Call for evidence on EU proposals on Alternative Dispute Resolution and Online Dispute Resolution
Executive Summary

The legal market is undergoing rapid change. Since the Legal Ombudsman opened in October 2010, our planning has grappled with significant innovation and dynamism in the market, stemming from businesses spotting new opportunities to grow, as well as changes to the regulatory structures introduced by the Legal Services Act 2007. Our experience tells us that these changes are challenging the traditional sectoral approach to professional services and also how consumers should be able to access redress. In our jurisdiction, we can resolve complaints about unregulated legal services if carried out by authorised lawyers, but not if carried out by others, such as will writers or claims management companies. This difference in access to redress and Alternative Dispute Resolution (ADR) causes consumer confusion and may lead to consumer detriment due to the different protections afforded users of different services.

As a result of this, the European Union (EU) proposal on ADR comes at a time that allows us an opportunity to re-examine ADR in the UK and formulate a more strategic and proportionate system which resolves existing gaps, overlaps and inconsistencies.

This paper provides background to the Legal Ombudsman and ADR in the context of legal and professional services in the UK; looking at the different tiers of ADR and how these fit with different sectors. We then look at the challenges which, to some extent, already exist and how they are likely to become more of an obstacle for consumers accessing redress using the changing legal services market to illustrate the need for a new approach in this arena.

This is a key opportunity to reform a fragmented system which has evolved over many years and that can be slow and inefficient. ADR does not need to take a ‘one size fits all’ approach as different levels of ADR should reflect the different needs of consumers within sectors. However, it is vital that a thorough re-examination and re-modelling of ADR should resolve existing overlaps, shortfalls and conflicts rather than increasing confusion for consumers accessing redress.

We welcome this consultation and would be happy to work with the Department for Business, Innovation and Skills (BIS) to form a response to the European Union’s proposals.
Background

The European Union (EU) has published a draft Directive on alternative dispute resolution (ADR) for consumer disputes and a draft Regulation on online dispute resolution for consumer disputes. The Department for Business, Innovation and Skills has issued a call for evidence seeking views on the impacts of the legislative proposals on the UK to inform the UK negotiating position.

The EU research identified a number of weaknesses in current arrangements, which include gaps in coverage of ADR in some economic sectors and geographic levels, a lack of awareness and insufficient information preventing consumers and businesses from using ADR, and variable quality of ADR schemes. As these issues reflect many of those facing consumers in England and Wales, and are ones we are currently grappling with, these proposals provide an opportunity to consider how redress and ADR can develop to overcome these deficiencies.

The Legal Ombudsman was established in 2010. We are a creation of the Legal Services Act 2007 and deal with service complaints about regulated lawyers in England and Wales, irrespective of whether they deliver regulated or unregulated legal services. This includes nine branches of the profession including solicitors, barristers, legal executives and others such as patent attorneys. This will broaden again to include multi-disciplinary practices with changes to regulation now coming in. In our first year we resolved around 7,500 cases, with contacts from around 80,000 consumers. Our service is available to all members of the public, very small businesses, charities, clubs and trusts, and is free to these consumers.

Our remit is to resolve disputes in a way that is independent, impartial, cost effective, fair and transparent, providing a straightforward path to redress for consumers of legal services. We also feed information back to consumers and the legal profession to help drive up standards and improve consumer confidence in this sector. Through effective use of technology we ensure complaints are dealt with quickly and at less cost than previous arrangements. We operate within a budget of £19.9M compared to the old system which cost £32.5M, according to independent analysis commissioned by the Ministry of Justice.

As a new scheme operating in an area where consumers are interacting with a highly organised and specialist professional service sector, we
understand why access to redress is so important to protect customers if things go wrong. Whilst working in this complex and changing market, the Legal Ombudsman has experienced first-hand the need for responsive and innovative solutions to market changes in the legal services and other professional sectors. This is essential to ensure that the shape of regulation and redress is sufficiently responsive to demand.

This consultation response begins with an overview of the complicated patchwork of ADR that exists in the UK, before looking at some of the problems which exist, and the opportunity which the EU's proposals award to overcome these issues. Answers to the call for evidence questions are included at Annex A.

Overview of the ADR landscape

The array of contractual services and products available across sectors makes a 'one size fits all' approach to ADR unrealistic and unwise. There are differences in the consumer experience which should properly dictate the structure and governance of schemes. There can be significant disparity in the relative levels of knowledge, influence and status between traders and consumers. In the legal sector, for instance, this can be particularly marked when transactions are, in effect, occasional and forced rather than regular and voluntary (such as in house purchases and probate). On the other hand, there are transactions, such as the purchase of food from a corner shop, where the relationship between trader and customer is much more equal and routine, and the freedoms of the market are more likely to operate in an unfettered manner.

