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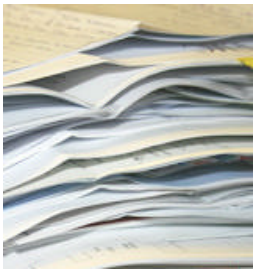
Resolving disputes between consumers and financial businesses: **Fundamentals for a financial ombudsman**

A practical guide based on experience in western Europe



By David Thomas and Francis Frizon for

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Contents

Preface

Glossary

Abbreviations and acronyms

ADR = alternative dispute resolution body (for out-of-court redress)

ANZOA = Australia and New Zealand Ombudsman Association

BIOA = British and Irish Ombudsman Association (covers UK and Ireland)[1]

ECHR = European Convention on Human Rights[2]

EEA = European Economic Area (comprises EU + EFTA)

EFTA = European Free Trade Area[3]

EU = European Union[4]

FIN-NET = European network of financial ombudsmen and financial ADRs (covers EEA)[5]

GDP = Gross domestic product

INFO = International network of financial ombudsmen (worldwide)[6]

UK = United Kingdom (of Great Britain and Northern Ireland)

Terminology

'Ombudsman' is recognised worldwide. This report uses it to include equivalent bodies that in some countries use other titles, such as 'arbiter'.

'ADR' is used in this report to cover both ombudsmen and other types of out-of-court redress bodies such as complaints boards and complaints departments of financial regulators.

'Mediator' is used for different purposes in different countries. Most use it for those ADRs that only mediate. But some use it for those with a wider role, similar to an ombudsman.

'Microenterprises' (the smallest businesses) and 'small and medium enterprises' are EU-wide definitions.[7]

[1] www.bioa.org.uk

[2] The ECHR (http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) covers the 47 Council of Europe member states, which are: the 27 EU member states; the 3 EFTA member states; and Albania, Andorra, Armenia, Azerbaijan, Bosnia Herzegovina, Croatia, Georgia, FYR Macedonia, Monaco, Moldova, Montenegro, Russia, San Marino, Serbia, Switzerland, Turkey and Ukraine.

[3] The 3 EFTA member states are Liechtenstein, Norway and Iceland.

[4] The 27 EU member states are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom. Croatia is on track to become a member.

[5] http://ec.europa.eu/internal_market/fin-net/index_en.htm

[6] www.networkfso.org – 49 member financial ombudsman schemes in 31 countries worldwide.

[7] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF

'Financial business' is used in this report to cover the whole range of businesses that provide or distribute credit, financial services or payment services.

'Intermediary' is used to cover a financial business (such as an insurance broker) that distributes the financial products of others.

Preface

Introduction

Purpose of this report

This report outlines the fundamentals for the creation of an independent and effective financial ombudsman. These fundamentals comprise some basic principles as well as a significant number of practical design issues.

Drawing on previous reports from The World Bank and others, the report starts by summarising how financial ombudsmen and other ADRs increase consumer confidence in financial services, and hence also benefit financial businesses by helping markets to improve and grow.

The report goes on to explain some of the additional issues and standards which should be taken into account in states which are members of the European Union *or* wish to join the European Union *or* wish to aspire to similar standards.

It describes how financial ombudsmen have grown in the developed financial market of western Europe, and provides case studies. It also summarises the current position in relation to consumer complaints against financial businesses in central/eastern Europe.

The report then outlines the key issues to be borne in mind by expert advisers when assisting in creating a financial ombudsman, or developing an existing one – including governance, funding, coverage, procedure, accessibility, transparency and accountability.

While taking account of the relevant constitutional, legal and cultural circumstances in different countries, it is important to remain true to the basic ombudsman principles (including independence and efficiency).

Acknowledgements

This report was prepared by:

- David Thomas (Principal Ombudsman, Financial Ombudsman Service in the UK); and
- Francis Frizon (Insurance Mediator in France).

Having originally qualified as lawyers, both of them have been:

- ombudsmen for more than a dozen years;
- steering committee members of FIN-NET (the European network of financial ombudsmen/ADRs);[8]
- steering committee members of INFO (the worldwide network of financial ombudsmen).[9]

They are grateful to:

- Sue Rutledge, Juan Carlos Izaguirre, Tomáš Prouza and their colleagues in the Global Program on Consumer Protection and Financial Literacy at The World Bank who have overseen this report;

[8] http://ec.europa.eu/internal_market/fin-net/index_en.htm

[9] www.networkfso.org – 49 member financial ombudsman schemes in 31 countries worldwide.

- the authors of the various documents from The World Bank and other organisations that are cited in this report and provide an essential foundation for it;
- Jean-Yves Mulle, Malgorzata Feluch and their colleagues in the European Commission's Internal Market Directorate General; and
- ombudsman colleagues in INFO, FIN-NET, BIOA and ANZOA, and those in the European Consumer Centres who direct consumers to the correct ombudsman.

During the consultation period, the draft of this report was presented at three international meetings:

- the INFO annual conference in Canada in September 2011;
- the FIN-NET bi-annual meeting in Malta in October 2011; and
- a financial ombudsman conference in Armenia in October 2011.

Comments in this report do not necessarily reflect the views of the organisations mentioned.

Preface

Executive summary

Consumer confidence and the financial ombudsman

Governments and financial businesses benefit if consumers have confidence in financial markets. A common theme of previous reports from The World Bank is that one key way to increase consumer confidence is to provide accessible and user-friendly arrangements to resolve disputes.

Like the courts, financial ombudsmen resolve individual disputes. Unlike the courts, they can also deal with consumer enquiries, and proactively feed back the lessons from their work to help governments, regulators, financial businesses and consumers improve things for the future.

Financial ombudsmen: help to support improvements and reduce disputes; help financial businesses themselves to resolve disputes with consumers; resolve any consumer disputes that financial businesses fail to resolve themselves; and reduce the burden on the courts.

European dimension

European Commission research shows that, in every country in the European Union, both consumers and sellers/suppliers find it easier to resolve disputes through ombudsmen and other ADRs than through the courts.

The European Commission is promoting out-of-court resolution of disputes. It has laid down fundamental standards for out-of-court redress schemes. And it has sponsored a European network of financial ombudsmen/ADRs in financial services (FIN-NET) to cover cross-border cases.

Recent European directives require financial ombudsmen/ADRs in consumer credit, payment services, electronic money and collective investments. Earlier directives encourage financial ombudsmen/ADRs in insurance intermediation, investments and distance marketing of financial services.

A proposed European directive, planned to come into force in 2014, will require ombudsmen/ADRs across the whole of the consumer sector – including the financial sector – and will lay down minimum requirements with which ombudsmen/ADRs must comply.

Development of financial ombudsmen/ADRs in western Europe

The financial ombudsman is the dominant kind of financial ADR in western Europe, although its precise form may vary. Many started covering a single sector (such as banking or insurance) but there is now a trend towards a single financial ombudsman covering all financial sectors.

Some countries use alternative forms of financial ADR instead of a financial ombudsman – such as a complaints department within a financial regulator, complaints boards (with an independent chair and equal numbers of members from consumer and industry bodies) or regional arbitration.

This report provides case studies of: an industry-established ombudsman scheme with a governance body (non-executive board); an industry-established ombudsman scheme without a governance body; and an ombudsman scheme established by law.

Overview of the fundamentals

Financial ombudsmen have been established in many different countries and sectors. While they may need to take account of the relevant constitutional, legal and cultural circumstances, they should remain true to fundamental ombudsman principles, including independence and effectiveness.

Key issues on coverage and governance include: whether financial businesses are required to be covered by a financial ombudsman; whether there should be a single ombudsman or ombudsmen for different sectors; how the financial ombudsman is appointed and funded; and whether there is a governance body.

Key issues on procedure include: requirements on how financial businesses handle complaints, including telling dissatisfied consumers about the financial ombudsman; enquiry and case-handling processes of the financial ombudsman; the basis on which the financial ombudsman decides cases; and whether ombudsman decisions are legally binding.

Governance and funding

The title 'ombudsman' should not be used for a body that does not comply with ombudsman principles – including independence and effectiveness – or which is unable in practice to secure redress for consumers. Otherwise, consumer confidence will be undermined.

The ombudsman should be (and also be seen to be) as independent and impartial as a judge – as well as having the necessary legal and technical expertise to resolve financial disputes authoritatively. This needs to be reflected in the appointment and governance arrangements.

Government funding may be constrained. Industry funding can comprise a levy on all financial businesses, case fees payable by financial businesses that have cases decided by the ombudsman or a combination of the two. Even a modest fee for consumers would be a barrier for the vulnerable.

Coverage and procedure

Ombudsman coverage of financial businesses within the relevant sector(s) should be comprehensive. It should include all financial businesses that are based in the country – including any that are foreign-owned.

Where financial businesses based in the country do business cross-border with consumers in other countries, the financial ombudsman should accept complaints against those financial businesses from those consumers.

Financial businesses should be required to have a published complaints procedure for consumers to use first. If financial businesses handle complaints well, this will reduce the number of disputes referred to the financial ombudsman.

The financial ombudsman's procedure should include enquiry-handling, so that some problems can be resolved before they turn into full-blown cases. Resolution of cases should include informal mediation, where this is possible, as well as formal decision.

Accessibility, transparency and accountability

Consumers can only access the financial ombudsman if they know about it, and where to find it. In addition to the ombudsman making information widely available, financial businesses should be required to tell dissatisfied consumers about the ombudsman.

The financial ombudsman should publish clear details about its powers and procedures and about the type and effect of its decisions. It is useful to publish case studies and/or guidance notes to illustrate the financial ombudsman's approach to typical cases.

Financial ombudsmen should publish a report at least yearly, explaining the work that they have done. They should provide appropriate statistics about the disputes they have handled and the way in which they have handled them (including the arrangements for quality-control).

Where financial ombudsmen identify systemic issues that financial regulators (or even government) would be better placed to tackle, the financial ombudsman should draw those issues to the attention of the financial regulators.

Context

Consumer confidence and financial ombudsmen

This chapter explains: the role of financial ombudsmen/ADRs in increasing consumer confidence in financial services; and the value added by the way in which financial ombudsmen work.

Benefits for consumers, financial businesses and governments

A growing and efficient market in financial services depends, amongst other things, on consumer confidence. Developing consumer confidence requires effective:

- prudential regulation, to ensure that financial businesses are financially sound and run by fit-and-proper people;
- conduct of business regulation, or effective self-regulation through industry codes, to ensure financial businesses treat consumers well;
- arrangements to provide appropriate protection to consumers if a bank or other significant financial business becomes insolvent;
- accessible and user-friendly arrangements to resolve disputes between consumers and solvent financial businesses; and
- measures to create confident consumers, by increasing their financial capability through public information on financial issues and on their rights and liabilities.

The *G20 High Level Principles on Financial Consumer Protection*[10], adopted by the Organisation for Economic Cooperation and Development in October 2011, include –

Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers' and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public.

In focusing on resolving disputes between consumers and financial businesses, this World Bank report draws on experience in the developed market of western Europe in order to identify considerations that are likely to be relevant elsewhere.

Information on conditions across all consumer sectors in the European Union – in the European *Consumer Conditions Scoreboard* (fifth edition, published March 2011)[11] – shows that consumers and businesses throughout the EU find it easier to resolve disputes through ombudsmen and other ADRs rather than through the courts.

[10] www.oecd.org/dataoecd/58/26/48892010.pdf

[11] http://ec.europa.eu/consumers/strategy/docs/5th_edition_scoreboard_en.pdf

The need for effective ADR through a financial ombudsman is supported by nine previous World Bank reports on improving consumer confidence in financial services in individual countries.[12] Common themes included:

- Special attention should be paid to consumer complaints. Many are enquiries rather than disputes. If they are not satisfactorily addressed, they undermine public confidence.
- Businesses should tell customers in writing how they can complain, and have a designated department/person to handle complaints. Regulators should review complaint files.
- Consumers should have access to a fast, inexpensive and effective redress mechanism. Ideally there should be one, clearly identified, central location for complaints or enquiries.
- Consumers should be able to submit complaints by phone, email, post or personal visit. The central complaints office should have a free phone line.
- Going to court is not a viable alternative for most consumers. Policy-makers should consider establishing a financial ombudsman.
- Statistics on consumer complaints should be analyzed and published. They should be used to identify future improvements in the protection framework.

Experience shows that an effective financial ombudsman benefits financial businesses and the state, as well as benefiting consumers:

- Consumers have greater confidence in financial services when they know that, if anything goes wrong, they will be able to take their dispute to an independent body that will resolve the issue quickly and informally, without the consumer needing a lawyer.
- Financial businesses benefit because: consumers are more likely to buy financial products; the cost of resolving disputes with consumers is kept to a minimum; and unscrupulous competitors who act unfairly are held to account.
- The state benefits because: redress can be provided at minimum cost; feedback from an ombudsman can help improve future regulation; and confident consumers are more likely to play their part in helping to develop a sound financial market.

Ombudsmen can fulfil a wider role than the courts. Like the courts they resolve individual cases. Unlike the courts, they can also deal with consumer enquiries, and proactively feed back the lessons from their work to help governments, regulators, financial businesses and consumers improve things for the future.

So an ombudsman's role in underpinning consumer confidence in financial services includes:

- helping to support improvements, and reduce disputes, in financial services; and
- helping financial businesses themselves to resolve disputes with consumers; as well as
- resolving consumer disputes that financial businesses fail to resolve themselves; and hence
- reducing the burden on the courts; as well as
- increasing financial inclusion.

[12] Azerbaijan, Bulgaria, Croatia, Czech Republic, Latvia, Lithuania, Romania, Russian Federation and Slovakia – see http://go.worldbank.org/HHAM6ZTHT0

How financial ombudsmen work

Ombudsman schemes in financial services aim to provide a quicker, cheaper and less formal way of resolving disputes than the courts. Public confidence requires that – like a judge – the ombudsman should be, and be seen to be, independent and impartial.

Financial ombudsmen expect consumers to take their complaint first to the financial business, and give the business an opportunity of putting things right. And ombudsmen expect financial businesses to look into complaints properly and provide a prompt and clear response to the consumer.

If the consumer is dissatisfied with the response from the financial business, or if the financial business fails to respond to the complaint within a reasonable time, then the consumer can refer the complaint to the ombudsman for independent consideration.

Unlike the courts in many countries, the ombudsman does not rely on the parties to bring forward all the necessary evidence and arguments. The ombudsman actively investigates the case and uses his/her specialist knowledge of financial services.

This means that the consumer is not placed at a disadvantage by the financial business's greater resources and technical knowledge. And neither the consumer nor the business needs to employ a lawyer to put the arguments for them (though they are not prevented from doing so).

The ombudsman will look into the circumstances of the case and see if it is possible to mediate a fair settlement that both the consumer and the business accept. If not, the ombudsman will take account of all the evidence and the arguments and issue a decision/recommendation.

In deciding whether or not to uphold the consumer's complaint, the ombudsman will take into account the law, any industry code and good industry practice. But the decision/recommendation will be based on equity – what the ombudsman considers to be fair in the circumstances of the case.

The ombudsman will give reasons for the decision/recommendation. If the ombudsman upholds the consumer's complaint, the ombudsman will go on to say what the financial business should do to put things right.

Best practice is for financial ombudsmen to be free to consumers – so that cost is not a barrier. And their method of working, and the fact the parties do not need lawyers, means that financial ombudsmen are very much cheaper than the courts for financial businesses.

Ombudsmen usually go beyond just deciding individual cases. They handle enquiries from both consumers and financial businesses. And they proactively feed back information from their work, in order to make things better for the future.

