

European Civil
Justice Systems

Harmonizing the Ombudsman Landscape

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Policy Brief

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The Foundation for Law, Justice and Society

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**Ombudsman
Services** ●●●●
Good for consumers - Good for business

European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration, and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.



Executive Summary

- The civil justice landscape is undergoing a major shift in the UK. The courts, already costly and complicated, deter the individual from pursuing civil justice when the potential settlement of their dispute is dwarfed by the expenditure they will need to make and the time they will need to commit. Opportunities for business to self-regulate and improve practice are also impeded by the lack of a wider understanding of what causes complaints and a holistic view of consumer attitudes towards a product, service, or the contact they have with businesses.
- Private sector ombudsman schemes can bridge this gap, but much of the sector still operates without one. As a result, an uncharted, though by all estimates large, number of consumer disputes are deprived of the option to seek out-of-court resolution.
- Directive 2013/11/EU, due for implementation before the next UK general election in 2015, requires Alternative Dispute Resolution (ADR) entities, the wider group to which ombudsman schemes belong, to be available for all business-to-consumer disputes. This provides a huge opportunity for consumers to obtain a route to justice across the aspects of daily life in which it has so far been difficult for most to access.
- If successfully implemented, the Directive will allow for a greater visibility of the functioning of the free market, and so for better regulatory action and business practice.
- The purpose of this policy brief is to illustrate how new and existing private sector ombudsman schemes can ensure that, in the implementation of the Directive and beyond, the best outcomes for consumers, business, and the wider market can be achieved, with ombudsman schemes established as an essential component within the continuum of administrative and civil justice.

Harmonizing the Ombudsman Landscape

The landscape

Increasingly, using administrative and civil courts and tribunals is not a viable option for citizens and consumers. The Woolf reforms, as implemented, mean that mediation and other forms of ADR should be attempted or at least considered before proceeding to the judicial process. The drastic cuts effected in legal aid mean that the risks of using courts and tribunals are greater, with complainants choosing to represent themselves in an unfamiliar arena, leading to cases taking longer and with greater chance of failure. Employment tribunal applications between January and March this year have fallen by 67%¹ compared with the same period last year, with up-front payment for access introduced in July 2013. This whole process has been described as the 'privatisation of civil and administrative justice',² and the potential for rationalizing and improving administrative justice has been considerably weakened by the abolition of the Administrative Justice and Tribunals Council.

The court system has long seemed inappropriate for the financially trivial consumer dispute, because consumers feel that their issues are insignificant for such an expensive and time-consuming procedure in what is such an unfamiliar arena. This is the context in which ombudsman schemes are now operating. It has been suggested that administrative and civil justice as provided by the state is in a crisis. Access to justice is difficult, and for many effectively denied. At the same time, reviews by the Public Administration Select Committee and the Cabinet Office, along with the EU Directive on ADR, mean that both public and private sector ombudsman schemes in the UK are under intense scrutiny.

Alongside this, the growing role of ombudsmen in resolving consumer disputes in the private sector, has demonstrated that another avenue to justice is

available. In providing timely, impartial resolutions, addressing the imbalance between the individual on the one hand, and an often powerful business on the other, private sector ombudsmen are providing justice in a modern, real sense. By collating and analysing the data which the resolution of complaints provides, ombudsmen are able to inform the market, regulatory bodies, governments, and businesses alike, and so bring an improvement to the consumer landscape as a whole.

The Financial Ombudsman Service (FOS), in determining redress for the many people affected by payment protection insurance (PPI); communicating the failings back to the companies, thereby providing the opportunity to change and improve practice; and in notifying the Financial Services Authority, is a specific example of an ombudsman providing an alternative to the courts. So, can ombudsmen fill the vacuum now created? Can they provide the necessary access to justice, ensuring that individuals are properly heard, that the evidence is appropriately scrutinized, and that the result is fair? The EU ADR Directive sets the requirement of comprehensive private sector ADR provision, and presents schemes with the opportunity to bridge the gaps in the modern justice system. If this impetus is successfully grasped by ombudsman schemes, measurement of the results that follow will set a strong case for expansion of ombudsman practice into other sectors, and strengthening what already exists, thereby potentially providing a springboard from which to revolutionize the justice landscape in the UK.