It seems right that this is reflected in the different ADR mechanisms (where these are available). Statutory schemes with official powers provide for those instances where there is significant need to re-balance the power differential between, for example, big business and individual consumers. Lighter touch approaches are fit for purpose for those transactions where the differences in access to information and consumer knowledge are not so pronounced. And, as we have learned during our first period of operation, courts, tribunal and consumer law, as enforced by Trading Standards, provide a vital safety net that wraps around current access to ADR for consumers.

In the UK there is a strong culture for resolving disputes through independent and impartial schemes. These, for historic reasons, are based on a sectoral approach, divided both between public and private
services and then by specialism of a professional or business sector, be it communications, telecoms, energy or finance. A result of this is that consumers are able to receive different remedies from different schemes, as they have different formal powers. Sometimes these differences are significant, especially in terms of adequacy of redress and enforcement. This illustrates the broad consequence of this sectoral approach: that the decisions made in these three levels are isolated and there is no encompassing strategy which binds them together. Some of these inconsistencies might be avoidable, but others stem from differences in the legislation which created them.

The first level of ADR includes statutory private Ombudsman schemes, of which we are one. Private Ombudsman schemes deal with complaints by consumers about traders and include the Financial, Housing, Pensions and Legal Ombudsmen, as well as the communications, energy and property schemes. The services covered by these schemes are in areas where there is a large gap in the information, resources and expertise between individual consumers and often large business. Ombudsman schemes in the UK are free of charge to members of the public and their availability means that consumers can challenge what they see to be poor service without the barriers of great financial expense and the stress often associated with going to court. There are considerable differences in the governance structures for private sector schemes, with schemes such as ours based in statute but others being largely voluntary. In addition, there are private sector adjudication schemes for consumers (CISAS for telecoms, POSTRS for postal services) and arbitration (such as ABTA for holiday disputes).

The second level consists of informal dispute mechanisms that can be provided by industry. These tend to be relatively low in cost and vary in quality, often taking the form of mediation services via their professional association. Within the legal sector, some will writers sign up voluntarily to mediation services - this provides an extra level of security for consumers and increases the credibility of firms. However, it also creates an uneven patchwork of ADR, far more complex than those in the first level. These mediation services are often in the market for a short amount of time. We are currently examining the potential merits of creating a voluntary jurisdiction for unregulated will writers. Evidence of potential consumer detriment in this area was provided by Leicester University’s study into potential consumer confusion within the legal services market, which is available on our website at www.legalombudsman.org.uk.
In addition, it can also be confusing when dispute resolution is led by a trader (and therefore not in the proposed EU definition of ADR). There is often a lack of clarity about how the outcomes of any resolution can be enforced. If a trader uses an internal complaints procedures or formal conciliation mechanism where a final decision is made, consumers face a great deal more certainty than in schemes that rely on pure forms of mediation. Because mediation is voluntary and relies on consensual agreement, it does not always result in a resolution and will not be binding. This can therefore be a costly exercise for consumers, without the benefits of access to an ADR scheme.

The third level are the formal courts and the tribunal process, which mop up the complaints which do not fall into the first two levels. At this level, there is potential for a disconnect between ADR and the courts. While they aim for the same result, the remedies they are able to provide and their processes are very different from other consumer protection measures. There needs to be a greater level of co-ordination to ensure that the alternative structures for access to redress and dispute mediation fit neatly into the broader framework of courts and tribunals. This is particularly important given the increased emphasis being placed on ADR mechanics such as mediation playing a more central part of the court process. Our view is that any approach to ADR would benefit from BIS working in a joined-up way with the Ministry of Justice (MoJ) to promote greater coordination between ADR initiatives and other consumer law protections offered through the courts and tribunals system, as part of a broader strategic approach.

**Challenges: existing overlaps, gaps, different geographical boundaries**

Ombudsman schemes provide an important path for redress for members of the public. However, there are overlaps and gaps in their jurisdictions, and inconsistencies between their processes. The current patchwork approach to ADR and redress is characterised by complex overlaps between existing ADR schemes. Moreover, consumer behaviour and business providers are no longer adhering to a sectoral approach, with the increased bundling together of products and services that cross professional (such as financial, accountancy and legal) or traditional consumer boundaries. The use of e-commerce, e-purchasing of products and the development and marketing of intelligent computer software are also eroding the distinction between product and service,
creator and provider. In addition to this, consumers are as likely to be confused by the gaps in provision of redress of ADR in other areas.

