

EXPLANATORY MEMORANDUM TO

THE ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER DISPUTES (AMENDMENT) REGULATIONS 2015

2015 No. 1392

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This instrument implements the remaining provisions of EU Directive (2013/11/EU) on alternative dispute resolution for consumer disputes (“the Directive”) and certain provisions of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (“the ODR Regulation”). The core provisions of the Directive were implemented in the Alternative Dispute Resolution for Consumer Disputes Regulations 2015 (S.I. 2015/542) (the “ADR C&I Regulations”) which were made on 16th March 2015, most whose provisions came into force on 7th April 2015. This instrument effects the implementation of the remaining provisions of the Directive and the ODR Regulation by amending the ADR C&I Regulations, so that most of the provisions implementing the Directive and ODR Regulation are located in a single Statutory Instrument. This instrument also makes consequential amendments to certain other Acts and Statutory Instruments.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 *Amendment of ADR C&I Regulations rather than revocation and replacement*

Although the Department is making a number of amendments to the ADR C&I Regulations, the Department has decided not to revoke and replace the ADR C&I Regulations. This is because a new instrument would give different numbers for existing provisions, whereas by amending the ADR C&I Regulations existing provisions maintain their numbering. Most provisions of the ADR C&I Regulations came into force on 7th April and we are aware that stakeholders have grown used to, and have produced materials based on, the existing numbering.

3.2 *Free issue procedure*

After considering the matter, the Department has decided not to apply the free issue procedure in relation to this instrument. This is because the amendments to the existing provisions are considered to be minor in nature and make up only a small proportion of this instrument, which otherwise contains new provisions which are being added to the ADR C&I Regulations and amendments to other legislation. As set out in paragraph 3.4.13 of Statutory Instrument Practice, the Department has consulted the S.I. Registrar who considered that based on these reasons the Department has a case not to apply the free issue procedure in this instance.

3.3 *No review provision*

This instrument contains no regulation obliging the Secretary of State to carry out a review of the instrument in five years’ time. This is because this instrument is an amending instrument and the provisions will be reviewed in accordance with the review provision contained in regulation 2 of the ADR C&I Regulations.

3.4 *Delay to the coming into force of Parts 4 and 5 of the ADR C&I Regulations*

To provide more time for traders to prepare their business operations for the new requirements imposed on them under Part 4 of the ADR C&I Regulations, and due to the likelihood that certain competent authorities will not certify their applicant ADR providers by 9th July, this instrument amends regulation 1(3) of the ADR C&I Regulations so that the trader information requirements, and associated enforcement regime, will commence on 1st October 2015 (the common

commencement date) rather than 9th July 2015. This constitutes late implementation of Article 13 of the Directive. It is the Department's view that this was the only viable way of ensuring a smooth implementation of the trader information requirements.

3.5 Implementation of certain provisions of the Regulation

Although EU Regulations are directly applicable, and therefore, as a rule do not require further transposition into domestic law, there are circumstances when transposition is required. One of these circumstances is when further transposition is required in order to make the provisions enforceable in UK law. Because the ODR Regulation leaves it open to member States to lay down the rules on penalties applicable to infringements, this instrument implements those provisions of the ODR Regulation which contain obligations on traders and ADR entities and sets out the penalties for breach of these obligations.

3.6 Amendments to the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003

Although the ADR C&I Regulations specified Article 13 of the Directive (and the corresponding UK regulation 19(1) and (2)) in regulation 20(2) and Schedule 8 for the purposes of section 212 of the Enterprise Act 2002, we thought it more appropriate that this provision, together with Article 14 of the ODR Regulation and regulation 19A(1) to (4) of the ADR C&I Regulations should be specified in the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (the "Order"), so that it is located together with other EU instruments specified for the purposes of section 212 of the Enterprise Act 2002. To effect the addition of reference to the ODR Regulation in the Order, we are amending provisions of the Order to refer to Regulations as well as Directives. The amendments to the Order will take effect on 9th January 2016.

4. Legislative Context

4.1 This instrument is being made to implement the remaining provisions of the Directive and some provisions of the ODR Regulation (which require transposition). The core provisions of the Directive were implemented in the ADR C&I Regulations.

