

**Consultation on the Provision of Alternative Dispute  
Resolution for Disputes Arising under the Consumer Credit  
Act 1974**

**Summary of Responses.**

**Department of Trade and Industry  
Consumer and Competition Policy Directorate**

## **Ministerial Foreword**

Britain has the largest and most competitive consumer credit market in Europe. The Consumer Credit White Paper, published in December 2003, set out a comprehensive programme of reform of existing UK consumer credit legislation aimed at building on this success and ensuring a credit market for the 21<sup>st</sup> century. As part of the proposals for primary legislation in this area, we published a consultation on the Provision of Alternative Dispute Resolution (ADR) for Disputes Arising Under the Consumer Credit Act 1974.

Our proposals for ADR were widely welcomed by consumer groups, industry, legal representatives and regulators. We received 45 responses to the consultation. I am extremely grateful to all those who responded for the enormous time and effort I know went into preparing their comments.

The responses were largely supportive of our policy approach, whilst making a number of helpful comments about the best way to achieve them. This document sets out some of the main points raised in the consultation process, and our response to them.

Credit has become an integral part of all our lives, enabling us to deal with unexpected emergencies and manage the many financial demands and risks of modern life. We must ensure that this continues, but we recognise that credit can go wrong, and in these situations we are committed to ensuring that consumers and industry alike are able to seek inexpensive, impartial dispute resolution. Our proposals for ADR for consumer credit disputes will make it easier for consumers, especially the most vulnerable, to challenge unfair credit agreements, but it will also provide industry with an efficient and inexpensive method of resolving the minority of disputes which cannot be settled through internal complaints-handling procedures.

Gerry Sutcliffe MP  
Minister for Employment Relations, Competition and Consumers  
Department of Trade and Industry

## **Executive summary**

On 8<sup>th</sup> December 2003 the Department of Trade and Industry published its Consumer Credit White Paper, entitled 'Fair, Clear and Competitive: the Consumer Credit Market in the 21<sup>st</sup> Century', which outlined plans for a wholesale overhaul of the consumer credit legislation in this country. On 17<sup>th</sup> December the ADR consultation paper was published, inviting comment on the details of our proposed provisions for consumer credit ADR, which had been introduced in the White Paper.

There was a shared understanding of the need for updated legislation to meet the needs of a vastly changed consumer credit market both larger and more complex than that of the 1970s, which served as the backdrop to the original legislation. The UK market provides a multitude of credit products to all groups of society, including some of the most marginalised and vulnerable. With this in mind few respondents disagreed with the fundamental principle of providing transparent, inexpensive and impartial dispute resolution services for all.

We received 45 responses to the consultation. The vast majority of these were broadly supportive of our proposals. Respondents included consumer groups, industry, trade associations, regulators, legal practitioners, academics and existing providers of dispute resolution systems.

This document summarises the responses we received as well as setting out our policy decisions on the areas covered by the consultation. Many of these decisions reflect the helpful responses received during the course of the consultation process, for which we are very grateful.

## **1. Analysis of Responses**

Proposals regarding the provision of an Alternative Dispute Resolution (ADR) mechanism for disputes arising under the Consumer Credit Act 1974 were published in a consultation document on 17<sup>th</sup> December 2003.

The consultation document was sent to a wide range of lenders, trade associations, consumer groups, regulatory and Government bodies plus other interested parties, and the main points made in response are summarised below.

### **1.1 Breakdown of responses**

In total 45 responses were received to this consultation document, the breakdown of which was:

Industry	20
Consumer organisations	6
Government Departments (incl. local government)	5
Individuals/other	5
Legal practitioners	5
Enforcement bodies	3
Academics	1

### **1.2 Questions**

*Question 1: Should the coverage of ADR extend to all holders of credit licences, or should it be limited to lenders?*

There was virtually unanimous agreement that the coverage of the ADR should extend to all holders of consumer credit licences.

Only one respondent, an industry representative, expressed serious doubts about the coverage of the ADR. They were firmly opposed to the introduction of any form of ADR for consumer credit, and felt that, if it was introduced, it should be limited in coverage and scope.

*Question 2: Should the scope of the ADR be limited to issues relating to unfair credit, or should it embrace all the issues in paragraph 52 of the consultation paper (which covers a much wider set of potential disputes, such as application problems, repayment problems, arrears handling, wrongly applied charges and credit reference registrations)?*

Again, there was virtually unanimous agreement that paragraph 52 was the best scope.

The only dissenting voices were the industry representative mentioned above, which is opposed to ADR in principle, and an enforcement representative which felt that the scope should be much wider.

*Question 3: Do you think that consumers should be charged a fee for bringing a case to ADR?*

There was a split here, largely down industry/consumer group lines, although this was by no means consistent. About a third of respondents answered 'yes' whilst two-thirds answered 'no'.

Industry respondents were split 50/50, consumer groups were all opposed, and all of the other sectors were split with a strong bias towards opposition.