A key tenet of the Legal Services Act 2007 was to bring consumer benefit from innovation and increased choice through competition in the legal services arena, allowing law firms to seek investment and ownership from non-legal sources. The cases we are seeing highlight that - as is to be expected - business innovation can, and is, happening independently of regulatory structures and frameworks. The area of wills and probate, for example, has shown itself to be at the forefront of some of these market developments, with a rise in use of legal products in relation to wills, and diverse providers in the marketplace - from the post office to banks and then to professional and specialised online providers. Online firms are also often engaged in sub-contracting arrangements which see the reserved legal activity being conducted by different organisations or firms. This has resulted in the evolution of multi-layered and complex business structures, some of which can fall within regulation, and some outside.

As an Ombudsman scheme we have significant concerns about the impact that these innovations are having on consumers with regards to rights and access to redress. We are interested to learn how your proposed approach to regulation will help us all achieve greater clarity in this increasing complex market place.

Consumers deserve clarity about when and why they are able to access redress for some of these business models and service providers but not for others. The complaints we are seeing tell us that companies are finding ways to develop and innovate, leaving evidence of consumer confusion about how to find help when things have gone wrong. Rather than just being part of a changing legal services market, it seems we are seeing a changing approach to how the more complex consumer services are delivered more generally – a joining-up across financial, accountancy and other services, as illustrated in the broad spectrum of providers of estate administration services. As such, we believe that a less segmented response to ADR is central to ensuring that consumers have access to a robust and comprehensive safety net and therefore can have confidence in ADR mechanisms overall.

The service we provide is based on entity rather than activity. This means that if a lawyer is regulated by an approved legal regulator, we can investigate complaints about their service. However, if the legal service has not been performed by a regulated lawyer, we are unable to look into it even if it is something which is usually done by a regulated
lawyer. This can lead to confusion for consumers trying to access redress. Research, commissioned by us, and undertaken by the University of Leicester showed that this is particularly apparent in will writing. Consumers who have used unregulated will writers cannot pursue a complaint through us, yet consumers who have used a solicitor to draft their will can.

The Solicitors Regulation Authority (SRA) has only recently begun to take applications for ABS licences, and it will be some months before firms start to be granted licences. However, we are already seeing significant change in how legal services are being provided. As we have publicly stated, we believe that these changes and the transformative effect of technology may mean that in a few years the legal sector looks very different to how it does today. The increasing interest of financial and insurance companies in providing legal services and their associated products, and the move towards commoditisation of the delivery of those services via online products, mean that the distinctions between what is a legal and a non-legal service (or a legal and non-legal product) are eroding quickly. If, for example, estate agents choose to take advantage of these opportunities to extend the range of their services, we could soon see the creation of one-stop house purchase providers; combining the functions of estate agency, surveying, mortgage broking and conveyancing. Such firms could, as currently set out, be subject to four different regulatory structures and four different Ombudsman schemes. In some cases, depending on which Ombudsman scheme may have locus, then consumers are faced with these ADR schemes having significantly different powers, meaning available remedies (and ability to enforce those remedies) can vary markedly. Such anomalies need to be addressed to make ADR make sense for consumers. For us, even as a comparatively new scheme, there are questions over whether our governance and jurisdiction would have been designed in the same way had these innovations been better understood when the Act was being drafted.

The EU proposals also provide a chance to examine the geographical spread of ADR schemes. Article 5 of the Directive is unclear about how the Member States’ obligation to make ADR available for cross-border transactions will work in practice. The current EU practice is based on the expectation that the ADR in the Member State where the trader is located is likely to be best placed to deal with complaints. This contrasts to how courts work, where it is the location of the consumer and the law governing the transaction that determines locus for a court to hear a matter. In addition, current Ombudsman jurisdictions vary in the UK, depending on how a sector is regulated (or not). Within our remit, we are
authorised to resolve disputes (and are able to enforce remedies) involving traders who are licensed by a regulator based in England and Wales.

Again, a harmonised approach to territorial issues which ties up to court processes seems warranted to avoid confusion for consumers and also to allow them to better access a range of dispute resolution mechanics, including both ADR and justice structures.

These issues also cause the potential for inefficiency across existing ADR mechanics and structures and pose the threat that ADR schemes will be less responsive to the risks posed by increasing market liberalisation and innovation. The traditional approach to ADR, including Ombudsmen, means that it is likely that there will also be inefficiencies in the overall cost base of these schemes, individually and collectively. The structures in place do not always maximise opportunities for economies of scale, which can assist with efficiencies both in timeframes for case resolution and cost.