Many of the contacts financial ombudsmen receive from consumers are enquiries. Some financial businesses are not good at explaining things to their customers, even when those customers complain.

An independent explanation from the financial ombudsman can often sort things out straight away. So, by handling enquiries effectively, ombudsmen can prevent many of them turning into full-blown complaints as well as playing a role in consumer financial education.

And financial ombudsmen receive enquiries from financial businesses as well. A business may receive a complaint and accept that it has not treated the customer well – but be unsure what redress would be fair. Advice from the ombudsman can often settle things there and then.

By reporting regularly on the trends that they see in their work, financial ombudsmen can provide independent insight – enabling governments and regulators to supervise financial services more effectively, and enabling financial businesses and consumers to avoid problems.

The reports can be used by consumer advisers and the media to help improve the financial capability of the public – by explaining to consumers in plain language: what financial issues to be careful about; what their rights and liabilities are; and how they can seek redress.

Context

European dimension

This chapter summarises issues that have a direct impact on the resolution of consumer complaints about financial services in the European Union (EU) – relevant to states that are members *or* wish to join *or* aspire to equivalent standards.

It starts with consumer protection in general, moves on to financial services issues and concludes by explaining the relevance of these issues to financial ombudsmen/ADRs.

Single market

The creation of the European single market has implications for the shape of the financial services industry, the growth of cross-border financial transactions and the challenges these create for financial ombudsmen/ADRs.

European Economic Area (EEA)

The EEA comprises a single market for goods and services, including financial services. It covers 30 countries – the 27 member states of the European Union plus the 3 member states of the European Free Trade Area (EFTA):

- Austria (EU)
- Belgium (EU)
- Bulgaria (EU)
- Cyprus (EU)
- Czech Republic (EU)
- Denmark (EU)
- Estonia (EU)
- Finland (EU)
- France (EU)
- Germany (EU)
- Greece (EU)
- Hungary (EU)
- Iceland (EFTA)
- Ireland (EU)
- Italy (EU)
- Latvia (EU)
- Liechtenstein (EFTA)
- Lithuania (EU)
- Luxembourg (EU)
- Malta (EU)
- Netherlands (EU)
- Norway (EFTA)
- Poland (EU)
- Portugal (EU)
- Romania (EU)
- Slovakia (EU)
- Slovenia (EU)
- Spain (EU)
- Sweden (EU)
- United Kingdom (EU)

Croatia is on track to become the 28th member state of the EU, and a member of the EEA, having signed an EU accession treaty on 9 December 2011.

European single currency

More than half of the EU member states have adopted the Euro single currency. Other states that joined in 2004 and 2007 are all due to adopt the Euro when they are able to meet the specified criteria. Some of these have fixed the exchange rate between their own currency and the Euro.

Cross-border transactions in the single market can be more straightforward, and more likely to take place, where the same currency is used in the member state where the seller/provider is based and in the member state where the consumer lives.

Consumer protection now

Consumer confidence

The European *Consumer Conditions Scoreboard* (fifth edition, published March 2011)[13] provides comparative details of consumer conditions in the EU member states – relating to all sectors, not just financial services. This shows:

- Across the EU, the percentage of consumers who feel adequately protected by existing consumer protection measures is 57% - but this ranges from a high of 80% in the United Kingdom to a low of 27% in Bulgaria.
- In every EU member state consumers say they find it easier to resolve disputes with sellers/providers through ombudsmen/ADRs than through the courts (irrespective of consumers' varying levels of confidence in their national courts) - and businesses also prefer ombudsmen/ADRs to the courts.

Consumer protection strategy

The European Commission's Consumer Protection Strategy 2007-2013[14] aims to establish equal levels of security and protection for consumers throughout the EU, as well as a more integrated internal market, by:

- empowering consumers by creating a more transparent market that offers consumers real choice;
- enhancing consumers' welfare in terms of price, quality, diversity, affordability, safety, etc; and
- protecting consumers from serious risks and threats.

Key steps include developing benchmarks for national policies, including consumer protection in the financial sector.

Directives on consumer protection

There are a number of general consumer protection directives[15] that apply equally to financial services – notably Directive 1993/13/EC on unfair terms in consumer contracts.[16]

Under this directive, where a consumer enters into a contract on a business's standard terms:

- the contract must be in clear and intelligible language;
- if there is any ambiguity, the meaning most favourable to the consumer applies; and
- the consumer is not bound by any terms of the contract that are assessed to be unfair.

The directive includes provisions that relate to unilateral changes of interest rates and charges by financial businesses.

Role of ombudsmen/ADRs

The European Commission's Consumer Protection Strategy considers that access to independent out-of-court settlement of consumer disputes is a key factor in increasing consumer confidence. The Commission has commissioned several detailed studies of consumer ombudsmen/ADRs, including:

[13] http://ec.europa.eu/consumers/strategy/docs/5th_edition_scoreboard_en.pdf

[14] http://europa.eu/legislation_summaries/consumers/general_framework_and_priorities/l32054_en.htm

[15] Directives (approved by the Council of Ministers and the European Parliament) set provisions which member states are required to incorporate into national law.

[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML

- A 2007 report from the Katholieke Universiteit Leuven, analysing and evaluating out-of-court redress[17] backed up by individual country reports.[18]
- A 2009 report from Civic Consulting on the use of ADR, which includes detailed schedules of ADRs in each member state.[19]
- A 2009 report on consumer redress in the European Union: consumers' experiences, perceptions and opinions.[20]

Harmonised recording of consumer complaints and enquiries

In 2010 the European Commission issued a recommendation on the use of a harmonised methodology for classifying and reporting consumer complaints and enquiries.[21] It encourages ombudsmen/ADRs to use this – so that the Commission can compare consumer complaints across the whole EU.

Consumer protection in future

Consumer protection strategy

On 9 November 2011 the European Commission published a draft Consumer Programme for 2014-2020.[22] It has four main strands. One of these is enhancing rights and redress for consumers – including the availability of cheap, rapid and easy redress through ombudsmen/ADRs.

Role of ombudsmen/ADRs

In January 2011 the European Commission issued a consultation paper on improving ombudsmen/ ADRs[23], followed in March 2011 by a summit meeting on ADR[24] and in May 2011 by a feedback statement in the light of the responses received.[25]

On 29 November 2011, the European Commission proposed:[26]

- a directive[27] on ADR, to be adopted by the end of 2012 and to come into force in the second half of 2014: and
- a regulation[28] on ODR (online dispute resolution), to be adopted by the end of 2012 and to come into force in the first half of 2015

[17] http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf

[18] http://ec.europa.eu/consumers/redress/reports_studies/28nationalreports.zip

[19] http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

[20] http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf

[21] http://ec.europa.eu/consumers/strategy/docs/consumer-complaint-recommendation_en.pdf

[22] http://ec.europa.eu/consumers/strategy/docs/proposal_consumer_programme_2014-2020_en.pdf

[23] http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf

[24] http://www.europarl.europa.eu/document/activities/cont/201104/20110404ATT16948/20110404ATT16948EN.pdf

[25] http://ec.europa.eu/consumers/redress_cons/Feedback_Statement_Final.pdf

[26] http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

[27] Directives (approved by the Council of Ministers and the European Parliament) set provisions which member states are required to incorporate into national law.

[28] Regulations (approved by the Council of Ministers and the European Parliament) set provisions which apply automatically in all member states.

Proposed directive on ADR

The directive is intended to address: geographical and sectoral gaps in coverage by ADRs; lack of awareness by consumers and businesses; and variable standards of ADRs.

In order to eliminate gaps, member states will be required to ensure that ADR is available, across all consumer sectors, for contractual disputes between consumers and businesses that provide goods or services.

Member states can use their national model of ADR [e.g. ombudsman] and more than one ADR body. They do not have to make individual businesses join the available ADR (and can rely on consumer pressure) but they are free to make it compulsory if they want.

The ADRs must be available to cover: national disputes (where the consumer and business are in the same member state); and cross-border disputes (where the consumer and business are in different member states); including disputes instigated by either the consumer or the business.

In order to improve awareness, businesses will be required to tell consumers about any ADR they are covered by – on the business's website (if any), in contracts and in invoices/receipts. And member states are required to ensure assistance is available for consumers with cross-border complaints.

In order to improve the standards of ADRs, the directive sets out a number of requirements – to be monitored by a competent body designated by each member state. The requirements are described below in the section on *European standards for out-of-court redress*.

Proposed regulation on ODR

The scope is much narrower than the ADR directive, because the ODR regulation applies only to:

- cross-border disputes (where the consumer and trader are in different member states); about
- online (or other electronic) transactions (excluding phone transactions and cash machines).

The Commission will establish an ODR platform – in effect an electronic clearing house – which will:

- enable complaints to be submitted online;
- pass them, through a national clearing house, to the relevant national ADR;
- facilitate online communication between complainant and ADR; and
- provide a system under which users can provide feedback on the ADR.

The relevant ADR must resolve the complaint within 30 days, unless it is a complex one, and give the Commission information about complaints handled (date of receipt, date of resolution and outcome).

European standards for out-of-court redress

Current requirements

The existing European Commission Recommendation 1998/257/EC sets standards for ombudsmen/ADRs that provide out-of-court settlement of consumer disputes by proposing or imposing solutions. The text of the Recommendation is set out in annex A to this report. It sets out seven principles, which are summarised below.

Independence principle: The decision-maker must be independent, to ensure impartiality.

Individual decision-makers must: have the necessary abilities, experience and competence; and have security of tenure for a period sufficient to ensure independence. An individual paid or appointed by a professional body must not have worked for the professional body (or any of its members) within the last three years.

Alternatively, decisions can be made by a body with equal membership from consumers and professionals.

Transparency principle: Anyone is entitled to ask for information about: the types of disputes that are covered; the rules and procedures that apply; how decisions are made; whether decisions are based on strict law or on fairness; whether decisions are binding; and any provisions about costs. An annual report must be published, showing the nature of disputes and the results obtained.

Adversarial principle: The parties must be allowed to present their viewpoint and to know the arguments and facts put forward by the other party, and know the contents of any reports from experts.

Effectiveness principle: The ombudsman/ADR must take an active role in investigating the complaint, so that the consumer does not need legal representation, and the ombudsman/ADR must provide a prompt decision. The procedure must be free for the consumer, or of moderate cost.

Legality principle: Decisions must be communicated to the parties in writing (or other suitable form) giving the grounds on which they are based.

The consumer must not be deprived of the mandatory protections in the law of the state in which the ombudsman/ADR is established, nor (in cross-border cases) in the law of the state where the consumer lives.

Liberty principle: Consumers cannot be forced to use the ombudsman/ADR if they prefer to go to court instead. Where decisions are binding, the parties must have been told of this in advance.

Representation principle: The procedure must not prevent parties being represented or assisted by a third party if they wish.

For ADRs which confine themselves to mediation, and do not propose or impose a solution, European Directive 2008/52/EC on mediation applies.[29]

Future requirements

The proposed ADR directive builds on Recommendation 1998/257/EC in order to set compulsory standards for ombudsmen/ADRs. Relevant extracts from the proposed directive are set out in annex B to this report, and summarised below.

Access: ADRs must deal with cross-border disputes as well as national disputes. ADRs must have a website. This must allow the parties to submit a complaint online, and exchange information electronically.

Expertise and impartiality: Decision-makers in ADRs must possess the necessary expertise and be impartial. Their impartiality must be guaranteed by ensuring they cannot be removed from office without just cause and have no conflict of interest.

[29] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

If the decision-makers form part of a collegial body comprising consumer and business representatives, each side must have equal representation.

Transparency: ADRs must publish, on their websites and in print: what types of disputes the ADR is able to deal with; its procedural rules; the language(s) that can be used; the basis on which disputes are resolved (for example, law or fairness); approximately how long the procedure takes; and the legal effect of the outcome.

ADRs must also publish, on their websites and in print: who the decision-makers are; how they are appointed; how long their term of office is; how the ADR is funded; and what international networks the ADR belongs to.

ADRs must publish an annual report, on their websites and in print, including: numbers and types of disputes; the number that were discontinued before resolution; the average time to resolve disputes; the rate of compliance with the outcome; the nature of any recurrent problems; and the ADRs' involvement in cross-border networks.

Effectiveness: ADRs' procedures must be effective, accessible to the parties (without requiring legal representation); and free, or of moderate cost, for consumers. Disputes must be resolved within 90 days, unless complex.

Fairness: ADRs must give both parties the opportunity to express their point of view, and to hear the arguments and facts put forward by the other party and any experts' statements. ADRs must provide the outcome in writing, with reasons.

ADRs must tell consumers that: they are not required to agree to a suggested solution; the outcome may be different from the outcome in court; and they are free to seek advice on whether or not to accept the outcome. ADRs must tell both parties the legal effect of the outcome, and allow them a reasonable time to reflect.

Cooperation with other ADRs cross-border: ADRs must cooperate in the resolution of cross-border disputes. They are encouraged to join any relevant cross-border network of ADRs. The European Commission will publish a list of these networks and update it every two years.

Cooperation with national consumer protection authorities: ADRs must cooperate with national consumer protection authorities. This excludes exchanging information on business practices that have caused complaints. National consumer protection authorities must provide ADRs with technical assessments and information where necessary to resolve individual disputes.

Each member state must designate a 'competent authority' to monitor the functioning and development of ADRs. ADRs are required to provide the relevant competent authority with information about their organisation, workload and performance (and are subject to penalties if they fail to do so).

Each competent authority will make a national list of ADRs and send it to the European Commission. The Commission will draw up and publish an EU-wide list of ADRs. Every two years, each competent authority must publish a report on the development and functioning of its national ADRs.

Human Rights

Anyone whose legal rights and obligations are being determined is entitled to a fair and public hearing by an independent tribunal, according to both:

- the United Nations Universal Declaration of Human Rights (article 10);[30] and
- the European Convention on Human Rights (article 6).[31]

Public bodies in the 47 member states of the Council of Europe[32], which includes all 30 states in the EEA plus another 17 states, must comply with the ECHR – including the right to a 'fair trial' in article 6 of the Convention.

Article 6 applies to an ombudsman/ADR if:

- it makes decisions that are binding on either party; *and*
- that party is required by law to use the ombudsman/ADR.

So, for example:

- article 6 *will* apply if a financial business is required by law to be a member of an ombudsman/ADR which makes decisions that are binding on the financial business; *but*
- article 6 will *not* apply if a financial business volunteers (for example, by being a member of a professional association) to join an ombudsman/ADR and be bound by its decisions.

Where article 6 applies there must be a fair and public hearing, and a published decision by an impartial tribunal established by law. But this requirement may be satisfied by a combination of the procedures of the ombudsman/ADR itself and any oversight by the courts.

So there is an inter-relationship – to be borne in mind in designing an ombudsman/ADR – between:

- whether membership of the ombudsman/ADR is compulsory by law;
- whether the ombudsman/ADR can make binding decisions;
- the extent to which the decision-maker is independent;
- the procedure followed by the ombudsman/ADR; and
- the degree of oversight by the courts.

Financial services sector

Significance

The financial services industry forms a key part of the European Union economy. Data at November 2011 showed: [33]

- EU banks had 212,000 branches and 434,000 ATMs (cash machines). There were 237 million banking transactions per day. EU citizens held bank deposits of over €6,100 billion. EU mortgage and other credit amounted to almost €6,000 billion. EU banks held 45% of global bank assets.
- The EU accounted for 34% of the global insurance market. EU insurance companies paid out €850 billion in 2010 (equivalent to €4,000 per household). EU asset-management businesses held investments of €18,200 billion (30% of the global total).