4.2 The attached transposition note explains the Department's approach to transposing the Directive and the ODR Regulation.

4.3 The Directive and ODR Regulation were cleared by the House of Commons European Scrutiny Committee on 12 December 2012, (published in 32nd Report, Session 12/13).

4.4 The Directive and ODR Regulation were considered and cleared by the House of Lords' Select Committee on the European Union on 27 March 2013 (Sift 1498, Session 12/13).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

5.2 Although the Directive and relevant provisions of the ODR Regulation could have been separately implemented in Northern Ireland, as consumer protection policy is within the competence of the Northern Ireland Assembly, the Northern Ireland Departments concerned have agreed that implementation of the Directive and ODR Regulation can be carried forward on a UK basis.

6. European Convention on Human Rights

6.1 This instrument is subject to the negative resolution procedure, but does make consequential amendments to primary legislation. The Acts it amends are: the Prescription and Limitation (Scotland) Act 1973 (1973 c. 52), the Limitation Act 1980 (1980 c. 58), the Foreign

Limitation Periods Act 1984 (1984 c.16), the Enterprise Act 2002 (2002 c. 40), and the Equality Act 2010 (2006 c. 3).

6.2 The Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs has made the following statement regarding Human Rights: “In my view the provisions of The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 are compatible with the convention rights.”

7. Policy background

What the Directive requires

7.1 Consumers are not always confident that if they experience problems when purchasing goods or services from a trader, that that problem will be resolved. Often the only option for the consumer is to seek redress through the Courts, which can be an expensive, lengthy and daunting process which puts many consumers off pursuing redress. Alternative dispute resolution (“ADR”) provides a means for consumers to resolve their problems without going to court. The aim of the Directive is to encourage growth and consumer confidence across the European Union by increasing access to ADR to resolve contractual disputes regarding the sale of goods or provision of services.

7.2 The Directive requires that Member States ensure that any dispute within its scope (which is most disputes concerning contractual obligations regarding the sale of goods or provision of services raised by a consumer against a trader) can be submitted to an ADR entity, which has been approved by a competent authority, if the trader so wishes (or if the trader is obliged for certain reasons to use ADR).

7.3 The Directive also requires traders to notify consumers about what options for ADR are available in the event they are unable to resolve a dispute themselves. This notification requirement will increase awareness and uptake of ADR among traders.

The Department’s approach to implementation of the Directive

7.4 The Department decided to implement the Directive in two tranches to ensure that as of the implementation date the UK meets the Directive’s requirement to have in place sufficient ADR provision to enable any trader who wishes to use ADR for a dispute within the scope of the Directive to use a certified ADR provider to resolve that dispute.

Tranche 1: (i) designated the competent authorities and set out their functions; (ii) set out the criteria an ADR provider must meet in order to receive certification; and (iii) put obligations on traders to give consumers certain information about the availability of ADR.

Tranche 1 was effected by means of the ADR C&I Regulations, most of whose provisions came into force on 7th April so that the newly designated competent authorities are able to complete the vetting of ADR providers prior to the implementation date on 9th July, so that as of 9th July the UK has in place sufficient certified ADR providers to enable any trader to access ADR.

Tranche 2: (i) sets out on-going obligations for certified ADR providers; (ii) provides the circumstances when an agreement made by the consumer to use ADR is not binding on the consumer, and the circumstances when a solution intended to be binding produced by a certified ADR provider does not bind a party; and (iii) sets out a provision to enable the Financial Conduct Authority to charge fees for its operations as a competent authority.

These provisions of Tranche 2 come into force on 9th July.

7.5 The deadline for implementing all provisions of the Directive is 9th July 2015. However, in order to ensure the smooth introduction of the new information requirements on traders, this instrument amends the ADR C&I Regulations so that the coming into force date of the information requirements on traders is 1st October 2015.