Recital 19 and Article 18 (d) of the proposed Directive state that complaints should be resolved within 90 days of an ADR receiving them. With effective structures, we consider that 90 days seems not only desirable, but also achievable for resolving consumer disputes as long as the first tier complaints process, where the complainant has complained to the trader, has already been exhausted. Otherwise, the ADR system could be uneconomically overburdened by cases that the trader was able and willing to solve.

Guiding principles

The emphasis in the UK in recent years has been for the creation of an increasing number of Ombudsman schemes. There is no question that Ombudsman schemes will need to form a significant part of the ADR landscape; the Ombudsman model has much to recommend it. The British and Irish Ombudsman Association has developed both principles for good complaint handling for member ADR schemes, as well as principles of good governance for schemes. These principles, which have at their heart the concepts of independence and impartiality, as well as proportionality and efficiency, are designed to ensure that recognised ADR schemes are credible and authoritative in their decision making.
Consumer confidence in the ability of ADR schemes to resolve disputes effectively goes beyond simply the absence of bias in decision making. Impartiality is a given for most schemes, but it is the additional need for decision makers to be – and to be seen to be – independent from the businesses or sector within their remit. Without this, and especially where businesses could be perceived to be influential or carry more clout than an individual consumer, the effectiveness of schemes could be called into question. The recent judgment\(^1\), following a judicial review of the Office for the Independent Adjudicator, makes this point, particularly in relation to the need for independence if a scheme is funded directly by a sector.

Our experience of the shift to an independent Ombudsman scheme in legal services illustrates this well. Prior to our creation, the professional bodies handling complaints about their members were owned, run, resourced and largely staffed by lawyers. This lack of credibility, of lawyers being perceived to be judging their own, was a strong part of the impetus behind the Legal Services Act 2007. Our governance mechanisms as set out in this statute are designed to ensure both independence of decision making as well as to ensure that the sector does not have control of funding arrangements or resourcing. Thus both the Chief Ombudsman and the Chair – and the majority of our Board and committees – have to be lay people rather than lawyers. This has clearly been critical to ensuring the credibility of the new scheme in the eyes of consumers and has not proved a significant issue in establishing credibility in the eyes of the profession.

With this in mind, we recommend that Article 6 of the ADR directive is extended to provide that those in charge of an ADR should be appointed by an individual (or a body with a majority) that is independent of those subject to investigation. The length of such appointments should be for a term sufficient to ensure their independence.

**Application of the EU proposals**

As you will be aware, unlike the proposed ODR regulation, the proposed ADR directive may be subject to change as it passes into British legislation, although the spirit of the proposal must remain intact.

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\(^1\) Mr Amandip Sandhar in R (Sandhar) v Office of the Independent Adjudicator for Higher Education, judgment 21 December 2011
Supposing the proposal remains largely unaltered, the Government will decide whether two important aspects are made mandatory in the UK. The first of these is the requirement for traders to participate with an ADR scheme, and the second is whether or not decisions made by ADR entities should be binding on traders.

A requirement obliging traders to participate in an ADR scheme would join-up redress within the legal sector, with will writing firms, for example, being required to sign up. It would also join-up redress within the wider landscape of professional services, with professionals such as insolvency practitioners and accountants having ADR entities covering their service complaints. Access to ADR for traders brings advantages – it can assist in diverting any persistent complainants to a third party who can assist to break a deadlock, saving time and resources. Learning from the broader pattern of complaints from an ADR scheme can also influence best practice which in turn can help a firm retain customers.

If participation with an ADR entity is not made compulsory, the proposals may take the form of a voluntary jurisdiction. We are currently examining the possibility of creating a voluntary jurisdiction for unregulated will writers. This may echo the shape of any non-mandatory implementation of the EU directive. However, it is already clear that the success of the scheme is likely to depend upon the threat of possible full regulation if traders do not opt for voluntary membership. It may therefore be important for Government not to reject the possibility of making ADR membership mandatory in the future.

Membership of an ADR scheme puts the good, compliant trader at an advantage to his non-compliant competitor. Moreover, a situation where some remedies, such as ours or the Financial Ombudsman’s were binding and others voluntary, would increase confusion amongst consumers. It could also lead to ADR being perceived as toothless, when it should be a credible alternative to court action.

However, in expressing a preference for mandatory rather than voluntary schemes, we would prefer that the style of ADR schemes is tailored to consumer need. Mandatory ADR is likely to be appropriate where there is a significant imbalance of power or information asymmetries between consumer and trader (such as professional services) but that voluntary ADR should suffice where there is no imbalance (such as greengrocers).