For ADR in the UK, though, a number of obstacles exist that must first be overcome if we are to realize these goals. If ombudsman schemes are to fill the vacuum created, they must become known as the route to justice, and it must be apparent that the outcomes are just. With the current plethora of schemes and methods, consumers are confronted with a confusing set of options in pursuing ADR, and

schemes will need to cooperate, to advertise the brand, and to construct loyalty to that brand, in order to send clear messages to consumers. By streamlining and simplifying access, people will know where to go, and the route to justice will be simple. By harmonizing process, people will know what to expect, when to bring a complaint, and transparency of this process can foster trust. This policy brief will expand on these ideas, with the goal of encouraging ombudsman schemes, as ADR bodies, to take up the gauntlet of justice in the British Isles.

Implementing the Directive

The Department for Business, Innovation and Skills (BIS) has consulted on the transposition and implementation of the Directive, which is expected to happen before the next general election in May 2015. It is unlikely that legislation will be introduced with the aim of rationalizing the current patchwork landscape in the near future. The Directive does, however, set out a number of requirements:

- A competent authority or authorities will approve new and existing schemes, and can remove those that are not up to the required standard.
- An outcome to the dispute in question is to be provided within 90 calendar days of the receipt of the full case file by the ADR entity, and if a dispute is to be rejected by the ADR entity this is to be communicated within three weeks.
- An ADR entity must meet a strict set of access criteria, which will be assessed and enforced by the new competent authority.
- Businesses will be required to indicate, if a complaint remains unresolved, whether they use an accredited ADR body. If not, or if an organization uses an unaccredited ADR body, they will be required to highlight what the approved ADR scheme would be in that sector.

These requirements present a number of challenges to private sector ombudsman schemes. Merely meeting the minimum requirement of the Directive, though, will be a wasted opportunity to achieve fully functional, cross-sector ADR provision and address the problems that consumers experience when accessing justice.

Streamline access

Received wisdom is that a complainant only needs to know about their right to go to an ombudsman *after* they have complained to an organization and remain dissatisfied once the organization has had the opportunity to resolve the complaint themselves. At that point it is up to the organization to pass on the necessary information.

A recent Ofgem study on Ombudsman Services revealed that consumers are much more likely to use the ombudsman if they know that an ombudsman exists before they have a complaint.⁴ Ofgem has now laid a responsibility on Ombudsman Services and the companies to heighten awareness of the ombudsman scheme.

The study produced for Ofgem also highlights that, of the 'circa 88,000 8-week/Deadlock letters sent to domestic customers, around 7% referred their complaint to OS:E' during the period between October 2011 and September 2012.⁵ Another study conducted by Ofcom in 2013 found that 'Around a quarter (27%) of communications complainants screened were eligible for referral to ADR', which was 'significantly more than were actually referred (4%)'.⁶

Reasons cited for these figures in both reports include that customers were unaware of the respective schemes available and feared a complicated, time consuming process. The Ofgem research piece indicates that one in three domestic customers do not escalate their complaint to the energy ombudsman because they are simply *unaware* of the existence of the scheme.⁷

The FOS reported in their annual report of 2012/2013 that 45% of the total number of complaints received came via claims management companies, who, often for a fee proportionate to the monetary value of the complaint, offer to help complainants 'navigate' this landscape. Despite the fact that the processes of both schemes are relatively transparent and straightforward, this evidence suggests that consumer perceptions do not reflect this, to the extent that they are willing to pay a proportion of their redress owed for the otherwise free-to-the-consumer service. The FOS reported that

this figure had fallen for the first time in many years as a result of their efforts in advertising their role and purpose.

It is clear, then, that consumers need to be aware of the availability of ombudsman schemes, and their processes should be transparent, with consumer experience widely shared, to encourage people to come forward without assistance. Consumers also need to be educated in what an ombudsman does and what they can investigate, to encourage a consumer who has an eligible complaint to come forward. For a true picture of the market to be drawn, and for truly inclusive access to justice to be provided, it must become second nature in the consciousness of the consumer to bring a complaint to an ombudsman. The best way to do this is to standardize the nomenclature; if all bodies approved by the competent authority are called ombudsman schemes, then the 'ombudsman' brand can be advertised effectively. This advertising can then be harnessed to make it known what an ombudsman is, what an ombudsman will do, and how to contact one.

If the Directive is to be transposed effectively, it will be necessary to help both businesses and consumers learn and understand what it means for them, what they can expect from ADR, how they can access the entity, and what their rights are in doing so. At present, even if someone knows an ADR scheme exists, finding the right one is not easy. A single portal for access, under a single descriptor, should be adopted to make sure that complainants do not have to spend their resources navigating the landscape, but find the process simple and transparent.

If consumers and businesses are to trust the process, they should expect to receive a similar outcome to other complaints with a similar content. Ombudsman schemes must publish data which includes decisions on particular cases or types of cases, the process by which they are reached, the reasons for those decisions, and any recommendations or actions required.