*Question 4: Would a requirement that consumers continue to make payments while the case is being resolved present a barrier to significant numbers of consumers obtaining redress from the ADR?*

This was not thought to be a significant problem, and no alternative could be suggested.

*Question 5: Should the fact that a case is being handled by the ADR body preclude either party from bringing court action?*

Some respondents felt strongly that ADR was supposed to simplify the situation, in which case the possibility of going to court should be precluded. Others felt that court should always be an option.

All the consumer groups and legal practitioners, along with a majority of the business representatives, answered 'yes' to this question. Opposition came mainly from other Government Departments, enforcement bodies and some sectors of industry.

*Question 6: If a case is already before a court, should either party be able to ask the ADR body to consider the case, or any aspect of it?*

Similarly, there was a split here, but a definite bias towards being able to send a case from court to ADR wherever possible.

Here all the opposition came from industry and legal practitioners, whilst the other respondents all showed strong support.

*Question 7: Are there any circumstances where it would not be appropriate for the court to stay an action and to ask the ADR body to consider the case?*

None were identified.

*Question 8: If there is a separate ADR, should there be a right of appeal?*

This question generated debate around the topics of Human Rights compliance and justice, although those opposed to an appeal pointed out that the decisions weren't binding on the consumer (if the consumer accepted them), so an appeal was not necessary. Ultimately, about two-thirds of respondents indicated that there should be a right of appeal, with about a third disagreeing.

Opposition here came from industry, with an enforcement body and a legal practitioner also expressing concerns. Support was strong amongst consumer groups and moderate amongst the other respondents.

*Question 9: If there were a right of appeal, who should meet the costs of the appeal?*

Very mixed responses here, of which the bullet points below give a summary:

- the consumer should meet the costs
- the lender should meet the costs,
- costs to be paid by the losing party

*Question 10: Does the proposal in paragraph 67 represent a reasonable balance between the needs of the individual consumers for redress and the need to establish a system which does not unreasonably impose new standards on the existing framework?*

Paragraph 67 reads: 'It cannot be right that the creation of a new system should deprive consumers of an existing right to opt for ADR. The issue is whether complaints against firms newly brought into the scope of the ADR should be limited. We are inclined to believe that the consumer should be able to challenge agreements signed before the lender became a member of an ADR scheme, but only in respect of actions taking place after that date.'

There was only one respondent who felt that this wasn't an acceptable policy, although they didn't suggest an alternative. This was a representative of the legal profession who considered that the retrospectivity proposals did not go far enough. All others were fully in agreement.

*Question 11: What should the timescale be for the inception of the ADR?*

As soon as possible, with caveats about not rushing into it, and making sure the new body is fully prepared and ready.

*Question 12: What should the appropriate relationship be between the ADR provider and the OFT?*

The majority of respondents felt that the OFT should be at arm's length, a regulator of consumer credit without actually regulating the ADR body itself.

*Question 13: Should the ADR body share information about cases it deals with, which relate to the fitness of a particular trader to continue to hold a licence, to the OFT?*

By far the majority of respondents felt that this was vital to the success of the ADR. Only four respondents were not convinced: three of these were industry respondents who did not wish the determinations of the ADR to be passed automatically to the licensing authority. The fourth was an enforcement body who noted that they already provide the OFT with similar information, and it should not be the role of the ADR to influence the regulator's deliberations on fitness to hold a licence.

*Question 14: Should a trader's failure to implement a decision of an ADR provider lead to an automatic loss of their consumer credit licence?*

Three consumer groups wholeheartedly agreed with this, and one legal representative could appreciate its benefits. However, virtually all of industry, legal practitioners and academics were strongly against, feeling that each decision should be made on a case by case basis, especially when it has such significant consequences as the decision to revoke a licence. Nonetheless, one industry representative thought that this proposal had some merits, as 'the loss of a consumer credit licence must be the ultimate available penalty otherwise there would be no good reason for "rogue" operators to accept any ADR decisions'.

*Question 15: What merits and drawbacks do you see with the options set out above? (These options were: 1) the FOS should provide all the ADR for consumer credit cases; 2) A new body should be set up to provide ADR for all consumer credit cases, with disputes about consumer credit involving FSA-regulated firms being transferred from the FOS to the new body; and 3) the ADR for consumer credit should be split, with the FOS dealing with the firms it currently deals with, and a new body covering other firms.)*

The most significant point to note is that four-fifths of respondents actively identified the FOS as their choice for consumer credit ADR provider. These included all of the consumer groups, enforcement bodies, legal practitioners and academics, and all but one of the 'others'. A number of industry representatives did express reservations about the use of the FOS, and a number of other issues were raised.

These other issues included:

- An industry respondent found 'no real merit' in the options set out and would much prefer that ADR be provided under the auspices of 'the Chartered Institute of Arbitrators with the appropriate funding from central funds.'
- An industry respondent expressed their deep concern at 'the suggestion that compulsory ADR should be deployed in the field of

consumer credit via, for example, the FOS.' They felt that, because the FOS is free to consumers, easy to access and poses none of the challenges of legal action, it is open to abuse and could be very damaging to industry interests. It was suggested that, if compulsory ADR was adopted, a rigorous process to weed out vexatious or speculative complaints would be necessary, as would a fee to consumers, refundable if the case was won.