We are also not arguing for a significant extension of regulation. Regulation and redress are different – a point which appears to be getting lost in the current debate on press behaviour. The case for any
increases in regulation is far weaker than that for an increase in access to redress.

Recital 7 of the draft ADR Directive provides for ADR mechanisms to cover complaints submitted by traders against consumers. Ombudsmen schemes were created to level the playing field between (weaker) citizens/consumers and (more powerful) institutions. It would be inconsistent with how Ombudsmen operate for them to handle complaints by institutions against consumers. It is unclear how any decisions could be enforced against consumers and there is a risk that complained-against traders might seek to confuse issues by counterclaiming against the consumer.

An opportunity to create a new strategic framework for ADR

The European Commission’s proposals provide an opportunity for ADR to be reformed in the UK, given the multifarious factors outlined above. Along with a strategic re-evaluation of the types of ADR and their spread across the various markets, we would suggest that there should be a review of the mechanisms for delivery of ADR, with the aim of ensuring optimum performance and economies of scale. Maximising existing schemes to develop a more strategic approach in this area would reduce costs; the Financial Ombudsman benefits from economies of scale currently unavailable to our scheme. However, with the increased joining up of legal services, especially with areas such as accountancy, there may be opportunities to maximise efficiencies from existing structures.

There may be innovations which may allow ways of meeting the BIOA principles that give consumers better access to redress at less cost and better levels of efficiency. Such a review would also aim to look at the narrow ADR mechanisms in the context of the wider consumer protection mechanisms provided by the courts and tribunals.

It seems essential for formalised ADR schemes to be backed by some level of regulation (although, as with the estate agents industry, this may be limited to a requirement that professionals be part of a scheme) and, where there is to be no mandatory or formal ADR scheme in operation, strong enforcement strategies in other areas of consumer law. These should include a proactive approach to consumer protection in addition to the redress that can be provided by an ADR scheme. The full range of
consumer protection options, including insurance, is fundamental to ensuring effective regulation. We are also keen to ensure that the other aspects of consumer protection – speedy discipline and compensation arrangements, trading standards and consumer law remedies as well as access to courts and tribunals – tie up with redress and insurance, so that the system has robust mechanisms in place enabling consumers to benefit from an adequate, joined-up, safety net. In our recently published Strategy 2012-2015 and Business Plan 2012-2013 we committed to look at how we could use the provisions in the Legal Services Act to create a voluntary jurisdiction under section 164 to fill these gaps and ensure access to free and fair redress for consumers of legal services.

An appropriate oversight and monitoring body would be one like the Administrative Justice and Tribunals Council (ATJC). The remit of the AJTC suggests that it might have been a candidate for the role. Its mission included seeking to ensure that the relationships between the courts, tribunals, Ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users. Given that there is no other body similar to the AJTC in the future landscape, it may be that asking another Government Department re-vamping the British and Irish Ombudsman Association or designating one Government Department (the current fragmentation of responsibility would not seem to meet the requirement) may be a response to the issues of oversight. This EU proposal provides us with an opportunity to look at how we can adopt modern approaches to consider new models both for individual schemes and the system as a whole.

Better information requirements would also help to break down barriers that discourage consumers from complaining. The draft proposals are welcome and would supplement first-tier complaint handling rules in the legal profession. But a single set of rules common across ADR schemes would be simpler to communicate to traders and consumers, providing a consistent approach to complaint handling as well as being simpler to operate. Such harmonisation within the legal sector will also help to contribute towards harmonisation between sectors, as the advent of new forms of regulation, such as Alternative Business Structures and the multidisciplinary traders it encourages will necessitate.

Due to these factors, the EU proposals present a key opportunity to re-model the existing system of ADR to resolve existing overlaps, shortfalls and conflicts rather than increasing confusion for consumers accessing redress. We welcome this consultation and would be happy to work with BIS in forming a response to the European Union’s proposals.
Annex A

Legal Ombudsman response to call for evidence questions

What are your views on the key estimates the European Commission make in their Impact Assessment which are summarised in Annex A? Overall do you think that the Commission's proposals will lead to their anticipated benefits for consumers, business and the Single Market?

We cannot comment on the reliability of the European Commission’s impact assessment. However, we can comment on what you have picked out as the key estimates in the assessment, by applying them to our own experience.

We aim to resolve complaints simply and informally, relieving consumers of the pressure and stress associated with going to court. Given the relatively low value of compensation which tends to be awarded in these cases, and the stress and inconvenience often associated with court action, it seems unlikely in many cases that complainants would have taken their case to court, if our service was not available.