[30] www.un.org/en/documents/udhr/index.shtml

[31] www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

[32] The Council of Europe member states are: the 27 EU member states, the 3 EFTA member states; and Albania, Andorra, Armenia, Azerbaijan, Bosnia Herzegovina, Croatia, Georgia, FYR Macedonia, Monaco, Moldova, Montenegro, Russia, San Marino, Serbia, Switzerland, Turkey and Ukraine.

[33] www.thecityuk.com/assets/Uploads/EU-Key-Facts-November-2011.pdf

- Cross-border financial services within the EU amounted to €72 billion per year. Financial services exported to countries outside the EU amounted to €60 billion. EU financial businesses employed 6.5 million people.

Cross-border financial regulation

For most financial services, a financial business based and regulated in one member state (its 'home state') is entitled to do business with consumers in any of the other member states. It can do this on the 'services basis', the 'establishment basis' or both.

The 'services basis' means that the financial business provides services cross-border (for example, by internet or by post) from its home state to consumers in one or more of the other member states. For example, an insurer regulated in member state A selling insurance to consumers in member state B by internet.

The 'establishment basis' means that the financial business has a 'regulatory passport' from its home-state regulator, which gives the financial business the right to establish branches in other member states (the 'host states') – though it must register with the host-state regulators. For example, a bank regulated in member state C establishing a branch in member state D.

Directives on financial services and ombudsmen/ADR

The creation of a single market in financial services requires a high degree of harmonisation in the rules relating to relevant financial services. Directives relating to particular types of financial services include, for example:

- Directive 2006/48/EC: credit institutions[34]
- Directive 2008/48/EC: consumer credit[35]
- Directive 2007/64/EC: payment services[36]
- Directive 2009/110/EC: electronic money[37]
- Directive 2002/83/EC: life assurance[38]
- Directive1973/239/EC: non-life insurance[39]
- Directive 2009/103/EC: motor insurance[40]
- Directive 2002/92/EC: insurance intermediation[41]
- Directive 2004/39/EC: financial instruments [investments][42]
- Directive 2009/65/EC: collective investments[43]
- Directive 2002/65/EC: distance marketing of financial services[44]

[34] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0048:EN:NOT

[35] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF

[36] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0064:EN:NOT

[37] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0110:EN:NOT

[38] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0083:EN:NOT

[39] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31973L0239:EN:NOT

[40] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:263:0011:0031:EN:PDF

[41] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0092:EN:NOT

[42] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0031:EN:NOT

[43] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF

[44] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:271:0016:0024:EN:PDF

Earlier directives require member states to *encourage* the use of ombudsmen/ADRs to resolve complaints – for example:

- Directive 2002/92/EC: insurance intermediation – article 11
- Directive 2004/39/EC: financial instruments [investments] – article 53
- Directive 2002/65/EC: distance marketing of financial services – article 14

More recent directives require member states to *ensure* that there are adequate and effective ombudsmen/ADRs to resolve complaints – for example:

- Directive 2008/48/EC: consumer credit – article 24
- Directive 2007/64/EC: payment services – article 83
- Directive 2009/110/EC: electronic money – article 13
- Directive 2009/65/EC: collective investments – article 100

European network for cross-border financial disputes (FIN-NET)

The development of the single market increases the number of cross-border financial services disputes, which pose particular challenges.

Where the financial business is in one member state and the consumer is in another member state, it is necessary for the relevant ombudsmen/ADRs in these states to co-operate, and to decide which one of them handles the case.

To deal with these issues, the European Commission sponsored the creation of FIN-NET – a Europe-wide network of ombudsmen/ADRs in financial services.[45] Members of FIN-NET sign up to a memorandum of understanding.

The text of the memorandum is set out in annex C to this report. In summary:

- The network is designed to cover disputes between a consumer in one member state and a financial business in another member state.
- The dispute is handled by the ombudsman/ADR in the member state where the financial business is (because that is the one most likely to get the financial business to comply with its decision).
- The consumer is entitled to deal with that ombudsman/ADR in the language of the contract with the financial business or the language in which he/she usually dealt with the financial business.
- The ombudsman/ADR in the member state where the consumer is will give the consumer all of the necessary information about the ombudsman/ADR that will handle the complaint.
- If requested by the ombudsman/ADR handling the complaint, the ombudsman/ADR in the consumer's member state will provide advice on the legal requirements in that member state.

FIN-NET members meet with the European Commission twice a year, in order to: exchange information about cases they have handled; brief the Commission on issues relevant to improving the market for financial services; and be briefed by the Commission on forthcoming directives and other initiatives.

Before an ombudsman/ADR joins FIN-NET, the government of its member state has to certify to the Commission that the ombudsman/ADR complies with the seven principles in Recommendation 1998/257/EC (see above).

[45] http://ec.europa.eu/internal_market/fin-net/index_en.htm

There are some gaps in the network. In some member states, there is no ADR in the particular sector. In some other member states, there is an ADR but it cannot join FIN-NET because it does not yet comply with the seven principles.

These gaps will be addressed by the proposed ADR directive, described above. This also requires member states to encourage relevant ADRs to join FIN-NET.

Implications of the European dimension for financial ombudsmen/ADRs

EU consumer protection strategy and the role of ombudsmen/ADRs

Ombudsmen/ADRs, for the resolution of consumer complaints, are a key component of the European Commission's strategy for consumer protection – and the proposed ADR directive and ODR regulation will impose EU-wide requirements for ombudsmen/ADRs.

Member states already required to ensure there are ombudsman/ADRs in some financial sectors

Member states are already *required* by European Directives to ensure there are adequate and effective ombudsmen/ADRs to resolve consumer complaints in relation to:

- consumer credit;
- payment services;
- electronic money; and
- collective investments.

And member states are already *encouraged* to provide adequate and effective ombudsmen/ADRs to resolve consumer complaints in relation to:

- insurance intermediation;
- investments; and
- distance marketing of financial services.

Member states will be required to ensure there are ombudsman/ADRs in all sectors

The proposed ADR directive will require member states to ensure that there are ombudsmen/ADRs is all consumer sectors, including all financial sectors, by the second half of 2014.

Cross-border establishment of financial businesses

Financial businesses can provide services by establishing branches in other member states. This means that a number of branches in any member state may be foreign-owned. In some member states, where the market has grown faster than local financial businesses, a significant proportion of financial services may be provided by foreign-owned branches.

There have been examples of a financial business establishing branches in another member state (where there is no effective financial ombudsman) and treating consumers in that other state in ways the financial business would not treat consumers in its own home state (where there is an effective financial ombudsman) – in effect, 'exporting' poor business practices to states where there is less consumer protection.

If an ombudsman/ADR covers only the national members of a financial-industry association, branches established in the country by foreign-owned businesses will not be covered. They are unlikely to be covered by the ombudsman/ADR from the foreign branch's home state. This will create significant

gaps, with many consumer disputes not covered. So it is best for the ombudsman/ADR to cover foreign-owned branches as well.

The proposed ADR directive will require European Union member states to ensure comprehensive coverage by ombudsmen/ADRs.

Cross-border services by financial businesses

Financial businesses can also provide services to consumers in other member states cross-border by internet. Indeed, because the internet is non-geographic, some consumers buy cross-border without realising that they are doing so. So there need to be agreed arrangements for the handling of disputes where the consumer is in one member state and the branch of the business in another.

The proposed ADR directive will require ombudsmen/ADRs to handle cross-border cases.

FIN-NET and ombudsman standards

FIN-NET (see above) exists primarily to deal with the issue of cross-border complaints. But an ombudsman/ADR can only join FIN-NET if it complies with the relevant standards. At present these are in Recommendation 1998/257/EC but these will be superseded by the standards in the proposed ADR directive.

And an ombudsman/ADR joining FIN-NET must sign-up to the memorandum of understanding (see above) – including the obligation to deal with consumers in other languages that businesses in the ombudsman/ADR's own member state use to deal with consumers abroad.

Fairness

It is usual for ombudsmen/ADRs to decide cases on the basis of fairness (sometimes called 'equity'), rather than by the application of strict law. This is an approach to consumer protection that is reflected in European Directives – such as the directive on unfair terms in consumer contracts, which is important (for example) in relation to unilateral changes of interest rates.

Financial products that are not in the national currency

In some member states that retain their national currency, consumers may nevertheless take out loans or other financial products in Euro or other currencies – without understanding the exchange-rate risk this creates.

This may generate complaints if there is a fluctuation in the exchange rate between the national currency and the currency of the financial product – with potentially serious consequences, for example, in relation to mortgages

Human Rights

If it is intended that financial business should be legally required to be covered by an ombudsman/ ADR that makes binding decisions, an appropriate balance must be struck among the independence of the decision-maker, the procedure to be followed and the degree of oversight by the courts.

This is in order to comply with article 6 of the ECHR, and article 10 of the United Nations Universal Declaration of Human Rights. The European Court of Human Rights has decided that an ombudsman who makes binding decisions is not necessarily required to hold an oral hearing.[46]

[46] www.bailii.org/eu/cases/ECHR/2011/1019.html

Context

Financial ombudsmen/ADRs in Europe

This chapter starts by summarising, for comparative purposes, the financial ombudsmen and ADRs in the developed financial market of western Europe (including Iceland, Norway and Switzerland – which are not part of the European Union).

It then provides case studies of three western European ombudsmen:

- a banking/insurance ombudsman (with a governance body) created by an industry association;
- an insurance ombudsman (without a governance body) created by an industry association; and
- a financial services ombudsman established by law.

It concludes by considering the current arrangements in various central/eastern European countries and how these might be developed in accordance with the considerations described in this report.

Financial ombudsmen and other financial ADRs in western Europe

Financial ombudsmen

The dominant kind of financial ADR in western Europe is the ombudsman, where final decisions or recommendations are issued by a single ombudsman or one of a panel of ombudsmen. Ombudsmen provide the main form of ADR in:

- Austria ..... for banking
- Belgium ..... separate for banking and investments, insurance
- Finland ..... combined for all financial sectors
- France ..... separate for banking, insurance
- Germany ..... separate for banking, insurance
- Greece ..... for banking and investments
- Ireland ..... combined for all financial sectors
- Italy ..... separate for banking, bank-sold investments
- Luxembourg ..... for insurance
- Netherlands ..... combined for all financial sectors
- Switzerland ..... separate for banking, insurance
- United Kingdom ..... combined for all financial sectors

Most ombudsmen started covering a single sector (such as banking or insurance). The number of combined ombudsmen, covering all sectors, has grown over time – first in the United Kingdom and then Ireland, Netherlands and Finland – with others considering moving in that direction.

Other financial ADRs

In some countries (or in some sectors in some countries) financial ADR is provided by financial regulators, complaints boards or arbitration centres – which are also eligible to join FIN-NET subject to the conditions described previously.

Though regulators exercise legal powers in their regulatory role, their dispute-resolution role is mostly limited to non-binding recommendations. Regulators provide the main form of ADR in:

- France ..... for investments

- Greece ..... for insurance
- Iceland ..... separate for banking, insurance
- Luxembourg ..... combined for banking and investments
- Malta ..... for all financial sectors
- Portugal ..... for investments
- Spain ..... separate for banking, insurance, investments

In complaints boards, decisions are taken by a committee with an independent chair and an equal number of members from consumer and industry bodies. Complaints boards provide the main form of ADR in:

- Denmark ..... separate for banking, mortgages, insurance, investments
- Norway ..... combined for all financial sectors
- Sweden ..... for all consumer sectors

As an example of how complaints boards work, in Denmark:

- The complaints boards are established under the Consumer Complaints Act and approved by the Minister for Economic and Business Affairs.
- The decision-makers are appointed by bodies where half the members come from the financial industry and half from the Danish Consumer Council.
- Funding comes mostly from the financial industry. Consumers pay a fee of €20, but this is refunded to the consumer if the complaints board upholds the complaint.
- Consumers must complain to the financial business first. There is a time limit of 5 weeks for the business to respond. The business must tell the consumer about the complaints board.
- The complaints board's decision is binding on the financial business unless it disputes the decision within 30 days – in which event the consumer can get legal aid to take the case to court.
- There is no minimum to the amount of the claim. There is no maximum to the amount that can be awarded.
- All the complaint boards are members of FIN-NET

Arbitration provides a formal decision that binds both sides. Regional arbitration centres provide the main form of ADR in:

- Portugal ..... for all consumer sectors

Case studies

As described in the previous chapter – *European dimension* – the member state of the European Union where consumers have the highest level of confidence is the United Kingdom, which was the first of the current member states of the European Union to have a cross-sector financial ombudsman.

An insurance ombudsman was established by the UK industry in 1981 (following a lead from Switzerland and Finland) and a banking ombudsman soon afterwards. Twenty years later, after investment ombudsmen had been established as well, all the UK financial ombudsmen were combined into a single Financial Ombudsman Service – established by law.

So the UK can provide case studies of both: a banking/insurance ombudsman established by the industry; and a combined financial ombudsman established by law.

Additionally, to provide an example of a financial ombudsman established against a background of different national circumstances and the civil law tradition, there follows also a case study of an ombudsman established by French insurers –

