing relationship with the Competent Authority.

According to the CTSI guidelines, the audit process is designed so that where the audited process doesn't immediately meet the requirements of the Regulations, the auditor will assist the applicant body in modifying processes to eventually comply. However, where an application is rejected, the competent authority must, as soon as is reasonably practicable, give written notice of this fact to the ADR applicant, which must include the ground on which it was rejected.

There is nothing to stop more than one approved body operating in a specified sector.

Approval auditing to be carried out over a three year cycle.

Where an application is rejected

If the CTSI has reason to believe that an approved body is no longer meeting the requirements, and the reason is within its control, it is required to:

- issue the body with a written notice – that written notice will identify what requirement is not met, and request that it is promptly corrected or at most **within 3 months** of the date of the notice;
- If the body fails to correct the problem and it is a serious failure, the CTSI is required to write to the body withdrawing its approval;
- The CTSI would provide the body with details of the appeal mechanism against this decision, along with the written notice.

#### 4.4 Do all ADR providers have to obtain approval?

Some organisations ('intermediaries') may provide assistance to consumers to help them resolve a dispute by providing legal advice or directing them to another appropriate person for help (often referred to as 'signposting') or even just advise them that they should try to resolve the problem with the trader first. According to CTSI guidance, this is not ADR, provided that there is no element of being 'actively' involved in trying to resolve the dispute between the consumer and the trader.

#### 4.5 What will ADR approval cost?

CTSI fees are dictated by the provisions of Regulation 15 of the [ADR Regulations 2015](#).

CTSI as competent authority will be charging annually for approving bodies and has agreed charging bands depending on the size and complexity of the body's case load. Once an auditor has been appointed, these fees will become chargeable whether or not an application is successful.

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