Not all service complaints that consumers would consider to be ‘legal services’ are covered by the Legal Ombudsman. For example, we can deal with complaints about solicitors who have drawn up wills but we cannot process complaints against non-regulated will writers.

It seems fair to presume that widening the scope of ADR to cover all contractual professional services would cover these gaps and save money for consumers who have received poor service. We will pick up this point again in our answer to question 4, when we talk about the gaps currently existing in ADR.

There can also be complications when legal services are bundled in with other professional services, such as in property transactions. Whilst we have good relationship with other Ombudsman schemes, the difference between regulatory frameworks (we work in an entity based framework, other can work within a transaction based framework) means that consumers can find it difficult to find the best course to redress.
The consultation document seeks views about the benefits to consumers of using ODR for cross-border e-commerce transactions. The legal landscape is undergoing a process of swift change as more competition is entering the market and Alternative Business Structures (ABS), are being introduced. The Solicitors Regulation Authority started to receive applications for ABS licenses in January and firms from overseas are already applying. In this time of quick and immense change, we are working with other consumer redress schemes. We would welcome initiatives to join up mechanisms of redress in the legal and professional services sectors to make sure that complaints handling schemes are consistent, reliable and accessible to all members of the public. We are currently working with other Ombudsman schemes to ensure that consumers are not adversely affected when purchasing these services.

The consultation document seeks comments on financial benefits to traders of ADR. It would be hard to quantify the amount of money we save in legal fees for firms as there is no guarantee that all of our complainants would use the courts if we did not exist. As already stated, given the relatively low levels of compensation that we typically award, and the stress and inconvenience often associated with pursuing cases through the courts, it seems likely that many complainants would not.

Although it is difficult to quantify any financial benefits to the legal profession of our ADR existing, we contribute to the profession by feeding back information, such as publishing Ombudsman decisions, which helps to level the playing field for firms who provide a good service to consumers.

The final point under this section in the consultation document looks at the estimated costs of providing additional information in letters, on websites, and so on. The legal professionals we oversee are currently required to provide information about complaints handling in their client care letters and to provide it again once they receive a complaint. We would welcome an extension of this best practice to other legal and professional services.

1. Can you provide any evidence to quantify the costs and benefits to the UK described in Annex B and Annex C and/or provide details of any additional costs or benefits?

Until we have more information about the form ADR will take - whether we would have to extend our remit, whether the scheme would be made
mandatory or binding, how much we would have to change our systems and so on - it is impossible for us to quantify any additional costs.

However, it is very likely that an expansion of existing services would be less costly than creating new services from scratch. Our scheme was deliberately set up to be flexible and adaptable to developments in the sector, so we feel confident that we would be able to alter our processes to deal with the proposals and a potential expansion of our remit. Our modern computer systems should be able to deal with the changes, as our telephony is fully integrated with our IT system, for example.

The consultation document asks us to comment on funding. Ombudsman schemes are funded in a variety of ways. We are funded through the legal profession; lawyers pay an annual levy to their regulatory body, which in turn passes some of that money on to us. In addition, as mentioned earlier, we charge case fees to lawyers in certain circumstances, although this constitutes a small proportion of our funding. If we were to expand our jurisdiction to cover other types of legal or professional services, we would expect our operational costs to increase to cover the new work. We would have to consider where this funding would come from. One option could be through increased case fees for unregulated entities.

Currently, there is no emphasis placed on awarding complainants higher amounts of redress than they would gain if they went through the courts. Instead, when a lawyer is found to have provided poor service, we aim to put things right and put the complainant in the situation they would have been in if they had not received the poor service. Indeed, the compensation we order from firms tends to be relatively small. £30,000 is the maximum we are permitted to order and we have only done this in a handful of cases. We are looking into extending this limit, as part of our review of scheme rules, but we would only order higher amounts if the case merited it. We have occasionally dealt with cases where we would have ordered firms to pay more than £30,000 if that had been possible.

We would like to understand more about the provision mentioned in paragraph 17 of the proposals, which states:

“The natural persons in charge of alternative dispute resolution should only be considered impartial if they cannot be subject to pressure that potentially influences their attitude towards the dispute. There is a particular need to ensure the absence of such pressure where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member.”
We are confident in our independence but as we are funded by the legal profession, through the MOJ, we would want to understand how we would need to evidence our independence, when the proposals are adopted.

2. Do you think that the “chargeback” process and/or processes used to resolve claims made under Section 75 of the Consumer Credit Act should be considered as a form of ADR? If not, do you think consumers would (or should) be more likely to use “chargeback” or make claims under Section 75 of the Consumer Credit Act where this is available, rather than using ADR to resolve a dispute? Why?