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Establishment		
The insurance ombudsman was established voluntarily by the insurance industry in 1981. The banking ombudsman was established voluntarily by the banking industry in 1985, using a similar design.	The *Médiateur de la Fédération Française des Sociétés d'Assurances* was established under a Mediation Charter in 1993.	The Financial Ombudsman Service was established under a law that came into effect in 2001. It incorporated the existing banking, building societies, insurance and investment ombudsmen to form a single ombudsman service.
Financial businesses covered		
Each of the ombudsman schemes covered the members of the industry association. The ombudsman scheme's terms of reference set the scope of the ombudsman's jurisdiction. But it was for the ombudsman to decide whether or not an individual case was within jurisdiction.	The Mediation Charter covers the members of the *Fédération Française des Sociétés d'Assurances* The Mediation Charter defines the scope of the jurisdiction. It is for the *Médiateur* to decide whether or not an individual case is within jurisdiction	The law gives: ▪ the Financial Services Authority (FSA) power to make rules setting the scope of the ombudsman service's jurisdiction (not limited to activities regulated by the FSA); and ▪ the ombudsman service compulsory powers over financial businesses covered by its jurisdiction.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Structure		
Each was established as a separate company with both: ▪ a board (to represent the industry members) comprising representatives from the member banks/insurers; and ▪ a council (to protect the ombudsman's independence) with a majority of members representing public/consumer interests and an independent chairman. ▪	There is no standing board or council.	The ombudsman service was established as a separate company with an independent public-interest board. The law provides for the members of the board to be appointed by the FSA, but says the board members must be appointed on terms that secure their independence from the FSA.
Appointment of ombudsman		
The independent council appointed the ombudsman (for a fixed term) and set the ombudsman's salary.	The *Médiateur* is appointed (for a fixed term) by a board of three, from the: ▪ government consultative committee for financial affairs; ▪ National Consumers Institute; and ▪ French Insurance Federation.	The law also provides for the ombudsmen (including a chief ombudsman) to be appointed by the independent public-interest board of the ombudsman service, but says the ombudsmen must be appointed on terms that secure their independence from the board. The ombudsmen are appointed on permanent contracts.
Reporting		
The ombudsman made a quarterly report to the council, and published an annual report.	The *Médiateur* publishes an annual report.	The chief ombudsman makes a monthly report to the board, and publishes an annual report.
Neither the council nor the board had any role in deciding cases, and the ombudsman would not disclose to them the identity of the parties in any cases.	The *Médiateur* will not disclose the identity of any party.	The board has no role in deciding cases.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Funding		
There was no charge for complainants. The ombudsman scheme budget was calculated by the ombudsman, proposed by the council and collected from the industry by the board. The budget was collected by the board, broadly in proportion to the number of cases, from each bank/insurer.	There is no charge for complainants. The scheme budget is calculated by the *Médiateur* and collected from the industry under the Mediation Charter.	There is no charge for complainants. The ombudsman service budget is proposed by the chief ombudsman, adopted by the board and approved by the FSA. Part of the budget is collected through a levy collected from all financial businesses by the FSA, broadly in proportion to market share. Most of the budget is collected in the form of case fees charged to those financial businesses with cases referred to the ombudsman service, so that funding is broadly in proportion to use. The case fee is currently £500 (about €570) per case. But the first three cases per business per year are free, to protect small financial businesses from the fear of being 'blackmailed' into settling groundless complaints in order to avoid the case fee.
Ombudsman powers		
The ombudsman was also the chief executive. As well as being the chief decision-maker for cases, the ombudsman appointed and managed the staff and managed the budget.	The *Médiateur* is also the chief executive. As well as being the chief decision-maker for cases, the *Médiateur* appoints and manages the staff and manages the budget.	The chief ombudsman is also the chief executive – who appoints and manages the staff and manages the budget. There is a panel of ombudsmen, each of whom has equal power with the chief ombudsman to decide individual cases.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Procedure		
Each scheme had terms of reference setting out the main procedures. The detailed procedures were set by the ombudsman.	The *Médiateur* sets any procedural rules that are not already covered by the Mediation Charter.	The law gives the ombudsman service power to make rules; following consultation, on the procedures that it follows in investigating and deciding cases.
Eligible complainants		
The ombudsman could deal with complaints from consumers (and from small businesses in the case of the banking ombudsman) if the complainant remained dissatisfied after the complaint had been considered by the bank/insurer.	A matter may be submitted to the *Médiateur* by the insured, by a third party or (with the consent of such parties) by the insurance company, after the internal procedures of the insurance company have been exhausted.	The ombudsman service can deal with complaints from consumers and micro-enterprises if the complainant remains dissatisfied after the complaint has been considered by the financial business, or if the financial business fails to issue a written decision within eight weeks.
Time limits		
The complainant had to refer the complaint to the ombudsman within 6 months of reaching the end of the complaints procedure of the bank/insurer, provided the bank/insurer told the complainant of that time limit in writing.	The legal limitation period (2 years for any action related to an insurance contract) is interrupted – it does not run while the case is with the *Médiateur*.	The complainant has to refer the complaint to the ombudsman within 6 months of reaching the end of the financial business's complaints procedure, provided the financial business's written decision told the complainant of that time limit in writing and enclosed the ombudsman service booklet.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
The complainant also had to refer the complaint to the ombudsman within 6 years of the event which had caused the complaint unless the consumer could not have known about the event at the relevant time. The legal limitation period (usually 6 years for contracts) was not interrupted while the case is with the ombudsman.	It is for the *Médiateur* to decide whether or not the limitation period applies to the case.	The complainant also has to refer the complaint to the ombudsman service within 6 years of the event which caused the complaint or (if later) within 3 years of the time when the complainant should have become aware that there were grounds for complaint. The legal limitation period (usually 6 years for contracts) is not interrupted while the case is with the ombudsman.
Commercial judgement		
The ombudsman would not second-guess a commercial decision of the bank/insurer (for example, whether or not to give a loan, or what premium to charge on an insurance policy) if there was no maladministration.	The role of the *Médiateur* is limited to disputes based on an existing contract. So it excludes any commercial decision such as the acceptance of the risk or the pricing of the premium.	The ombudsman service will not second-guess a legitimate commercial decision by the financial business if there was no maladministration.
But the ombudsman would look at the case if the commercial decision was reached – for example – as a result of following an unfair process, taking into account inaccurate information or unlawfully discriminating on the grounds of gender, race etc.	Different authorities deal with insurance companies and discrimination. If in a case the *Médiateur* discovers a discriminatory process it is in his discretion to decide whether to disclose it.	But the ombudsman service will look at the case if the commercial decision was reached – for example – as a result of following an unfair process, taking into account inaccurate information or unlawfully discriminating on the grounds of gender, race etc.
Obtaining information		
The bank/insurer was required to provide any information that the ombudsman required in order to consider the case – but the ombudsman would not disclose to complainants information that would enable anyone to get round the business's security systems.	There is a time limit of six weeks for insurance companies to respond to requests for information or documents from the *Médiateur*.	The financial business is required to provide any information that the ombudsman service requires in order to consider the case – and, by law, this overrides any duty of confidentiality that the financial business may owe to any third party.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Decision-making		
If a case was not resolved by mediation, the ombudsman (or a member of staff on the ombudsman's behalf) would send the parties a written recommendation about what the outcome should be.	After investigating the matter (and if no solution is found or accepted during the investigation) the *Médiateur*, issues a formal opinion (advice) within 3 months after gathering all necessary documentation from both parties.	Cases are investigated by members of the ombudsman service's staff called 'adjudicators'. If a case is not resolved by mediation, the adjudicator sends the parties a written recommendation about what the outcome should be.
If either of the parties rejected the recommendation, both parties were able to submit further arguments and evidence – and then the ombudsman issued a final decision. If the complainant accepted that decision, it became binding on both parties.	The opinions of the *Médiateur* are not binding on the parties. But only the chief executive of the insurance company can decide that the company will not follow the opinion.	If either of the parties rejects the recommendation, both parties are able to submit further arguments and evidence – and then one of the ombudsman issues a final decision. If the complainant accepts that decision, it becomes legally binding on both parties.
In deciding a case, the ombudsman was required to do so on the basis of what was fair in all the circumstances of the case. In doing so, the ombudsman would take into account (but not be bound by): ▪ what a court would do; ▪ any relevant code of practice; and ▪ good industry practice.	The *Médiateur* is required to state in any opinion he issues that it has been prepared taking into account elements of law and equity but also with the aim of achieving an amicable solution which does not necessarily correspond to a strictly judicial approach. The mediator freely takes into account court jurisprudence, codes of practice, good practices and fairness.	In deciding a case, the ombudsman service is required to do so on the basis of what is fair and reasonable in all the circumstances of the case. In doing so, the ombudsman service is required to take into account (but not be bound by): ▪ what a court would do; ▪ any regulatory rules; ▪ any relevant code of practice; and ▪ good industry practice.

United Kingdom: *Banking/insurance ombudsman established by industry (with governance body)*	*France:* *Insurance ombudsman established by industry (without governance body)*	*United Kingdom:* *Combined financial services ombudsman established by law*
Oversight by courts		
There was no appeal to court. As membership was voluntary, the ombudsman scheme was not subject to judicial review by the courts.	There is no appeal to court, but the parties are free to take their case to court.	There is no appeal to court. But any party can apply to the courts within three months for judicial review if they claim that the ombudsman service has failed to follow a fair procedure or has acted irrationally – in which case the court would send the case back to the ombudsman to be decided again.
The banking ombudsman had a test case procedure (though this was only used once). If the bank applied before the ombudsman had made a decision, the case could go to the courts for decision if: ▪ the bank said the case involved an important issue or point of law for the bank (or banks generally); ▪ the ombudsman agreed; and ▪ the bank agreed to pay the complainant's legal costs in the court case.	There is no test case procedure.	There is a (very seldom used) test case procedure. If the financial business applies before the ombudsman has made a decision, the case can go to the courts for decision if: ▪ the financial business says the case involves an important and novel issue; ▪ the ombudsman agrees; and ▪ the financial business agrees to pay the complainant's legal costs in the court case.

Financial ombudsmen/ADRs in central/eastern Europe

Another World Bank report – *Resolving disputes between consumers and financial businesses: Current arrangements in central/eastern Europe* – is published alongside this report. It:

- summarises current arrangements in Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia; and
- suggests appropriate ways forward in accordance with the financial ombudsman fundamentals described in the remaining chapters of this report.

Annex D to this report summarises the key points from that other report.

Overview of the fundamentals

This chapter gives an overview of the interrelated and fundamental considerations – discussed in greater detail in the following chapters – for designing/developing a financial ombudsman. Expert advice can assist in applying these fundamental considerations to local circumstances.

Financial ombudsmen have been established in many different countries and sectors. They need to take account of the relevant constitutional, legal and cultural circumstances – whilst remaining true to fundamental ombudsman principles, including independence and effectiveness.

Leading examples of how such fundamental ombudsman principles have been described can be found in:

- the British and Irish Ombudsman Association (BIOA) criteria, set out in annex E to this report;[47]
- the BIOA principles of good governance for ombudsman schemes, set out in annex F;[48] and
- the Australia and New Zealand Ombudsman Association criteria set out in annex G.[49]

Bodies creating and developing financial ombudsman schemes can contact existing expertise in this area through INFO (the worldwide network of financial ombudsmen)[50] and FIN-NET (the European Union network of financial ombudsmen).[51]

Key practical issues to address in designing a financial ombudsman include:

- Are financial businesses required to be covered by a financial ombudsman? If so, is that by law, as a condition of a regulatory licence or a result of membership of an industry association?
- If a financial ombudsman is compulsory, should it be established by law – or at least subject to standards that are laid down by law and/or overseen by the financial regulator?
- Should there be a single ombudsman for all sectors, or separate ombudsmen for different sectors (such as banking or insurance)? How would any gaps and overlaps be avoided?
- How is the financial ombudsman to be appointed, and on what terms, in order to ensure that the ombudsman is (and is seen to be) independent?
- Should there be a governance body to oversee the operations of the ombudsman scheme? If so, by whom should its members be appointed?
- Is the financial ombudsman free for consumers? If it is not funded by the state, how is its cost to be recovered from the financial industry?
- Which financial businesses should be covered? Does that include intermediaries and other advisers? Which complainants should be covered? What time limits should apply?
- Are consumers required to take their complaint to the financial business first? Should there be rules (and time limits) for complaint-handling by financial businesses?

[47] www.bioa.org.uk/criteria.php

[48] www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf

[49] www.anzoa.com.au/ANZOA%20Policy%20Statement_Ombudsman_Essential%20Criteria.pdf

[50] www.networkfso.org – 49 member financial ombudsman schemes in 31 countries worldwide.

[51] http://ec.europa.eu/internal_market/fin-net/index_en.htm

- How should financial businesses be prevented from having contract terms that seek to restrict consumers from having access to the financial ombudsman?
- How will consumers know about, and find, the financial ombudsman? Should it be able to handle enquiries as well as disputes?
- Is there a minimum amount for claims that can be referred to the financial ombudsman and/or is there a maximum amount that the ombudsman can award?
- How is it ensured that the financial ombudsman's procedures are fair, and that decisions are both fair and consistent?
- Are decisions by the financial ombudsman non-binding, binding on the financial business or binding on both parties?
- If decisions are binding on the financial business, what happens if a financial business refuses to comply?
- How will the financial ombudsman report on its work? What information should the financial ombudsman publish? Should the ombudsman report systemic issues to the financial regulator?
- Should the financial ombudsman have any other role in the arrangements for increasing consumers' financial capability?

There is also helpful information in international standard ISO 10003:2007(E): *quality management – customer satisfaction – guidelines for dispute resolution external to organisations.*[52]

[52] www.iso.org/iso/catalogue_detail?csnumber=38449

Governance and funding

This chapter covers governance (including appointment of the financial ombudsman) and funding, in the context of maintaining independence and effectiveness.

Using the title 'ombudsman'

The title 'ombudsman' should only be used for an external body that complies with ombudsman principles – including independence and effectiveness – and which is able in practice to secure redress for consumers. A 'pretend' ombudsman will damage consumer trust.

The UK prime minister's department has issued guidance on the use of the title 'ombudsman'.[53] The guidance requires UK government departments to have regard to the BIOA criteria, in annex D, covering independence, effectiveness, fairness and public accountability.[54]

New Zealand goes even further. There, the Ombudsman Act 1975 places legal restrictions on the use of the title 'ombudsman' – so that use of the title without legal authority is a criminal offence.[55]

Independence

A financial ombudsman provides an alternative to the courts; so the ombudsman should be (and also be seen to be) as independent and impartial as a judge – as well as having the necessary legal and technical expertise to resolve financial disputes authoritatively.

In order to obtain the confidence of consumers:

- the financial ombudsman should not be appointed by the industry, nor by a body with a majority of industry members; and
- the person appointed as financial ombudsman should not have worked in the financial industry nor for a financial industry association within the previous three years.

To secure the ombudsman's independence, he/she may be appointed by:

- the Parliament; or
- the government; or
- the financial regulator(s); or

more usually by:

- a body which only has public-interest members; or
- a body where industry representatives are in a minority and can be outvoted.

To preserve the ombudsman's independence, the term of office should not be too short. BIOA sets a minimum of five years. The term may be subject to renewal, in which event the decision about

[53] www.cabinetoffice.gov.uk/sites/default/files/resources/guide-new-ombudsman-schemes.pdf

[54] www.bioa.org.uk/criteria.php

[55] www.legislation.govt.nz/act/public/1975/0009/latest/DLM431187.html

renewal should be made at least one year before the term ends – so as not to undermine the ombudsman's independence in his/her last year.

It should not be possible to remove the ombudsman early – except for incapacity, misconduct or other good cause. The decision should be in the hands of the independent body that appointed the ombudsman, or a body that is equally independent of the financial industry.

The industry should not be able to bring pressure on the ombudsman by influencing any reduction or suspension of the ombudsman's salary. It may be helpful to link the salary to that of a particular grade of judge or other public official.

Only the ombudsman (or a staff member appointed and authorised by the ombudsman) should have power to decide whether a complaint is within the ombudsman's jurisdiction as defined by the relevant rules. And an ombudsman's decision/recommendation on a case should be final.

This is subject to the United Nations and, where applicable, European Conventions on Human Rights. If financial businesses are compelled by law to be covered by the financial ombudsman and that ombudsman makes binding decisions, some oversight by the courts may be required.

But that does not require a full appeal to the courts on the merits of the case. It is enough that the court can require the ombudsman to reconsider the case if it comes to the conclusion that the ombudsman failed to follow a fair procedure.

Governance body

It may be helpful for the financial ombudsman scheme to have an independent governance body – a board or council. This may be the body that appoints the ombudsman, or a body that is equally independent of the financial industry (though the industry may have minority representation).

The governance body should not be involved in deciding cases nor in the day-to-day management of the ombudsman scheme. Its function is to:

- help safeguard the independence of the ombudsman;
- help ensure that that the ombudsman scheme has adequate resources to handle its work;
- oversee the efficiency and effectiveness of the ombudsman scheme; and
- advise the ombudsman on the strategic direction of the ombudsman scheme.

Funding

A financial ombudsman can be funded by the government, out of taxation. But, with other pressures on public finances, it is more usual for the cost of the financial ombudsman to be borne by the financial industry from which the ombudsman's work arises.

From the ombudsman's point of view, the important thing is that there is sufficient funding, rather than how the cost is divided among the financial industry. In different countries, the industry prefers to share the cost in a number of ways, including:

- a levy payable by all the financial businesses covered by the ombudsman scheme, often apportioned according to their market share;
- case fees payable by the financial businesses about which consumers actually refer complaints to the ombudsman scheme; or

- a combination of the two, with part of the funding coming from a levy payable by all financial businesses and part from case fees.

A levy reflects the fact that all financial businesses benefit from the increased consumer confidence created by the existence of the ombudsman. Case fees mean that more of the cost is borne by the financial businesses that have more cases.

It is common for any case fee to be payable irrespective of the outcome of the case – to avoid the complication of a further dispute about whether or not the case should be chargeable and because the emphasis should be on resolving the dispute rather than who is 'right'.