Harmonize process

The ADR Directive requires that a competent authority be set up to validate ADR schemes, and as

comprehensive ADR provision comes into force, the possibility of a further fragmentation of the landscape exists. Combined with a lack of knowledge about what to expect from the ADR body, as different methods of practice are permitted, this could lead to a low take-up of ADR and make effective promotion of ADR difficult. This would also represent a missed opportunity to vastly increase the collection of data on consumer markets, and so improve regulation and governance of those markets.

The competent authority or authorities, alongside the Ombudsman Association, should work with ADR bodies to align the practice and processes that they use. For the best possible effect, this should be done with the core model of an ombudsman scheme in mind: for the transparency of process it affords; for the simplification of the landscape; for the benefit of justice for the consumer; for the uniformity of decision; and for the benefits the gathered data can provide to regulation, government, and the consumer.

It is clear that a single point of contact would enable increased consumer engagement and would simplify the process for many. As the ADR Directive requires the establishment of a helpdesk, this could also be the single point of contact, forwarding complaints to the relevant scheme, which would then complete the contact and begin the investigation processes. With greater harmonization of scheme processes this initial gathering of information could be much more integrated. Working together to achieve greater cooperation and understanding through shared knowledge and process would provide numerous benefits for all stakeholders in the ADR landscape. Simple process exchanges on jurisdiction would enable frontline advisors, within the single point of contact, to properly manage the expectations of consumers and advise more clearly and consistently on complaint acceptance criteria. Adoption of similar binding arrangements would give both consumer and business a clearer understanding of their legal standing in relation to the ADR body and its decision. With the development of early and mid-term resolution methods, away from the lengthier ombudsman's-decision approach when favourable, a shared framework for utilizing these methods would be advantageous over numerous bodies, each with

numerous methods of resolution, for every consumer and business to understand.

Sharing of knowledge gained from complaints is a significant issue for all parties involved in consumer transactions. Recent issues with doorstep selling across the energy sector and poor sales practice in finance have highlighted areas in which regulatory and redress bodies need to liaise fully to enable early warning signs to be spotted, consumer detriment to be halted, and proactive regulatory guidance and government action to be formulated. The streamlining of reporting methods on the part of ombudsmen would allow for greater interaction between schemes and regulators, and schemes and other schemes, to take place, and so to coordinate action. The presence of other forms of non-binding or questionably independent schemes within the private sector framework would not allow this joined-up picture of the market to be formed.

Consumer demand and business uptake

The ADR Directive does not demand mandatory membership, and if the current environment does not allow for the creation of mandatory ADR above the requirements imposed by the Directive, it will be essential for consumers to be encouraged to actively seek out a business which utilizes an approved ADR scheme and so drive businesses towards membership, and ultimately better practice.

Easy-to-access, transparent, and trustworthy ombudsmen schemes, available for all consumer transactions and advertised under a single banner, would greatly encourage consumer usage and provide for simple consumer education on the part of consumer interest groups. The requirement to indicate whether a business utilizes an ADR scheme is designed to incentivize a large proportion of companies to adopt an approved ADR scheme, without requiring mandatory provision for one. Although companies need only inform customers of whether they use approved ADR when a dispute remains unresolved, it is to be expected that consumers will begin to act before they commit to contract for the supply of goods and services. As ADR will not be mandatory for much of the consumer landscape, successful implementation of the Directive will rely on business acceptance and

consumer pressure to ensure seamless provision. To encourage uptake by consumers and businesses requires an ADR sector which is visible and easy to access, and which provides trusted, impartial decisions. Consumers will need to press companies for clarification about whether a business utilizes an ADR scheme that is approved by the competent authority.

Ombudsman schemes have reported that in general, participating companies have been positive about the resulting benefits it affords them in terms of consumer loyalty and business practice improvement. The German Schlichtungstelle fuer den Oeffentlichen Personenverkehr (SOeP) reported a general refusal by airlines to participate in its voluntary ADR scheme, which relies upon the participating company to accept the proposed resolution. Some of the initial views expressed by the airlines were that the process adds no value to the industry, that the technical knowledge required of the industry is too complex for the scheme to handle, that the process gave undue weight to the perspective of the consumer, and that airlines themselves are service-minded and know how to satisfy their customers best.⁸ Once airlines joined, perspectives shifted dramatically. Airlines began to show an eagerness to refer unresolved disputes to the body, and although the decisions are not legally binding on companies, 80% of remedies were implemented.