Section 75 of the Consumer Credit Act 1974 provides valuable protection to consumers who have suffered loss from a transaction while using a credit card. However, it does not provide the comprehensive cover that ADRs afford.

We are concerned that if the Consumer Credit Act were the only source of redress for consumers, it would lead to those who are able to hold a credit card having more protection than those who do not.

The consultation document also looks at the provisions made by the global voluntary scheme, “chargeback”. Again, there are accessibility issues with this scheme, as it only covers Visa and Mastercard debit and credit cards. If this was considered as a form of ADR, these customers would be better protected than consumers who do not use these services. The consultation rightly points out that this scheme is voluntary so there is also an issue with its durability.

In addition, these routes to redress only cover financial loss and not compensation for distress, inconvenience, or any other types of poor service which ADRs investigate and order redress for. Nor are these services independent, and it is in the interests of credit and debit card providers that they do not have to provide compensation to consumers.

It is also worth noting that the protection offered to consumers by these two services do not cover traders; the European Commission’s proposals on ADR and ODR both entitle traders to lodge complaints about their customers.
3. **What do you think of the proposed scope of the Directive?**

Where do you think there are gaps, if any, in the provision of ADR currently in the UK? Can you provide any estimates on how much public subsidy, if any, would be required to ensure ADR of the required standards is available for all consumer disputes?

The Legal Ombudsman is only in a position to comment on gaps in consumer redress within the legal and professional services sector. In October 2011, we commissioned the University of Leicester to undertake independent research on the legal services landscape. They found that consumers are often unclear on what a legal service is, and what the route to redress is, if something goes wrong.

The research highlighted the difference between public perceptions of a ‘legal service’ and those legal services and practitioners we have jurisdiction to oversee. There are gaps in redress in the areas of mediation, immigration advice and employment advice, to name but a few. A gap which was particularly noted in the research was unregulated will writing. Under the current arrangements, the Legal Ombudsman can investigate complaints against will writers as long as the lawyer is regulated, but if the will writer is unregulated, we are unable to pursue a claim.

We will be consulting this year on possible voluntary expansions of our jurisdiction to cover some of these gaps. If a voluntary jurisdiction scheme is established, it would fit in well with the proposed ADR directive, as a voluntary jurisdiction is likely to resemble the arrangements that would exist if the ADR directive is non-mandatory on traders. If it is made mandatory, voluntary jurisdiction would serve as a good intermediary stage.

As well as gaps in redress in legal services, there are other professional services which are not currently covered by an ADR mechanism. In our recent response to the BIS Commons Select Committee’s inquiry into the Insolvency Service, we explored the possibility of expanding our jurisdiction to cover insolvency practitioners. Insolvency practitioners often come from a legal background and share some regulators with the lawyers we oversee. With this in mind, rather than creating a new ADR scheme, it may be logical to extend our jurisdiction.

We would like to see the gaps in redress in the legal sector closed so members of the public are able to access redress regardless of who they
buy a legal service from. This may become even more complicated in the future as ABS firms start to emerge. We are keen that arrangements which are made to meet any changes in ADR join-up and work well together to create an efficient and straightforward process for consumers. Consumers should be able to expect a similar outcome if the provider of the professional is covered by more than one ADR. If it was viewed appropriate, we would be happy to discuss the possibility of extending our remit to other professional services.

4. What do you think of the standards/requirements for ADR providers that are proposed by the EU? If you are an ADR provider can you currently demonstrate that you meet them? If not, why not? Would you be willing to develop your scheme so it could meet these standards? If so, what might this cost you? Are there any standards that you think are not appropriate or not required? Are any missing? Can you see any potential for UK ADR providers to provide their services to non-UK businesses?

The approach outlined in the European Commission’s proposed ADR directive seems, at this point, to fit well with the scheme we already operate at the Legal Ombudsman. If we became an ADR entity under the proposals, we would have to make changes to some of our processes. However, we feel that these changes would be workable and the proposals could lead to an even more effective joined-up system of consumer redress and protection. Below, we have listed the changes that the consultation document invites us to comment on, along with how we see them fitting into our existing scheme:

- Transparency: ADRs will have to make information publicly available about their governance, funding, and practical procedures, as well as publishing annual reports and statistics. We already release information on our website, and through freedom of information requests, and we publish annual reports and Ombudsman decisions online. In publishing information, we go beyond our obligations and publish case studies on our website which help to illustrate how our processes work, feeding back to consumers and the legal sector. We also use social media, such as Adam’s blog, which is an informal commentary on what happens at the Legal Ombudsman on a day to day
basis. Openness and transparency are a part of our culture and we feel confident that we would be able to meet this requirement.