But – provided there is also some element of funding by levy – it may be prudent to allow each financial business a small number of 'free' cases per year, to protect smaller businesses from the fear of being 'blackmailed' by a consumer with a spurious complaint who knows about the case fee.

The ombudsman scheme should consult publicly before fixing its yearly budget. Depending on the make-up of the governance body, it may be appropriate for the final budget to be approved by an impartial third party – such as a financial regulator – to ensure it is neither too little for the workload nor too much for the industry to pay.

The effectiveness principle in European Recommendation 1998/257/EC requires that the ombudsman is free or of modest cost for consumers. And even a modest fee will be a barrier to more vulnerable consumers. So funding from fees payable by consumers is unlikely to be appropriate.

Coverage and procedure

This chapter deals with the coverage of a financial ombudsman including: the number of ombudsmen; which financial businesses are covered; and which consumers are eligible to complain.

It also covers the necessary procedures, both: complaint-handling by financial business; and enquiry and complaint-handling by financial ombudsmen.

Coverage

One financial ombudsman or an ombudsman for each sector?

At the outset, especially where it is necessary to create a consensus amongst all those involved, it may be easier to start by creating an ombudsman for a particular sector – such as for banking or insurance.

But the traditional boundaries between banking, insurance and investment are becoming increasingly blurred in many countries, with – for example – banks selling insurance and investments alongside bank accounts and loans.

So there is a growing trend towards bringing the sectors together in a single financial ombudsman. An ombudsman scheme that covers all financial services offers economies of scale and flexibility when workload swings between different financial sectors. It is also simpler for consumers to understand.

Financial businesses and activities covered

An ombudsman with partial coverage is better than no ombudsman at all. But, even if the ombudsman only covers a single sector (such as banking or insurance), it is helpful if all the financial businesses in that sector are covered by one ombudsman.

It is unhelpful if a financial ombudsman covers only the members of a particular national industry association – especially where:

- there is more than one association (so that there is more than one ombudsman); or
- foreign-owned financial businesses are not members (creating gaps in coverage).

It is easier to obtain comprehensive coverage where financial businesses are required by law (or by regulatory requirement) to be covered by a financial ombudsman. This may be a financial ombudsman which:

- is established by law; or
- complies with criteria laid down by law; or
- is approved by the relevant financial regulator.

A few countries have the unusual idea of 'competitive' ombudsmen, where – subject to specified minimum standards – the financial industry is able to choose between two or more competing financial ombudsmen.

Such a choice presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal.

It overlooks the role of financial ombudsmen as an alternative to the courts and creates one-sided competition – because, unlike the financial businesses, the consumers are not given any choice of ombudsman. See the ANZOA document in annex H.

Coverage issues in insurance and investments

An insurance ombudsman should preferably cover not only insurers (and their agents) but also brokers and other intermediaries. Otherwise, consumers will not know where to go – and there may be significant gaps in coverage.

For example, where a consumer's complaint is about a rejected claim, it may not be apparent to the consumer whether the problem is that:

- the intermediary sold a policy that did not cover the relevant risk; or
- the risk is covered but the insurer was wrong to reject the claim.

It is much simpler if the consumer can refer the complaint to an ombudsman with jurisdiction over both the insurer and the intermediary.

Similar issues arise in relation to investments, where it may not be clear to the consumer whether the problem lies with the financial business that designed and produced the investment or with the intermediary or other adviser that recommended the consumer to buy the investment.

Coverage issues in 'banking'

In the area that consumers identify as 'banking', there are regulatory differences that are almost impossible for most consumers to understand:

- Banks are involved in both deposit-taking and lending (or credit). Indeed, a current (or cheque) account with an overdraft facility may move backwards and forwards between deposit-taking and lending, depending on whether it is in credit or debit at a particular time.
- Bank lending may be in various forms, including ordinary loans and also credit cards. But, in many countries, loans and credit cards are also provided by financial businesses that are not banks. Consumers may find it difficult to understand the distinction, especially if the lending is arranged through an intermediary.
- There is also an increase in other forms of 'money' (such as electronic money) and transactions in 'money' (such as payment services – moving money from one place to another, or from a consumer to a business). Electronic money and payment services are neither deposit-taking nor lending. Some are provided by banks, and some are provided by businesses that are not banks.

And, though many consumers have one or more plastic cards, few fully understand the differences among:

- a debit card (debiting an account that may be in credit or authorised overdraft);
- a charge card (a short-tem facility that does not count as credit for many purposes);
- a credit card (which is a loan, maybe short-term or longer-term); and
- a stored-value card or 'electronic purse' (which is electronic money).

So, consumers are unlikely to know whether or not they are covered (and where to go if they have a problem) unless the financial ombudsman or 'banking' ombudsman covers all deposit-taking, lending (credit), electronic money and payment services – even if not provided by a bank.

In those countries where there are organisations that record the credit history of consumers (and are consulted by financial businesses before they provide credit), consideration should be given to whether these organisations also should be covered by the financial ombudsman.

Complainants covered

It is usual for complaints to be accepted from consumers – people who use a financial service primarily for private purposes.

Consideration should be given to whether the consumer has to be a customer of the financial business. Some financial ombudsmen also cover prospective customers, and can deal with complaints about wrongful refusal to provide a service (perhaps involving unlawful discrimination).

There are other potential complainants to consider, including those for whose protection a financial product was taken out by someone else – for example an employee who is intended to be covered by an insurance or pension taken out by their employer.

Other potential complainants include:

- someone who gave a guarantee or surety for a customer's debt;
- someone who is a beneficiary of a collective investment;
- someone about whom wrong information has been registered with a credit-history agency; or
- someone on the receiving end of action by a debt-collector.

Some financial ombudsmen also accept complaints from smaller businesses, on the basis that their capabilities are likely to be similar to those of consumers. They are usually defined in relation to turnover and/or staff numbers. The European definition of 'micro-enterprise' or 'small and medium enterprise' may be used.[56]

Where businesses are allowed to complain, it is quite common to exclude disputed transactions between two financial businesses in relation to financial services – for example, a dispute between an insurance broker and an insurer.

Where the service was provided

It is necessary to consider whether (or not):

- the branch of the financial business that provided the financial service has to be in the same country as the financial ombudsman; and
- the consumer who received the financial service has to be in the same country as the financial ombudsman.

The principles underlying the FIN-NET memorandum of understanding are that:

- the branch of the financial business that provided the financial service was in the same country as the financial ombudsman (so that the financial ombudsman's decision/recommendation is likely to be effective in practice); but
- the consumer who received the financial service does not have to be in the same country as the financial ombudsman (so that cross-border cases are covered).

[56] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF

When the service was provided

It is also necessary to consider any time limits for consumers to refer disputes to the ombudsman:

- Should the financial ombudsman cover disputes about events that happened before the ombudsman was set up, or only cover events from the date the ombudsman was established?
- Should there be a time limit from the date of the event that caused the dispute? Should the length of the time limit reflect what is usual in that country's courts?
- If the consumer could not have known about the event at the time, should the time limit run instead from when the consumer should have known he/she had grounds for complaint?
- Should there also be a time limit from the date on which the financial business rejected the consumer's complaint (if the business's decision warned the consumer of that time limit)?
- Should the ombudsman have discretion to extend time limits where, for example, the consumer was prevented by illness from complying with the time limit?

In some countries, the time limits for taking a case to court may be interrupted whilst an ombudsman considers the case. And European Directive 2008/52/EC on mediation provides for this in the case of pure mediation, but not in the case of an ombudsman.[57]

Procedure

As previously explained, ombudsmen expect consumers to take up their complaint with the financial business first, so that it has a reasonable opportunity to try and resolve the dispute to the consumer's satisfaction. This means that financial businesses need effective complaints procedures.

And the financial ombudsman itself should have a published procedure that is clear, fair, effective, prompt and economical. The effectiveness, adversarial, legality, liberty and representation principles in European Recommendation 1998/257/EEC are relevant (see annex A), as are the similar principles in the proposed ADR directive (see annex B).

Complaint-handling by financial businesses

There should be a clear process (and time limit) for the handling of complaints by financial businesses – so that:

- as many disputes as possible can be resolved quickly;
- the number of disputes that have to be referred to the ombudsman is minimised; and
- it is clear when the consumer can refer the dispute to the ombudsman.

In some countries, the financial regulator lays down rules on how financial businesses should deal with complaints. In other countries, it is dealt with by the rules of the financial ombudsman scheme.

In November 2011 the European Insurance and Occupational Pensions Authority published a report on best practices, and a consultation paper on proposed guidelines, for the handling of complaints by insurance undertakings.[58]

[57] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

[58] https://eiopa.europa.eu/consultations/consultation-papers/index.html

Issues to consider include:

- Does a complaint have to be in writing and described formally as a complaint or, as in some countries, should financial businesses be required to treat any oral or written 'expression of dissatisfaction' as a complaint?
- Especially where a complaint does not have to be made formally, should a problem that is resolved by the financial business to the consumer's satisfaction straight away (or perhaps by the end of the next business day) be counted as a complaint?
- If a consumer complains first to the financial ombudsman, without having complained to the financial business, should the financial ombudsman itself pass the complaint on to the financial business?
- Should the financial business be required to publish written details of its complaints procedure? Should it be required to provide details to consumers automatically when they enter into a contract and/or if they make a complaint?
- Should there be any limit on the number of stages in the complaint process? Should there be a time limit for the financial business to provide a written acknowledgement of the complaint and a time limit for it to provide a written decision?
- In considering complaints, should the business be required to take account of previous financial ombudsman decisions and/or any guidance published by the ombudsman on its approach to particular issues?
- Should the financial business's decision on the complaint tell the consumer how to refer the dispute to the financial ombudsman if the consumer remains dissatisfied, and should it explain any time limit for doing so?

Particularly with larger financial businesses, it is helpful if there is a single person with overall responsibility for the handling of complaints – and to whom the financial ombudsman can talk about any issues that arise.

The financial ombudsman should consider how far it can assist the early resolution of cases by financial businesses through:

- publishing details of its approach to common disputes;
- giving advice to consumers and financial businesses; and/or
- helping train consumer advice centres and financial businesses' complaint departments.

Enquiry and complaint-handling by financial ombudsman

It is usually helpful for the financial ombudsman to have good facilities to handle consumer enquiries (including by phone and email) in order to supplement any material that the financial ombudsman publishes in print or on its website.

Early explanations can often resolve misunderstandings and prevent disputes turning into full-blown cases. In some countries, financial ombudsmen find that only around a quarter of enquiries actually turn into full cases.

Assuming that a dispute is within the ombudsman's jurisdiction, it may be resolved in a variety of ways. There are some cases where it is clear at the outset that a full investigation is not justified, for example where:

- the case has already been decided by a court, or raises legal issues that can only be resolved by a court;

- the financial business has already offered as much compensation as the ombudsman would award for what the consumer says the financial business did wrong; or
- the complaint is about the legitimate exercise of the financial business's commercial judgment and there has been no maladministration.[59]

There are some cases that can be resolved quickly and fairly by mediation – where, assisted by an independent view from the ombudsman about the circumstances in dispute, a settlement can be negotiated that both the consumer and the financial business agree.

For cases that require investigation, the financial ombudsman should take an active role in deciding what evidence is required and calling for it. The ombudsman needs power to require the financial business to provide any relevant documents and other records.

The parties should be allowed a proper opportunity to present their viewpoint. This includes knowing the arguments and facts put forward by the other party, and the contents of any reports from experts, and having an opportunity to comment.

Usually it is possible for the ombudsman to come to a conclusion about the case on the basis of what the parties have said plus the documents and other records – supplemented, where necessary, by talking to the parties by phone – without requiring a formal hearing.

The ombudsman should have to power to issue a decision that can bind the financial business – or a recommendation that there is a reasonable expectation the financial business will follow, with any failure to follow the recommendation being published by the ombudsman.

It is usual for the ombudsman to be able to base the decision/recommendation on what is fair in the circumstances of the case – taking into account not only what a court would do but also industry codes and what the ombudsman considers to be good industry practice.

The ombudsman's decision should be given in writing, with reasons. In order to reflect that the ombudsman's procedure is more informal than a court's, it is common to set a maximum limit to the amount of compensation that the ombudsman can award in any one case.

The financial ombudsman rules should make clear:

- whether any compensation can include, in addition to financial loss, other factors – such as:
  - damage to the consumer's reputation caused by the financial business;
  - distress and inconvenience that the financial business has caused to the consumer;
  - costs incurred by the consumer; and/or
  - interest until the compensation is paid; and

- whether the ombudsman has power to require the financial business to do anything else to put things right for the consumer.

Some financial ombudsman schemes, particularly some of the larger ones, have a two-stage process. An investigator recommends an outcome – which the consumer and financial business can both accept, or either of them can 'appeal' the case to the ombudsman.

As previously mentioned, if financial businesses are compelled by law to be covered by the financial ombudsman and that ombudsman makes binding decisions, some oversight by the courts may be

[59] Maladministration might include, for example, failing to follow the proper procedure, taking into account incorrect information or unlawful discrimination.

required in order to comply with article 6 of the European Convention on Human Rights, and article 10 of the United Nations Universal Declaration of Human Rights.

But that does not mean binding decisions require a full appeal to the courts on the merits of the case. It is enough that the court can require the ombudsman to reconsider the case if it comes to the conclusion that the ombudsman failed to follow a fair procedure.

The European Court of Human Rights has decided that an ombudsman who makes binding decisions is not necessarily required to hold an oral hearing.[60]

[60] www.bailii.org/eu/cases/ECHR/2011/1019.html

Accessibility, transparency and accountability

This chapter covers the ways in which the financial ombudsman can be: accessible to those who use its services; transparent, so that its work is understood; and accountable for the impartiality and quality of its work.

Accessibility

Consumers with a problem can only access the financial ombudsman if:

- they know that the ombudsman exists;
- they know how to contact the ombudsman; and
- the means of contacting the ombudsman ensure that cost is not a barrier.

In some countries the burden of this falls entirely on the financial ombudsman – though the financial press may assist. In some other countries regulators (or the rules of the financial ombudsman) assist by requiring financial businesses to tell consumers about the financial ombudsman:

- by notices in branches; and/or
- in the financial business's contract documentation; and/or
- in the financial business's published complaints procedure; and/or
- when the financial business receives a complaint; and/or
- in the financial business's decision on a complaint.

The ombudsman should have a website which explains to consumers how to make a complaint – and also explains to financial businesses how to handle a complaint. But information should be readily available also to consumers who do not have access to the internet.

This may involve the financial ombudsman making information available through local agencies such as consumer advice centres, public libraries, local authorities or other places where consumers are used to receiving information.

It helps if consumers with enquiries can phone the ombudsman scheme free-of-charge, so that cost is not a barrier for the poor – who may not have access to the internet. And provision should be made for consumers who are particularly vulnerable because of disability, age or other reasons.

It may be appropriate for the ombudsman scheme to provide training for consumer advice agencies and for complaints departments of financial businesses – and to create liaison groups where key issues (but not particular cases) can be discussed.

The ombudsman scheme should ensure that all its communications are in clear and jargon-free language. This includes its letters and its decisions/recommendations.

Consideration should be given to whether or not the financial ombudsman should have any other role in the arrangements for increasing consumers' financial capability. This may depend on whether specific responsibility for consumer education has been given to some other body.