## **2. Our policy response to the consultation respondents**

Here we outline the policy decisions we have taken on each of the issues relating to the questions we posed in the consultation document. The decisions took careful account of what was said in response to the consultation.

*Provider of the ADR:* subject to completion of detailed arrangements, the Financial Ombudsman Service will be the consumer credit ADR provider. There will be a new jurisdiction of the FOS – the Consumer Credit Jurisdiction – which will be responsible for handling disputes relating to consumer credit. This jurisdiction will, however, be as consistent as possible with the existing FOS rules, and will only differ in the few areas where consumer credit differs significantly from other financial services.

*Coverage of the ADR:* the consumer credit ADR will compulsorily cover all standard consumer credit licence holders. Those covered by Group Licences will not fall within the jurisdiction of the consumer credit ADR.

*Scope of the ADR:* the ADR will be able to consider disputes relating to consumer credit transactions. However, the FOS will retain discretion not to consider cases it feels are outside of its jurisdiction. This includes cases where:

- There has been no material loss, distress or inconvenience
- The firm is already offering a fair and adequate resolution
- The complaint is about the proper exercise of a firm's commercial judgement
- The complaint has no reasonable prospect of success
- The matter is more appropriate for the courts to deal with

The FOS does not, for example, consider disputes which revolve entirely around allegedly excessive interest rates, as the setting of interest rates is considered to be the proper exercise of a firm's commercial judgement. This is a matter which is more appropriate for the courts to deal with. However, a dispute in which the level of interest charged is only an element may be considered by ADR on its other merits.

*Fees to use the ADR:* the ADR will be free for consumers. The FOS always consults on the fees it charges to industry, and will do so in this case. The current situation for industry is that firms pay a small annual levy and a

standard case fee (£360) for cases in excess of two a year (the first two cases per year are free). For the vast majority of consumer credit firms this would mean never having to pay a fee to access ADR, contributing just a small levy for the benefits of an industry-wide dispute resolution mechanism.

*The relationship between the courts and the ADR:* the courts will be able to stay an action and refer it to the ADR at the judges' discretion. The ADR will be able to refer a complainant to the courts if it feels unable to deal with a dispute. A case will not be able to be dealt with in both the courts and the ADR simultaneously except in very particular circumstances where the outcome of the ADR case will not affect the court case. One example of this might be where a possession order due to arrears of £5,000 is being dealt with in court and a dispute over a £50 charge wrongly levied on the account is being dealt with in ADR. The outcome of the dispute over such a relatively small sum is not going to affect the wider case in the court.

*Right of appeal:* whether there will be an external right of appeal from the decisions of the ADR remains undecided until the results of the ongoing review of the FOS are known. This review, being undertaken by the FOS and the FSA, is part of the much wider routine review of the Financial Services and Markets Act currently under way.

*Relationship between the ADR and the regulator:* a Memorandum of Understanding is being drafted between the FOS and the OFT to ensure that this relationship is clearly defined. The regulator will be at arm's length from the ADR provider to ensure the absolute impartiality and transparency of ADR processes and decisions.

*Information-sharing:* similarly, details of information-sharing requirements between the OFT and the FOS are also being outlined in draft documents.

*Enforcement of ADR decisions:* failure of a trader to abide by the decision of the ADR will not automatically result in the loss of their consumer credit licence. However, this failure will be made known to the OFT and will be taken into account when assessing the fitness of that trader to hold a licence. The decisions of the ADR will be enforceable by consumers in the County Court.

## **Annex A**

### **List of respondents**

AdviceUK	HSBC Holdings Ltd
Phillip Bliss Aiker (Barrister)	Institute of Credit Management
Association for Payment Clearing Services	LACORS
Barclays	The Law Society
British Bankers Association	The Law Society Scotland
British Cheque Cashers Association	Leicestershire County Council
British Vehicle Rental and Leasing Association	Littlewoods Finance Company Ltd
Cattles Plc	Lloyds TSB
The Centre for Effective Dispute Resolution	J. K. Macleod (Professor of Law)
Chartered Institute of Arbitrators	Mail Order Traders Association
Citizens Advice Scotland	Marks and Spencers Money
Confederation of British Industry	Money Advice Trust
Consumer Credit Association	Montague Martin (Solicitor)
Consumer Credit Trade Association	National Australia Group Europe
Department for Constitutional Affairs	National Debtline
Egg Banking Plc	National Pawnbrokers Association
Finance and Leasing Association	The Office of Fair Trading
The Financial Ombudsman Service	Paragon
General Consumer Council for Northern Ireland	Martin Partington (Law Commission)
Glasgow City Council	Royal Bank of Scotland Group
	Scottish Consumer Council
	Philip Snow
	South East Trading Standards Authorities
	Trading Standards Institute
	Trading Standards Northern Ireland

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