7.6 The Directive is a minimum harmonisation measure which means it sets out minimum standards for the quality of service a certified ADR provider must provide, and the minimum information a trader must give to a consumer. A member State is permitted to impose higher standards on certified ADR providers or traders, provided the purpose of these additional requirements is to ensure a higher level of consumer protection. The way the Department has chosen to implement the Directive is to permit competent authorities, if they have the power under another enactment, to set further requirements for an applicant ADR provider to meet before certifying the ADR provider, provided that the purpose of the additional requirements is to ensure a higher level of consumer protection. The Department, in implementing the Directive, has decided not to make use of ADR compulsory for traders, but its implementation recognises that a trader may be bound to use ADR under another enactment, rules of a trade association, or contract.

What the ODR Regulation requires

7.7 The ODR Regulation obliges the European Commission to create an electronic platform (the “ODR Platform”) to enable consumers and, if a member State so permits, traders, to submit an initial dispute submission to a certified ADR provider online. Most provisions of the ODR Regulation are therefore concerned with the functions of the ODR Platform and require no express implementation into domestic UK law. The ODR Regulation does, however, have a few provisions relating to how a certified ADR provider must interact with the ODR Platform, and the ODR Regulation also has a provision requiring online traders to notify consumers about the existence of the ODR platform.

The Department’s approach to implementation of the ODR Regulation

7.8 Regulations are directly applicable in a member State and therefore usually require no further implementation into domestic law. However, since the ODR Regulation requires a member State to lay down the rules on penalties applicable to infringements of the Regulation, the Department feels it is necessary to expressly implement those provisions of the ODR Regulation that put obligations on certified ADR providers, and on online traders, so that corresponding enforcement provisions can also be provided for.

7.9 The provisions of the ODR Regulation only enter into force on 9th January 2016.

The contents of this instrument

This instrument therefore implements provisions of both the Directive and ODR Regulation. The provisions of this instrument cover:

- (i) the implementation of those articles of the Directive that were not implemented by means of the ADR C&I Regulations;
- (ii) the implementation of those articles of the ODR Regulations that require implementation;
- (iii) certain corrections to the ADR C&I Regulations; and
- (iv) the postponement of the coming into force of the trader information requirements.

7.10 Since making the ADR C&I Regulations the Department has had further discussions with the European Commission and has received comments from certain stakeholders which has led the

Department to decide to make minor drafting amendments to certain provisions in the ADR C&I Regulations.

7.11 This instrument also contains a provision to enable the Financial Conduct Authority to make rules to charge fees to the Financial Ombudsman Service for its functions as a competent authority under the ADR C&I Regulations as of 9th July 2015. Under section 138I of the Financial Services and Markets Act 2000, the Financial Conduct Authority must consult the PRA and the public before it makes rules. It has, therefore, also been necessary provide a provision to disapply the usual consultation requirement for the Financial Conduct Authority in relation to the first rules which it issues under this new power.

7.12 Given that the Directive must be implemented by 9th July 2015, but the provisions of the ODR Regulation only come into force on 9th January 2016, certain regulations of this instrument come into force on 9th July 2015, and others on 9th January 2016.

8. Consultation outcome

8.1 As well as on going engagement with business and consumer groups, two formal consultations have been conducted. The first, in December 2011, gathered views on the European Commission's proposal for a Directive on ADR. This informed the UK Government's views for the EU negotiations to ensure that the Directive agreed provided a fair and effective framework for business while maintaining high levels of consumer protection.

8.2 In June 2014 BIS ran a further consultation seeking views on the best approach to implementing the Directive. 87 responses were received to this consultation though not all responded to all of the questions. A full list of respondents to the consultation is contained in the Government response which can be found at the following link: <https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers>

8.3 In summary responses were received from business representatives, individual businesses, public sector organisations, ADR providers, consumer organisations, individual consumers, regulators and trading standards. The consultation sought views on:

- **How we ensure ADR is widely available** - Almost all respondents agreed there were significant gaps in the provision of ADR in the UK. Most of those that disagreed or were unsure were from the sectors where ADR was mandatory. A significant majority of respondents agreed that the current provision of ADR in the UK is not sufficient. The majority of those who responded agreed that the Government could expect those businesses who are currently not obliged to use ADR to sign up to a voluntary scheme.
- **How a competent authority scheme will operate** - Thirty-one respondents were in favour of appointing the sector regulators as sector specific competent authorities where this was appropriate, in addition to a new generic competent authority for ADR schemes in non-regulated sectors. Of the nineteen respondents who disagreed with this proposal, many favoured a single competent authority appointed to cover all consumer ADR providers.
- **Setting up an ODR contact point to assist with online disputes** - The majority of respondents agreed the ODR contact point should only assist cross-border disputes. Two respondents agreed on costs grounds as the workload for the ODR contact point would be greatly increased if it had to deal with domestic cases.
- **Helping businesses comply with information requirements** - The majority of respondents favoured the option of having suggested wording and guidance. However, some caveated this

response with the requirement that the wording used should be for guidance only and not compulsory.

- **Provisions where the UK has the choice in how to implement the Directive (e.g. whether we should account for “in-house mediation”)** - The majority of respondents agreed with the Government proposal that in-house ADR should not be included as part of the UK’s implementation of the ADR Directive, with a number of respondents making clear that inclusion of in-house services would undermine the independence of the service.
- **Whether a rationalisation of the ADR landscape is necessary** - Nine respondents commented it was too early to say and many did not directly respond to the question. Thirteen respondents said they thought ADR should be simplified in the longer term and that the benefits would outweigh the costs.

8.4 In addition, a number of stakeholder meetings were held to discuss implementation of the Directive, including several roundtables for ADR providers on the process and implications for becoming approved ADR entities.

8.5 The Government is very grateful to everyone who has taken the time to contribute. The information and comments received have been used to amend and finalise this instrument.

9. Guidance

9.1 Specific guidance for competent authorities and entities wishing to get approval as a certified ADR provider will be published by the Trading Standards Institute once this instrument has been made.

9.2 The Department will issue guidance for business on their responsibilities under the ADR C&I Regulations (as amended by this instrument) once this instrument is made. Guidance for consumers will be published alongside the guidance on the broader rights being introduced by the Consumer Rights Act 2015.

10. Impact

10.1 An Impact Assessment for this measure was validated as fit for purpose and assessed as out of scope of One In Two Out by the Regulatory Policy Committee on 15th September 2014. In light of the Government no longer tendering for a residual ADR provider, the Impact Assessment has been updated and is attached to this memorandum.

10.2 The impact of the ADR C&I Regulations, as amended by this instrument, is expected to be small. Although all traders in scope of the ADR C&I Regulations will need to signpost the consumer to a certified ADR provider once they have exhausted their internal complaint handling processes in response to a complaint of a consumer, a trader is not under an obligation to submit to ADR, unless they are under an obligation under another enactment, or due to the rules of a trade association that they belong to, or due to their having entered into an agreement with an ADR provider to use ADR. Only those traders who are under some existing obligation to submit to ADR need to put information about an ADR Entity on their website and in their general terms & conditions (where such general terms & conditions exist) – and many of these traders will be under an existing obligation to put such information on their websites.

11. Regulating small business

There is no flexibility to vary implementation of the Directive or ODR Regulation according to the size of firms. Accordingly the trader information requirements and online trader information

requirements introduced by this instrument will apply to all businesses, irrespective of their size. The Directive does not make use of ADR compulsory for businesses, but recognizes that certain businesses may be obliged, or have committed, to use ADR due to obligations of other pieces of legislation they are in scope of, or due to the rules of a trade association to which they may belong, or due to the terms of a contract that they might have entered into with a certified ADR provider.

12. Monitoring & review

Since the instrument merely amends other Acts and Statutory Instruments it does not contain a review provision. Regulation 2 of the ADR C&I Regulations obliges the Secretary of State to carry out a review of how the Directive and ODR Regulation have been implemented every five years, so the substance of the provisions of this instrument will be reviewed as part of the review made under regulation 2 of the ADR C&I Regulations.

13. Contact

Peter Lovitt at the Department for Business, Innovation and Skills Tel: 020 7215 0189 or email: peter.lovitt@bis.gsi.gov.uk can answer any queries regarding the instrument.