Transparency

The rules and procedures of the financial ombudsman should be published and easily accessible. They should include a clear statement of:

- the types of dispute that the financial ombudsman can deal with;
- anything the consumer must do before referring a dispute to the financial ombudsman;
- the process the financial ombudsman uses for the disputes that are referred to it;
- any requirements of the parties as part of that process;
- any costs that have to be paid, or which can be awarded at the end of the process;
- how and by whom cases are decided;
- the basis of decision (fairness/equity or strict law);
- whether or not the decision is published;
- whether or not the names of both parties or the financial business are published;
- whether the decision is binding on the financial business or not;
- whether the decision is binding on the consumer or not; and
- the consequences of not complying with a decision.

It will assist consumers and financial businesses to resolve disputes between themselves, and reduce the number that are referred to the financial ombudsman, if the ombudsman publishes the approach taken to typical disputes – through case studies and/or guidance notes.

Accountability

Accountability does not involve any restriction on the independence of the financial ombudsman. It involves the ombudsman paying due regard to the overall public interest in the forward-planning and day-to-day running of the ombudsman scheme.

Financial ombudsmen should publish a report at least yearly, explaining the work that they have done. They should provide appropriate statistics about the disputes they have handled and the way in which they have handled them (including the arrangements for quality-control).

Many ombudsman schemes also consult publicly in advance about their procedures, business plans and budgets. This gives an opportunity to obtain information that helps to estimate future workload – something that is often the most difficult aspect of managing a financial ombudsman scheme.

Differing views are taken in different countries about the extent to which the financial ombudsman should share information (or not) with the financial regulator. Whatever the position is, it should be publicly documented.

Where financial ombudsmen identify systemic issues that financial regulators would be better placed to tackle, it is helpful if the financial ombudsman can draw those issues to the attention of the financial regulators.

Annex A

European Commission Recommendation 1998/257/EC [61]

COMMISSION RECOMMENDATION of 30 March 1998
on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Text with EEA relevance) (1998/257/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community and in particular Article 155 thereof,

Whereas the Council, in its conclusions approved by the Consumer Affairs Council of 25 November 1996, emphasised the need to boost consumer confidence in the functioning of the internal market and consumers' scope for taking full advantage of the possibilities offered by the internal market, including the possibility for consumers to settle disputes in an efficient and appropriate manner through out-of-court or other comparable procedures;

Whereas the European Parliament, in its resolution of 14 November 1996 (1), stressed the need for such procedures to meet minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publicising and transparency of proceedings and called on the Commission to draft proposals on this matter;

Whereas most consumer disputes, by their nature, are characterised by a disproportion between the economic value at stake and the cost of its judicial settlement; whereas the difficulties that court procedures may involve may, notably in the case of cross-border conflicts, discourage consumers from exercising their rights in practice;

Whereas the 'Green Paper on the access of consumers to justice and the settlement of consumer disputes in the single market` (2) was the subject of wide-ranging consultations whose results have confirmed the urgent need for Community action with a view to improving the current situation; Whereas the experience gained by several Member States shows that alternative mechanisms for the out-of-court settlement of consumer disputes - provided certain essential principles are respected - have had good results, both for consumers and firms, by reducing the cost of settling consumer disputes and the duration of the procedure;

Whereas the adoption of such principles at European level would facilitate the implementation of out-of-court procedures for settling consumer disputes; whereas, in the case of cross-border conflicts, this would enhance mutual confidence between existing out-of-court bodies in the different Member States and strengthen consumer confidence in the existing national procedures; whereas these criteria will make it easier for parties providing out-of-court settlement services established in one Member State to offer their services in other Member States;

Whereas one of the conclusions of the Green Paper concerned the adoption of a Commission recommendation with a view to improving the functioning of the ombudsman systems responsible for handling consumer disputes;

[61] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998H0257:EN:NOT

Whereas the need for such a recommendation was stressed during the consultations on the Green Paper and was confirmed during the consultation on the 'Action Plan` communication (3) by a very large majority of the parties concerned;

Whereas this recommendation must be limited to procedures which, no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution; whereas, therefore, it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent;

Whereas the decisions taken by out-of-court bodies may be binding on the parties, may be mere recommendations or may constitute settlement proposals which have to be accepted by the parties; whereas for the purposes of this recommendation these various cases are covered by the term 'decision`;

Whereas the decision-making body's impartiality and objectivity are essential for safeguarding the protection of consumer rights and for strengthening consumer confidence in alternative mechanisms for resolving consumer disputes;

Whereas a body can only be impartial if, in exercising its functions, it is not subject to pressures that might sway its decision; whereas, therefore, its independence must be guaranteed without this implying the need for guarantees that are as strict as those designed to ensure the independence of judges in the judicial system;

Whereas, when the decision is taken by an individual, the decision-maker's impartiality can only be assured if he can demonstrate that he possesses the necessary independence and qualifications and works in an environment which allows him to decide on an autonomous basis; whereas this requires the person to be granted a mandate of sufficient duration, in the course of which he cannot be relieved of his duties without just cause;

Whereas, when the decision is taken by a group, equal participation of representatives of consumers and professionals is an appropriate way of ensuring this independence;

Whereas, in order to ensure that the persons concerned receive the information they need, the transparency of the procedure and of the activities of the bodies responsible for resolving the disputes must be guaranteed; whereas the absence of transparency may adversely affect the rights of the parties and cause misgivings as to out-of-court procedures for resolving consumer disputes;

Whereas certain interests of the parties can only be safeguarded if the procedure allows them to express their viewpoints before the competent body and to acquaint themselves with the facts presented by the opposing party and, where applicable, the experts' statements; whereas this does not necessarily necessitate oral hearings of the parties;

Whereas out-of-court procedures are designed to facilitate consumer access to justice; whereas, therefore, if they are to be effective, they must remedy certain problems associated with court procedures, such as high fees, long delays and cumbersome procedures;

Whereas, in order to enhance the effectiveness and equity of the procedure, the competent body must play an active role which allows it to take into consideration any element useful in resolving the dispute; whereas this active role is all the more important when, in the framework of out-of-court procedures, the parties in many cases do not have the benefit of legal advice;

Whereas the out-of-court bodies may decide not only on the basis of legal rules but also in equity and on the basis of codes of conduct; whereas, however, this flexibility as regards the grounds for their decisions should not lead to a reduction in the level of consumer protection by comparison with the protection consumers would enjoy, under Community law, through the application of the law by the courts;

Whereas the parties are entitled to be informed of the decisions handed down and of grounds for these decisions; whereas the grounds for decisions are a prerequisite for transparency and the parties' confidence in the operation of out-of-court procedures;

Whereas in accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right that knows no exceptions; whereas since Community law guarantees free movement of goods and services in the common market, it is a corollary of those freedoms that operators, including consumers, must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State; whereas out-of-court procedures cannot be designed to replace court procedures; whereas, therefore, use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised;

Whereas in some cases, and independently of the subject and value of the dispute, the parties and in particular the consumer, as the party who is regarded as economically weaker and less experienced in legal matters than the other party to the contract, may require the legal advice of a third party to defend and protect their rights more effectively;

Whereas, in order to ensure a level of transparency and dissemination of information on out-of-court procedures in line with the principles set out in the recommendation and to facilitate networking, the Commission intends to create a database of the out-of-court bodies responsible for resolving consumer disputes that offer these safeguards; whereas the database will contain particulars communicated to the Commission by the Member States that wish to participate in this initiative;

Whereas, to ensure standardised information and to simplify the transmission of these data, a standard information form will be made available to the Member States;

Whereas, finally, the establishment of minimum principles governing the creation and operation of out-of-court procedures for resolving consumer disputes seems, in these circumstances, necessary at Community level to support and supplement, in an essential area, the initiatives taken by the Member States in order to realise, in accordance with Article 129a of the Treaty, a high level of consumer protection;

Whereas it does not go beyond what is necessary to ensure the smooth operation of out-of-court procedures;

Whereas it is therefore consistent with the principle of subsidiarity,

RECOMMENDS

that all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes respect the following principles.

I Principle of independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions.

When the decision is taken by an individual, this independence is in particular guaranteed by the following measures:

- *the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function,*
- *the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable to be relieved of his duties without just cause,*
- *if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned.*

When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals or by complying with the criteria set out above.

II Principle of transparency

Appropriate measures are taken to ensure the transparency of the procedure. These include:

1 provision of the following information, in writing or any other suitable form, to any persons requesting it:

- *a precise description of the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute,*
- *the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet, as well as other procedural rules, notably those concerning the written or oral nature of the procedure, attendance in person and the languages of the procedure,*
- *the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure,*
- *the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.),*
- *the decision-making arrangements within the body,*
- *the legal force of the decision taken, whereby it shall be stated clearly whether it is binding on the professional or on both parties.*

  If the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated, as shall the means of obtaining redress available to the losing party.

2 Publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.

III Adversarial principle

The procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements.

IV Principle of effectiveness

The effectiveness of the procedure is ensured through measures guaranteeing:

- *that the consumer has access to the procedure without being obliged to use a legal representative,*
- *that the procedure is free of charges or of moderate costs,*
- *that only short periods elapse between the referral of a matter and the decision,*
- *that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.*

V Principle of legality

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

All decisions are communicated to the parties concerned as soon as possible, in writing or any other suitable form, stating the grounds on which they are based.

VI Principle of liberty

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.

The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

VII Principle of representation

The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

***THIS RECOMMENDATION** is addressed to the bodies responsible for the out-of-court settlement of consumer disputes, to any natural or legal person responsible for the creation or operation of such bodies, as well as to the Member States, to the extent that they are involved.*

Annex B

Extracts from proposed European ADR directive [62]

Article 5
Access to alternative dispute resolution

1 *Member States shall ensure that disputes covered by this Directive can be submitted to an ADR entity which complies with the requirements set out in this Directive.*

2 *Member States shall ensure that ADR entities:*

(a) have a website enabling the parties to submit a complaint online;

(b) enable the parties to exchange information with them via electronic means;

(c) accept both, domestic and cross-border disputes, including disputes covered by [the proposed ODR] *Regulation of the European Parliament and of the Council of* [date of adoption] *on online dispute resolution for consumer disputes (Regulation on consumer ODR); and*

(d) when dealing with disputes covered by this Directive take the necessary measures to ensure that the processing of personal data complies with the rules on the protection of personal data laid down in the national legislation implementing Directive 95/46/EC. [63]

...

Article 6
Expertise and impartiality

1 *Member States shall ensure that the natural persons in charge of alternative dispute resolution possess the necessary expertise and are impartial. This shall be guaranteed by ensuring that they:*

(a) possess the necessary knowledge, skills and experience in the field of alternative dispute resolution;

(b) are not liable to be relieved from their duties without just cause;

(c) have no conflict of interest with either party to the dispute.

2 *Member States shall ensure that ADR entities where the natural persons in charge of dispute resolution form part of a collegial body provide for an equal number of representatives of consumers' interests and of representatives of traders' interests in that body.*

Article 7
Transparency

1 *Member States shall ensure that ADR entities make publicly available on their websites and in printed form at their premises information on:*

(a) the natural persons in charge of alternative dispute resolution, the method of their appointment and the length of their mandate;

[62] http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

[63] The data protection directive - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

(b) the source of financing, including percentage share of public and of private financing;

(c) where appropriate, their membership in networks of ADR entities facilitating cross-border dispute resolution;

(d) the types of disputes they are competent to deal with;

(e) the rules of procedure governing the resolution of a dispute;

(f) the languages in which complaints can be submitted to the ADR entity and in which the ADR procedure is conducted;

(g) the types of rules the ADR entity may use as a basis for the dispute resolution (e.g. rules of law, considerations of equity, codes of conduct);

(h) any preliminary requirements the parties may have to meet before an ADR procedure can be instituted;

(i) the costs, if any, to be borne by the parties;

(j) the approximate length of the ADR procedure;

(k) the legal effect of the outcome of the ADR procedure.

2 Member States shall ensure that ADR entities make publicly available on their websites and in printed form at their premises annual activity reports. These reports shall include the following information relating to both domestic and cross-border disputes:

(a) the number of disputes received and the types of complaints to which they related;

(b) any recurrent problems leading to disputes between consumers and traders;

(c) the rate of dispute resolution procedures which were discontinued before an outcome was reached;

(d) the average time taken to resolve disputes;

(e) the rate of compliance, if known, with the outcomes of the ADR procedures;

(f) where appropriate, their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes.

Article 8
Effectiveness

Member States shall ensure that ADR procedures are effective and fulfil the following requirements:

(a) the ADR procedure is easily accessible to both parties irrespective of where the party is situated;

(b) the parties have access to the procedure without being obliged to use a legal representative; nonetheless parties may be represented or assisted by a third party at any stage of the procedure;

(c) the ADR procedure is free of charge or at moderate costs for consumers;

(d) the dispute is resolved within 90 days from the date on which the ADR entity has received the complaint. In the case of complex disputes, the ADR entity may extend this time period.

Article 9
Fairness

1 Member States shall ensure that in ADR procedures:

(a) the parties have the possibility to express their point of view and hear the arguments and facts put forward by the other party and any experts' statements;

(b) the outcome of the ADR procedure is made available to both parties in writing or on a durable medium, stating the grounds on which the outcome is based.

2 Member States shall ensure that in ADR procedures which aim at resolving the dispute by suggesting a solution

(a) the consumer, before agreeing to a suggested solution, is informed that:
(i) he has the choice as to whether or not to agree to a suggested solution;
(ii) the suggested solution may be less favourable than an outcome determined by a court applying legal rules;
(iii) before agreeing or rejecting the suggested solution he has the right to seek independent advice;

(b) the parties, before agreeing to a suggested solution, are informed of the legal effect of such agreement;

(c) the parties, before expressing their consent to a suggested solution or amicable agreement, are allowed a reasonable period of time to reflect.

...

Article 13
Cooperation between ADR entities on the resolution of cross-border disputes

1 Member States shall ensure that ADR entities cooperate on the resolution of cross-border disputes.

2 Where a network of ADR entities facilitating the resolution of cross-border disputes exists in a sector-specific area within the Union, Member States shall encourage ADR entities that deal with disputes in that area to become a member of that network.

3 The Commission shall publish a list containing the names and contact details of the networks referred to in paragraph 1. The Commission shall, if necessary, update this list every two years.

Article 14
Cooperation between ADR entities and national authorities enforcing Union legislation on consumer protection

1 Member States shall ensure cooperation between ADR entities and national authorities entrusted with the enforcement of Union legislation on consumer protection.

2 This cooperation shall include mutual exchange of information on business practices by traders about which consumers have lodged complaints. It shall also include the provision of technical assessment and information by such national authorities to ADR entities where such assessment or information is necessary for the handling of individual disputes.

3 *Member States shall ensure that cooperation and mutual information exchanges referred to in paragraphs 1 and 2 comply with the rules on the protection of personal data laid down in Directive 95/46/EC.*[64]

Article 15
Designation of competent authorities

1 *Each Member State shall designate a competent authority in charge of monitoring the functioning and development of ADR entities established on its territory. Each Member State shall communicate the authority it has designated to the Commission.*

2 *The Commission shall establish a list of the competent authorities communicated to it in accordance with paragraph 1 and publish that list in the Official Journal of the European Union.*

Article 16
Information to be notified to competent authorities by ADR entities

1 *Member States shall ensure that ADR entities established on their territories notify to the competent authority the following:*

(a) their name, contact details and website address;

(b) information on their structure and funding, including information on the natural persons in charge of alternative dispute resolution, their funding and by whom they are employed;

(c) their rules of procedure;

(d) their fees, if applicable;

(e) the approximate length of the ADR procedures;

(f) the language or languages in which complaints can be submitted and the ADR procedure conducted;

(g) a statement on the elements necessary to establish their competence;

(h) a reasoned statement, based on a self-assessment by the ADR entity, on whether it qualifies as an ADR entity falling within the scope of this Directive and complies with the requirements set out in [articles 5 to 9].