- Costs: our service is already free of charge to consumers; we are funded by the legal profession.

- Time limits: cases should take a maximum of 90 days to resolve, although in complicated cases this could be extended. Under our current arrangements we have the same goal with most of our cases resolved within 90 days. Customers are required, in the first instance, to complain to their law firm. If their complaint is not dealt with satisfactorily, then they come to us, and do not include this first step within the 90 days. It is unclear in the proposals whether first tier complaints are included within the time limit. Based on our experience, we do not feel this would be realistic.

- An online service: ODR will be conducted entirely online. Currently, we contact complainants using their preferred method of contact. We already correspond with customers via email and letter. However, the majority of our initial contacts are by telephone. Complainants do seem to appreciate having a range of options available to them.

- Accepting claims from other member states: we would be happy to accept complaints about any firm that is regulated in the UK.

- Ensuring personal data complies with relevant rules: we already do this.

- Sharing information and co-operating with other bodies: ADRs will exchange information via electronic means. We already have systems set up where we can securely share information electronically with several different partner organisations.

- Competent authority: information on this is given in the answer to Q6.

- Including information in letters: traders will have to provide information in their initial correspondence to consumers, and again if they receive a complaint, regarding the ADR they prescribe to. Lawyers in the UK and Wales are already expected to provide this information to consumers. Widening this out into other sectors would be an expansion of best practice and ensure more consistency across sectors. We welcome any efforts to
improve consistency of approach between agencies and joined up working.

- Principles: ADRs will have to demonstrate that they are impartial, transparent, effective and fair. These principles chime with our own values, we strive to be independent, fair, effective, open and shrewd.

Perhaps the largest change in the work we do, if the proposals are fully adopted, would be processing complaints from traders about consumers. But, without any indication of how many complaints we could expect, it is hard to quantify what this would mean in terms of increased costs and resources.

5. What do you think about the proposed role of the Competent Authority? What kind of organisation do you think could be a suitable Competent Authority? What kind of organisation do you think could be a suitable Competent Authority for the UK? Can you suggest an existing organisation that you think would be well-placed to take on this role? How much do you think it would cost to fulfil this role?

Member states will need to designate a competent authority to accredit, monitor and report on ADR schemes. Under the current arrangements, Ombudsman schemes have a parent Government department. The Legal Ombudsman currently reports to the Ministry of Justice. In line with our priorities and values, we would welcome working with any Competent Authority that encourages a joint up partnership approach to ADR.

The Administrative Justice and Tribunals Council would seem a natural choice for this, although it currently faces an uncertain future as a draft order to abolish the AJTC is expected to be laid this spring.

6. Do you think that consumers would change their behaviour if businesses were required to inform consumers about an ADR scheme and/or whether they would participate in ADR? What evidence do you have to support this view?

We recently undertook our first quarterly customer satisfaction survey. Our initial results seem to suggest that providing consumers with information on complaints processes in lawyers’ client care letters, and
then again when a consumer complaints to the firm, leads to customers pursuing their complaint through the Legal Ombudsman. However, it is likely that some of our respondents would have found us through other channels if the information was not included in the client care letter.

8. What would be the costs to business of providing these additional information requirements to consumers? How could these impacts be lessened for all businesses and, in particular, for small or medium businesses?

No comments.

9. Any other comments:

The consultation document does not seem to have considered the implications of taking complaints from traders about consumers. If these are adopted, we could expect a considerable increase in our workload and this would have to be funded, either by the legal profession or through public funds.

If ADR is not adopted, or isn’t made mandatory, and ODR is adopted there could be a situation where the public are better protected when purchasing from traders in other member states than they are in the UK. As an organisation that is committed to best practice, we would be concerned if this scenario unfolded.

10. What do you think about the proposals in the ODR Regulation? What would be the costs/benefits of the OR platform and facilitators to consumers, businesses and ADR providers? Would ADR providers be able to meet the 30-day deadline for concluding cross-border disputes? What would be the costs to business of these additional reporting requirements? Might these requirements mean business is more reluctant to trade online and cross-border?

Our main concern about the proposed ODR regulation, hinges on the 30 day limit for resolving complaints. Few of our cases are resolved within a month. Providing a service where communication is purely online should speed the process up. However, much of our communication with complainants and firms is already electronic and the majority of our
cases take up to 90 days to resolve. We expect that it would be difficult to resolve all cases within 30 days.