Consumers actively searching out a company with an accredited ADR scheme will in turn push companies to take the initial step of signing up to an approved ombudsman or ADR body; once part of a scheme, the clear benefits of belonging will reinforce and streamline access, which, together with a harmonized process, will drive this consumer action.

The Ombudsman and case law

The potential effect of this seamless provision, in a harmonized and streamlined landscape, is likely to have additional benefits beyond providing consumers with access to justice and improving business practice. Case law is built up through the courts and the establishing of precedence. This is an area where ombudsman schemes have no

formal locus. While they take law, regulation, and legal decisions into account, it is not for them to interpret or determine points of law. With the reduction in the number of cases being heard by courts and tribunals, this essential element of our judicial system is weakened, and the rule of law compromised.

For ombudsman schemes, this presents a problem in that they will not be able to draw on legal decisions as one of the cornerstones of the dispute resolution they practise. Is there anything ombudsmen can do to mitigate? Yes, in a limited but influential way. By receiving, investigating, and resolving the individual cases brought, ombudsmen gain a unique knowledge. They can influence behaviour and decision-making by publishing what they find, by feeding back on poor performance, and by issuing guidance on how to improve. Public sector ombudsmen may be given the power to conduct own initiative investigations; private sector ombudsmen can report systemic failure to the relevant regulator, professional body, or trade association, recommending investigation and change, and influencing policy. Drawing on decisions made by ombudsman schemes in similar cases to guide complex or unprecedented situations is already commonplace and an effective method of ensuring consistency within schemes. This could be expanded on a cross-scheme basis to inform

determinations on cases that fall under the remit of one scheme, yet sharing significant elements with cases falling under the jurisdiction of another.

Decisions based on these determinations already inform regulatory and government decisions, through reporting of systemic failure and complaint figures and types. The constantly shifting environment and immediacy of digital communications and online service provision in the modern age is at odds with the delays inherent in lengthy court cases before a decision is reached. Given the ability of ombudsman schemes to reach their conclusions relatively rapidly, they enable action to be taken in what is as close as possible to a real-time basis. Analysis of patterns of behaviour across sectors and the conclusions drawn by ombudsman schemes could support additional proactive action by regulatory bodies. It is time to recognize that the ombudsman is no longer an alternative to the courts, but an essential and integral part of the justice system. As such it is time to come of age. To lift the public profile of ombudsman schemes so that people know who they are and what they are; to simplify access for those using ombudsman schemes; to harmonize processes and standards so that members of the public know what to expect; and to feed back findings to influence and change policy and practice.

Notes

- 1 Ministry of Justice (2014) 'Tribunal Statistics Quarterly: January to March 2014', p. 2.
- 2 Hazel Genn (2012) 'Why the privatisation of civil justice is a rule of law issue', 36th F.A. Mann Lecture, Lincoln's Inn, London, 19 November 2012.
- 3 The guidelines, entitled 'Treating Customers Fairly', drawn up in 2006, outline the customer outcomes expected by the FSA, and financial institutions are expected to train to these outcomes and illustrate how they have achieved them. A guide to gathering MI data and measuring against these guidelines was also produced. In other cases, businesses have proven to be more responsive to feedback provided than in this case, though miss-selling has time and again proven to be an area that has required direct regulatory intervention across many sectors.
- 4 Gfk NOP (2013) 'Complaints to Ombudsman Services: Energy, Report for Ofgem exploring why few consumers refer their complaint to Ombudsman Services: Energy', p. 36.
- 5 Ibid., p. 8.
- 6 Caroline McGarr (2013) 'Alternative Dispute Resolution Research', Gfk NOP, p. 4.
- 7 Gfk NOP (2013) 'Complaints to Ombudsman Services: Energy', p. 35.
- 8 Christof Berlin (2014) 'Trusting CDR for aviation', presentation at 'Trusting the 'middle man': Impact and legitimacy of ombudsmen', 30 April, University of Oxford.



The Foundation

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Lewis Shand Smith was appointed Chief Executive and Chief Ombudsman of the Ombudsman Service Ltd in 2009. The Ombudsman Service is approved or appointed by the relevant authorities to resolve complaints in the energy, communications, property, and copyright licensing sectors, amongst others. He is also Chair of the Ombudsman Association and the National Energy Ombudsman Network (NEON). Previously, he spent five years as deputy ombudsman with the Scottish Public Services Ombudsman — a Crown appointment.

From 1990 to 1999 Lewis was a member of Shetland Islands Council, becoming Convener/Leader in 1994. He is a former Vice-President of the Convention of Scottish Local Authorities, was a member of the Executive of the Scottish Constitutional Convention, and represented the UK on the European Committee of the Regions.

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