In the event of changes to the information referred to in points (a) to (g), ADR entities shall immediately notify these changes to the competent authority.

2 *Member States shall ensure that ADR entities communicate to the competent authorities at least once a year the following information:*

(a) the number of disputes received and the types of complaints to which they related;

(b) the rate of ADR procedures which were discontinued before an outcome was reached;

(c) the average time taken to resolve the disputes received;

(d) the rate of compliance, if known, with the outcomes of the ADR procedures;

(e) relevant statistics demonstrating the way in which traders use alternative dispute resolution for their disputes with consumers;

(f) any recurrent problems leading to disputes between consumers and traders;

[64] The data protection directive - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

(g) *where applicable, an assessment of the effectiveness of their cooperation within networks of ADR entities facilitating the resolution of cross-border disputes;*

(h) *a self-assessment of the effectiveness of the ADR procedure offered by the entity and of possible ways of improving its performance.*

Article 17
Role of the competent authorities and of the Commission

1 *Each competent authority shall assess, on the basis of the information it has received in accordance with Article 16(1), whether the ADR entities notified to it qualify as ADR entities falling within the scope of this Directive and comply with the requirements set out in* [articles 5 to 9].

2 *Each competent authority shall, on the basis of the assessment referred to in paragraph 1, establish a list of the ADR entities that fulfil the conditions set out in paragraph 1. The list shall include the following:*

(a) *the name, the contact details and the website addresses of these ADR entities;*

(b) *their fees, if applicable;*

(c) *the language or languages in which in which complaints can be submitted and the ADR procedure conducted;*

(d) *the elements necessary to establish their competence;*

(e) *the need for the physical presence of the parties or of their representatives, if applicable; and*

(f) *the binding or non-binding nature of the outcome of the procedure.*

Each competent authority shall notify the list to the Commission. In the event that any changes are notified to the competent authority in accordance with the second subparagraph of Article 16(1), the list shall be updated immediately and the relevant information notified to the Commission.

3 *The Commission shall establish a list of the ADR entities communicated to it in accordance with paragraph 2 and update this list whenever changes are notified to the Commission in accordance with the second sentence of the third subparagraph of paragraph 2. The Commission shall publish this list and its updates and transmit it to the competent authorities and the Member States.*

4 *Each competent authority shall publish the consolidated list of ADR entities referred to in paragraph 3 on its website and by any other means it considers appropriate.*

5 *Every two years, each competent authority shall publish a report on the development and functioning of ADR entities. The report shall in particular:*

(a) *identify areas, if any, where ADR procedures do not yet deal with disputes covered by this Directive;*

(b) *identify best practices of ADR entities;*

(c) *point out the shortcomings, supported by statistics, that hinder the functioning of ADR entities for both domestic and cross-border disputes, where appropriate;*

(d) *make recommendations on how to improve the functioning of ADR entities, where appropriate.*

Article 18
Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to … Article 16(1) and (2) of this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Annex C

FIN-NET memorandum of understanding [65]

Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services in the European Economic Area

1 Objectives of the Memorandum

The present Memorandum is a declaration of intent on cross-border co-operation between the Parties. The Memorandum outlines the mechanisms and other conditions according to which the Parties intend to co-operate in order to facilitate out-of-court settlement of cross-border disputes between consumers and providers in the area of financial services. The provisions of this Memorandum are not legally binding on the Parties and it does not therefore create any legal rights or obligations to the Parties or any third party.

2 Definitions

In the present Memorandum, the following definitions will apply:

"Out-of-court settlement" is a method which, regardless of the detailed procedure, leads to the settlement of disputes between consumers and providers in the area of financial services through the active intervention of a dispute settlement body that proposes or imposes a solution.

"Dispute settlement body" is a body which fulfils the role of an independent third party in the out-of-court settlement of disputes between consumers and providers in the area of financial services.

"Cross-border dispute" is a dispute between a consumer and financial services provider when the supplier is established in one Member State and the consumer has his residence in another Member State.

"The competent scheme" is the appropriate dispute settlement body for financial services in the country where the service provider is established.

"The nearest scheme" is a dispute settlement body for the appropriate financial services sector in the consumer's country of residence.

3 The parties to the Memorandum

Parties to the Memorandum are listed in Annex 1.

Access to the Memorandum is open to any scheme which is responsible for out-of-court settlement of disputes between consumers and service providers in the area of financial services provided that it complies with the principles in the Commission Recommendation No 98/257.

[65] http://ec.europa.eu/internal_market/fin-net/docs/mou/en.pdf

4 Compliance with the principles in the Recommendation No 98/257

The parties will comply with the principles applicable to bodies responsible for out-of-court settlement of consumer disputes in accordance with Commission Recommendation No 98/257 (Annex 2). Bodies which the Member States have not yet notified to the Commission's database in accordance with the Recommendation will use their best endeavours to arrange that their Member State notifies them to the Commission database by the end of the year 2001.

5 Scope of co-operation

Co-operation covers consumer complaints with regard to cross-border financial services. Each participating scheme co-operates in areas which it normally covers according to its terms of reference and/or its legal obligations.

6 Guidelines for the procedure in the complaints network for out-of-court settlement of cross-border disputes

The following model outlines the guidelines which, in general, should govern co-operation in case of a cross-border complaint.

6.1 The nearest scheme will give to the consumer all the necessary and appropriate information about the complaints network and about the competent scheme. This information should cover at least the issues outlined in paragraph 8.1.

6.2 Where appropriate, the nearest scheme will remind the consumer of the advisability of first addressing complaints to the financial services provider directly, since this is often a precondition which must be fulfilled before dispute settlement bodies are able to take on board complaints. The nearest scheme will also warn the consumer that there may be a time limit for submitting the complaint to the competent scheme and possible time limits for any legal actions before the courts.

6.3 The nearest scheme will:

a) transfer the complaint to the competent scheme or

b) advise the consumer to contact the competent scheme directly or

c) if the financial services supplier has accepted the jurisdiction of the nearest scheme, or if the legal obligations of the nearest scheme oblige it to do so, resolve the complaint itself within the limits of its rules of procedure.

6.4 Once the competent scheme has received a cross-border complaint it is its responsibility to try to resolve the dispute between the service provider and the consumer according to the rules laid down in its terms of reference and/or in its legal obligations, and taking into account the Commission Recommendation No 98/257, including the applicable law.

6.5 The model described above is to be regarded as the basic co-operation procedure in the network. Parties to the Memorandum can, however, always agree to an alternative method of co-operation in the interest of settling the dispute more efficiently.

7 Language of the dispute settlement

If the consumer does not choose to deal with the competent scheme in the usual working language of the scheme, he may deal with it in the language either:

- *of his contract with the financial services supplier; or*
- *in which he normally dealt with the financial services supplier.*

8 Exchange of information

8.1 The parties will provide the Commission services promptly with the following information about their scheme, and any changes as regards the scheme:

- *Contact information*
  - *name*
  - *postal address*
  - *phone number*
  - *fax number*
  - *any e-mail address*
  - *any website address*
- *Coverage*
  - *financial institutions covered*
  - *financial products covered*
  - *whether intermediaries are covered*
- *Organisation*
  - *whether the scheme is public/private and statutory/voluntary*
  - *who runs the scheme*
  - *who funds the scheme*
- *In which language(s) the scheme can*
  - *handle enquiries*
  - *deal with complaints*
  - *issue decisions*
- *Any charges payable by the consumer*
- *Whether the decision is binding on the financial institution or the consumer*
- *Typical times for handling complaints*
- *Limits*
  - *any limit on amount of complaint or award*
  - *any time limits in bringing the complaint to the scheme*
  - *any time limits in bringing the complaint to the court and whether the filing of the complaint to an ADR body will stop the time running.*
- *Availability of an annual report (and in what languages)*
- *Whether the scheme has been notified to the Commission in accordance with Recommendation 98/257.*

8.2 The Commission services will make this information available to the participating schemes by putting it on a web-site accessible to the participants and to the consumers.

8.3 Within the framework of its possibilities the nearest scheme provides the competent scheme with information on appropriate mandatory consumer protection rules in force in the consumer's country of residence. The competent scheme should ask this information with a specific written request which includes concrete questions concerning the particular case. Such requests for information from other schemes will be replied to as swiftly as possible.

9 Data protection

If the nearest scheme intends to transfer the complaint to the competent scheme, the nearest scheme will inform the consumer that any appropriate personal data will be transferred to the competent scheme in accordance with Article 10 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

10 Information on the functioning of the Network

On request the parties will provide the Commission services annually with statistics on cross-border cases that they have handled and their comments on the functioning of the co-operation network. The Commission services will request this information in a specific form.

11 Report on the application of the Memorandum

The Commission services envisage convening an annual meeting of the participating schemes and presenting to it a report on the application of this Memorandum. The meeting will decide on any updating of the Memorandum, if needed.

Annex D

Financial ombudsmen/ADRs in central/eastern Europe

[For fuller information on the current arrangements, see the separate World Bank report – *Resolving disputes between consumers and financial businesses: Current arrangements in central/eastern Europe* – which is published alongside this report.]

Bulgaria

The World Bank reviewed the financial ombudsman/ADR position previously in 2009.

The *Diagnostic Review of Consumer Protection and Financial Capability in Bulgaria*[66] recommended that consideration should be given to creating a financial ombudsman, to replace existing conciliation committees.

In 2011 the only dedicated ADR in financial services was the legally-established Conciliation Commission for Payment Disputes. This provides non-binding recommendations in disputes about credit cards, loans, payment services and electronic money.

There is no financial ombudsman/ADR for other aspects of banking or for any aspects of insurance or other financial products. And Bulgaria has no member of FIN-NET to handle cross-border cases.

So, as recommended in 2009, consideration should be given to creating a financial ombudsman – which should adopt the standards that will enable it to become a member of FIN-NET.

Croatia

The World Bank reviewed the financial ombudsman/ADR position previously in 2010.

The *Diagnostic Review of Consumer Protection and Financial Literacy in Croatia*[67] said that the proposed mediation centre for the banking sector was unlikely to be successful, and that consideration should be given to establishing a financial ombudsman.

In 2011, admittedly only one year on, the situation remained substantially the same. In banking, all that is available to consumers is mediation. Consumers have to pay a fee for that (though the fee was being waived until the end of 2011).

In insurance, consumers have free access to mediation, or to an industry-appointed ombudsman who can provide a non-binding recommendation but this is limited to complaints about the insurance code of ethics.

So, as recommended in 2010, consideration should be given to establishing a financial ombudsman – which should adopt the standards that will enable it to become a member of FIN-NET.

[66] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/RO_-_CPFL_Vol_I.pdf

[67] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/Croatia_CPFL_Vol1_English.pdf

Czech Republic

The World Bank reviewed the financial ombudsman/ADR position previously in 2007.

The *Technical Note on Consumer Protection in Financial Services in the Czech Republic*[68] recommended that the existing Financial Arbiter (then dealing only with electronic payments in the banking sector) should be converted into a financial ombudsman covering all areas of the financial sector.

There has been substantial progress in the direction recommended by The World Bank – so that the Financial Arbiter covers most banking services and (from July 2011) consumer credit and some investments. The Financial Arbiter is a member of FIN-NET.

The Ministry of Finance has proposed to extend the Financial Arbiter's jurisdiction to cover insurance and other investments, possibly from 2012.

So consideration should be given to continuing to extend the Financial Arbiter's jurisdiction until it covers all areas of the financial sector, as recommended in 2007.

Estonia

The World Bank has not previously reviewed the financial ombudsman/ADR position in Estonia.

In 2011, in both banking and insurance, consumers had free access to the legally-established Consumer Complaint Committee (provided the claim is for at least €20). The Committee provides a non-binding recommendation, and is a member of FIN-NET.

In insurance, consumers have the alternative of free access to the industry-appointed Insurance Conciliation Body, which provides mediation or a non-binding recommendation. It is not a member of FIN-NET.

Hungary

The World Bank has not previously reviewed the financial ombudsman/ADR position in Hungary.

Both banking and insurance, as well as other financial services, have been covered by the Financial Arbitration Board since 1 July 2011.

This was established by law and is run by the Hungarian Financial Supervisory Authority. It is a member of FIN-NET.

It provides free access to consumers. It offers mediation, a non-binding recommendation and (if both parties agree in advance) a decision that is binding on both parties.

[68] http://siteresources.worldbank.org/EXTECAREGTOPPRVSECDEV/Resources/CR_CPFS_12June07.pdf

Latvia

The World Bank previously reviewed the financial ombudsman/ADR position in 2010.

The *Diagnostic Review of Consumer Protection and Financial Literacy in Latvia*[69] and *Action Plan on Financial Consumer Protection in Latvia*[70] recommended:

- The Consumer Rights Protection Centre (which is a government agency) should make sure it is legally equipped to deal with all relevant financial services complaints it receives, proposing legislative change if necessary.
- Consideration should be given to establishing a financial ombudsman by law – to replace the ombudsmen established by the banking and insurance associations, which were not seen by consumers as independent and were little-used.

In 2011, admittedly only one year on, the situation remained substantially the same – and Latvia has no FIN-NET member. The Consumer Rights Protection Centre has a very limited role in relation to individual disputes and does not consider itself to be a suitable ADR for financial services.

It has been encouraging the industry-based ombudsmen to develop, but without success thus far. The banking and insurance ombudsmen have not demonstrated that they comply with the fundamental standards in Commission Recommendation 1998/257/EC.

The industry-based Motor Insurers' Bureau provides non-binding recommendations in disputes between third parties and motor third-party liability insurers.

The banking and insurance ombudsmen, and the Motor Insurers' Bureau, have not demonstrated that they comply with Commission Recommendation 1998/257/EC.

So the existing banking and insurance ombudsmen should adopt the standards that will enable them to become members of FIN-NET – or as recommended in 2010, consideration should be given to establishing a financial ombudsman by law.

Lithuania

The World Bank previously reviewed the financial ombudsman/ADR position in 2009.

The *Diagnostic Review of Consumer Protection and Financial Literacy in Lithuania*[71]recommended:

- The Insurance Supervisory Commission should retain its consumer protection role in insurance while the State Consumer Rights Protection Authority increases its capacity and expertise.
- The State Consumer Rights Protection Authority and the Insurance Supervisory Commission should be given legal authority to make decisions binding on financial businesses.
- At a later stage, consumer protection in insurance should pass from the Insurance Supervisory Commission to the State Consumer Rights Protection Authority (a FIN-NET member).
- In the longer term, the State Consumer Rights Protection Authority was likely to become overwhelmed and consideration should be given to establishing a statutory financial ombudsman.

[69] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/Latvia_CP_Vol_1_En.pdf

[70] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/LV_Action_Plan_ConsultativeDraft.pdf

[71] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/Lithuania_CP_Vol1_En.pdf

As a result of forthcoming changes to the regulatory arrangements, expected in 2012, the Insurance Supervisory Commission will cease to exist. Future arrangements for out-of-court redress have not yet been decided.

As recommended in 2009, if out-of-court redress remains with the State Consumer Rights Protection Authority, it should be given the necessary powers and resources – or consideration should be given to creating a financial ombudsman, which should adopt the standards that would enable it to become a member of FIN-NET.

Poland

The World Bank has not previously reviewed the financial ombudsman/ADR position in Poland.

In banking, consumers have access to the industry-appointed Banking Ombudsman, which provides a decision that binds the financial business but not the consumer.

In insurance, consumers have free access to the government-appointed Insurance Ombudsman, which provides a non-binding recommendation – with the possibility, at some cost, of going on to arbitration.

In both banking and insurance, consumers have the alternative of access to the Arbitration Court at the Financial Supervisory Authority, which provides mediation and decisions binding on both parties. Consumers must pay a fee of €62.00, which is refunded if they win.

The Banking Ombudsman, Insurance Ombudsman and Arbitration Court at the Financial Supervisory Authority are all members of FIN-NET – and should use the opportunity of adopting best practice from amongst their FIN-NET colleagues.

Romania

The World Bank previously reviewed the financial ombudsman/ADR position in 2009.

The *Diagnostic Review of Consumer Protection and Financial Literacy in Romania*[72] recommended:

- A financial ombudsman or other similar procedure should be put in place, and should become a member of FIN-NET.
- As a first step, ombudsmen could be established by the professional associations. If this did not prove sufficiently effective, consideration should be given to establishing an ombudsman by law.

A Special Projects Initiative was established with support from The World Bank which, amongst other things, produced proposals for a financial ombudsman.

In banking, the National Bank of Romania provides a non-binding recommendation in disputes about cross-border transfers.

The banking ombudsman proposed by the Special Projects Initiative has not been established. Consumers have access to the Union of Banking Mediators and the Association of Mediators in the Financial-Banking Field – FINBAN, but they both charge consumers a non-returnable fee and provide only mediation.

[72] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/RO_-_CPFL_Vol_I.pdf

In insurance, there is the industry-appointed Insurance Arbitration Commission – but this charges consumers a non-returnable fee, provides only mediation and focuses on business-to-business disputes.

None of these bodies is a member of FIN-NET to cover cross-border complaints – though the Union of Banking Mediators has put itself forward as a candidate and the Association of Mediators in the Financial-Banking Field – FINBAN says it plans to apply.

As recommended in 2009, consideration should be given to creating a financial ombudsman – which should adopt the standards that will enable it to become a member of FIN-NET.

Slovakia

The World Bank previously reviewed the financial ombudsman/ADR position in Slovakia in 2007.

The *Technical Note on Consumer Protection in Financial Services in Slovakia*[73] recommended that a financial ombudsman should be created, and should join FIN-NET.

In 2011, consumers now have free access to the industry-appointed Banking Ombudsman – which provides mediation and a non-binding recommendation. The Banking Ombudsman is not a member of FIN-NET. In insurance, there is no financial ombudsman/ADR.

As recommended in 2007, Slovakia should have a financial ombudsman – which should not be restricted to banking and which should adopt the standards that will enable it to become a member of FIN-NET.

Slovenia

The World Bank has not previously reviewed the financial ombudsman/ADR position in Slovenia.

In banking, consumers have free access to the Banking Settlement Council, appointed by a body where half of the members come from the financial industry. It provides a non-binding recommendation.

In insurance, consumers have free access to the industry-appointed Mediation Centre (providing mediation in damages claims) and Insurance Ombudsman (providing non-binding recommendations on breaches of the insurance code or good insurance practice, but not damages claims).

The Banking Settlement Council, Insurance Mediation Centre and Insurance Ombudsmen have not demonstrated that they comply with Commission Recommendation 1998/257/EC – and neither is a member of FIN-NET.

They should adopt the standards that will enable them to become members of FIN-NET (and should use the opportunity of adopting best practice from amongst their FIN-NET colleagues) or consideration should be given to establishing a financial ombudsman by law.

[73] http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/SkCPFSVolIMainReport.pdf

Annex E

BIOA criteria for ombudsmen [74]

A. Guiding principles

The Association will afford recognition as Ombudsman Offices to those bodies whose core role is to investigate and resolve, determine or make recommendations with regard to complaints against those whom the Ombudsman is empowered to investigate; and which meet the detailed Criteria set out below.

The Association will only give recognition to Ombudsman's Offices whose primary role is to handle complaints by individuals about maladministration, unfair treatment, poor service or other inequitable conduct by those subject to investigation.

The Association recognises and values the wide range of Ombudsmen schemes in the public and private sectors and the variations in their constitution, jurisdiction, powers and accountability. The Criteria for Recognition of Ombudsman's Offices have been drawn up with that in mind and the Association will apply the Criteria with sufficient flexibility to encompass those variations.

The Association expects users of Ombudsman schemes in the public and private sectors to have comprehensive and coherent coverage and clear and simple access to Ombudsmen and will take account of this when considering applications for membership of the Association.

In the case of private sector schemes, the Association is opposed to the fragmentation of redress schemes within a single industry. The Association prefers there to be a single Ombudsman within an industry. Where more than one scheme is established within an industry, the Association will normally only afford recognition to the scheme or schemes to which a substantial number of firms in the industry belong.

Criteria

The Association's Criteria for the Recognition of Ombudsman Offices are set out in detail in Part B below. The five key Criteria are:

- *Independence*
- *Fairness*
- *Effectiveness*
- *Openness and transparency*
- *Accountability*

Governance

The Association expects Ombudsman Members to comply with its Principles of Good Governance (and any amendments thereto).

Principles of Good Complaint Handling

The Association expects Ombudsman Members to operate in accordance with its Principles of Good Complaint Handling (and any amendments thereto).

[74] www.bioa.org.uk/criteria.php

Use of the title of 'Ombudsman'

The title of 'Ombudsman' should not be used unless the Association's Criteria for Recognition of Ombudsman's Offices are met. The Association will not admit to Membership in any category organisations or individuals which use the title of 'Ombudsman' but do not meet the Association's Criteria.

The Association also hopes that, in the interests of users, organisations which meet the Criteria for Recognition of Ombudsman's Offices will use the title of 'Ombudsman' unless there is a good reason not to do so.

Recognition

The decision on whether a scheme is recognised as meeting the Criteria will be made at the discretion of the Executive Committee or by a General Meeting of the Association on the recommendation of the Validation Committee.

Review

The Validation Committee will also, when requested to do so by the Executive Committee or a General Meeting of the Association, review whether existing Ombudsman Members continue to meet the Criteria for Recognition and advise the Executive Committee accordingly.

B. Detailed Criteria

1 Independence

(a) The Ombudsman must be visibly and demonstrably independent from those whom the Ombudsman has the power to investigate.

(b) The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.

(c) The term of office should be of sufficient duration not to undermine independence. The appointment should be for a minimum of five years. It may be subject to renewal but the renewal process should not undermine or compromise the office holder's independence.

(d) The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.

(e) The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman's appointment, but this does not exclude their minority representation on the body which is authorised to terminate.

(f) The Ombudsman alone (or someone acting on his or her authority) must have the power to decide whether or not a complaint is within the Ombudsman's jurisdiction. If it is, the

Ombudsman (or someone acting on his or her authority) must have the power to determine it. The Ombudsman's determination should be final and should not be able to be overturned other than by the courts or an appeal route provided for by law.

(g) Unless otherwise determined by statute the Ombudsman should be accountable to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.

2 Fairness

(a) The Ombudsman should be impartial, proceed fairly and act in accordance with the principles of natural justice.

(b) The Ombudsman should make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.

(c) In all cases where it is decided not to accept the complaint for investigation, the Ombudsman should notify the complainant of that decision and the reasons for it.

(d) In all cases investigated, the Ombudsman should notify the parties concerned of the decision and the reasons for it.

3 Effectiveness

(a) The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved.

(b) The Ombudsman should expect those subject to investigation to have accessible and fair internal complaints procedures.

(c) Accessibility

(i) The right to complain to the Ombudsman should be adequately publicised by those subject to investigation.

(ii) Complainants should normally have direct access to the Ombudsman scheme. If, exceptionally, this is prevented by law, the Ombudsman should seek to minimise the adverse impact on complainants.

(iii) The Ombudsman's procedures should be straightforward for complainants to understand and use.

(iv) Those complaining to the Ombudsman should be entitled to do so free of charge.

(d) Powers and procedures

The Ombudsman should:

(i) Be entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman's jurisdiction without the need for any prior consent of the person or body against whom the complaint is made. This does not preclude a requirement that before the Ombudsman commences an investigation, the complainant should first have exhausted the internal complaints procedures of the person or body being investigated.

(ii) Save as otherwise provided by law, have the right to require all relevant information, documents and other materials from those subject to investigation.

(iii) Be entitled but not obliged, to disclose to the complainant or to the person being investigated such information, documents and other materials as shall have been obtained by the Ombudsman from the other of them unless there shall be some special reason for not making such disclosure, for example, where sensitive information is involved or disclosure would be a breach of the law.

(e) Implementation of Decisions

Either

(i) Those investigated should be bound by the decisions or recommendations of the Ombudsman; or

(ii) There should be a reasonable expectation that the Ombudsman's decisions or recommendations will be complied with. In all those cases where they are not complied with, the Ombudsman should have the power to publicise, or require the publication of such non-compliance at the expense of those investigated.

4 Openness and transparency

(a) The Ombudsman's Office should ensure openness and transparency so that members of the public and other stakeholders know why the scheme exists, what it does and what to expect from it; and can have confidence in the decision making and management processes of the scheme.

(b) Information in the public domain should include a clear explanation of an Ombudsman scheme's legal constitution, governance and funding arrangements.

(c) The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge.

(d) The Ombudsman should be entitled in the Annual Report, or elsewhere, to publish anonymised reports of investigations.

5 Accountability

(a) The Ombudsman, staff members and members of any governing body should be seen to be responsible and accountable for their decisions and actions, including the stewardship of funds.

(b) The Ombudsman should publish an Annual Report and Annual Accounts.

Annex F

BIOA principles of good governance for ombudsmen [75]

The six principles are –

Independence

Ensuring and demonstrating the freedom of the office holder from interference in decision making.

- *Freedom from interference in decision making on complaints*
- *Appropriate and proportionate structure and financial arrangements*
- *Appointment, re-appointment and remuneration of the office holder consistent with ensuring independence*
- *Governance arrangements which ensure and safeguard the independence of the office holder and the scheme*
- *Those involved in the governance of the scheme to conduct themselves at all times in the best interest of the scheme*

Openness and transparency

Ensuring openness and transparency in order that stakeholders can have confidence in the decision-making and management processes of the scheme.

- *Clear explanation of legal constitution, governance and funding arrangements*
- *Open and clear policies and procedures, and clear criteria for decision making*
- *Clear and proper recording of decisions and actions*
- *Free availability of information and publication of decisions, consistent with statute, contract and good practice*
- *Clear delegation arrangements, including levels of authority*
- *Register of interests, to apply to the office holder, appropriate staff members and members of any governing body*

Accountability

Ensuring that all members of the scheme, including the office holder, staff members and members of any governing body, are seen to be responsible and accountable for their decisions and actions, including the stewardship of funds (with due regard to the independence of the office holder).

- *Subject to appropriate public or external scrutiny*
- *Accountable to stakeholders for operation of scheme*
- *Financial accountability, and appropriate internal controls to demonstrate the highest standards of financial probity*

[75] www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf

- *Robust mechanism for review of service quality*
- *Clear 'whistle-blowing' policy*

Integrity

Ensuring straightforward dealing and completeness, based on honesty, selflessness and objectivity, and ensuring high standards of probity and propriety in the conduct of the scheme's affairs and complaint decision making.

- *Impartiality in all activities*
- *Identify, declare and deal with conflicts of interest (including office holder, staff members and members of any governing body)*
- *Compliance of all those involved in the governance or operation of the scheme with relevant principles of public conduct*
- *Arrangements for dealing with conflicts about governance issues*

Clarity of purpose

Ensuring that stakeholders know why the scheme exists and what it does, and what to expect from it.

- *Explanation of the purpose of the scheme and who it serves*
- *Clear status and mandate of the scheme*
- *Clarity of extent of jurisdiction*
- *Governance arrangements which are clear in relation to the office holder's adjudication role*

Effectiveness

Ensuring that the scheme delivers quality outcomes efficiently and represents good value for money.

- *Leadership which defines and promotes the values of the scheme*
- *Keeping to commitments*
- *Good internal planning and review processes*
- *Quality assurance and a process for review of service*
- *Quality outcomes for complainant, organisation complained about, scheme and all other stakeholders*
- *Recommendations accepted by bodies in jurisdiction*
- *Effective risk management controls*
- *Cost effectiveness and value for money*

Annex G

ANZOA criteria for ombudsmen [76]

Independence

- *The office of Ombudsman must be established—either by legislation or as an incorporated or accredited body—so that it is independent of the organisations being investigated.*
- *The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.*
- *The Ombudsman must not be subject to direction.*
- *The Ombudsman must be able to select his or her own staff.*
- *The Ombudsman must not be — or be able to be perceived as — an advocate for a special interest group, agency or company.*
- *The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.*
- *The Ombudsman's office must operate on a not-for-profit basis.*

Jurisdiction

- *The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.*
- *The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.*
- *The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.*

Powers

- *The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.*
- *In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.*
- *There must be an obligation on organisations within the Ombudsman's jurisdiction to respond to an Ombudsman question or request.*

[76] www.anzoa.com.au/ANZOA%20Policy%20Statement_Ombudsman_Essential%20Criteria.pdf

- *The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.*
- *The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.*

Accessibility

- *A person must be able to approach the Ombudsman's office directly.*
- *It must be for the Ombudsman to decide whether to investigate a complaint.*
- *There must be no charge to a complainant for the Ombudsman's investigation of a complaint.*
- *Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.*

Procedural fairness

- *The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:*
- *The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman's decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.*
- *The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment.*
- *The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.*

Accountability

- *The Ombudsman must be required to publish an annual report on the work of the office.*
- *The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.*

Annex H

ANZOA policy statement on competition among ombudsman offices [77]

Members of ANZOA, both parliamentary and industry Ombudsman/Commissioner offices, operate according to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability.

ANZOA considers that 'competition' among Ombudsman offices runs counter to these principles, particularly the key principle of independence, for the reasons set out below.

ANZOA's position is that there should be only one external dispute resolution (EDR) Ombudsman's office for any industry or service area.

Competition in Ombudsman offices is most likely to impact on industry Ombudsmen, and is considered inefficient and undesirable on a range of policy levels:

- *It is not in the interests of consumers/citizens or their advocates, as it may not be clear where to take complaints or which is the most appropriate service to deal with particular issues.*
- *It is likely to add unnecessary and inefficient costs to Ombudsman services, e.g. inefficient duplication of infrastructure/resources/services/information systems, mechanisms to establish a 'common door' approach, and the need to provide information to consumers about different offices.*
- *It may lead to manipulation of dispute resolution services, differing standards, and inconsistencies in decision making which could be adverse for consumers and participating organisations.*
- *Poor performing organisations may choose to join an alternative office that they believe is not as rigorous in its approach to complaints.*
- *An office may focus more on participating organisations rather than on complainants or consumers in order to keep or grow its membership.*
- *Where offices are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different offices, potentially about the same issues.*
- *The value of the Ombudsman's office as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, service providers and the wider community.*

ANZOA believes that while it is inappropriate to apply concepts of market forces and competition to what are effectively 'natural monopolies', other appropriate mechanisms can be utilised to provide a proxy for the benefits that can otherwise be derived from competing services. These mechanisms include appropriate governance arrangements, independent reviews, public reporting, effective self-regulatory and/or regulatory mechanisms, benchmarking, formal or informal peer reviews, and scrutiny through avenues such as ANZOA.

There may be overlaps between some Ombudsman offices, but this is different from competition between offices. An overlap is usually dealt with by way of a Memorandum of Understanding between the offices, or other transparent arrangements.

[77] http://www.anzoa.com.au/ANZOA_Policy-Statement_Competition-among-Ombudsman-offices_Sept2011.pdf