

# How important is procedural justice for Consumer Dispute Resolution?

A case study of an ombudsman model for European consumers

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**Keywords:** Consumer Dispute Resolution (CDR), Alternative Dispute Resolution (ADR) in Europe, procedural justice, ombudsman decision-making, legitimacy, access to justice.

## Abstract

*Recent EU legislation has mandated the extension of comprehensive coverage of Consumer Dispute Resolution (CDR) throughout the EU. The extension of CDR has given rise to a range of questions about the theoretical and practical implications of these changes. The field of CDR is underexplored in academic literature and only a few studies provide an overview of this rapidly developing area. There is a need to base CDR schemes on empirical evidence to inform practice and to provide justice. Tyler's procedural justice model of public compliance with the law might be beneficial in this inquiry. This exploratory study tests whether Tyler's well-established normative model of social regulation holds true in the CDR context by applying it to the ombudsman. In doing so, this paper seeks to contribute to a richer understanding of how to assess consumer acceptance of an ombudsman model of CDR. The study finds that Tyler's model cannot be fully translated to the UK ombudsman case study. The current dearth of comparative empirical evidence on the effectiveness of CDR in Europe fuels the need for further inquiry and re-evaluation of its theoretical foundations.*

## INTRODUCTION

The main incentive to encourage and develop Consumer Dispute Resolution (CDR<sup>2</sup>) standards in Europe is to increase access to justice by providing alternatives to long and costly court procedures, which have proven to be unsuitable for low-value consumer

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<sup>2</sup> CDR is used in this paper to define a distinct development and field in its own right that of consumer disputes distinguishing it from the more general field of alternative dispute resolution (ADR). Therefore CDR is used throughout the paper except when referring to legislation 'directive on consumer ADR', although the author sees it as CDR.

complaints. Europe's CDR bodies are undergoing significant reorganisation and expansion. A recent European Union (EU) directive on alternative dispute resolution (ADR)<sup>3</sup> for consumers requires each member state to implement CDR schemes covering almost every sector that involves contractual consumer to business disputes (except for health and education) by 9 July 2015.<sup>4</sup> Some of the many existing CDR schemes across Europe do not yet satisfy the directive's requirements. Compliance with the directive therefore means that the existing patchy CDR landscape in the EU has to be reformed by learning from (and possibly improving) existing CDR models and creating new ones.

One important part of this change is the setting of shared standards for decision-making procedures between CDR models. Several questions arise out these pending changes. How will informal and flexible CDR bodies develop alongside the formal (traditional) existing legal frameworks (for example, courts)? Will the quality of decision-making suffer as a result of the creation of a fast, affordable and user-friendlier model of dispute resolution for consumers? Will traditional legal expertise be lost to informal procedures as a result of settlement rather than adversarial procedures? What makes CDR models legitimate in the eyes of their users?<sup>5</sup>

It is too early to assess the impacts that CDR might have on national justice systems. However, it is possible to try to understand what will encourage consumers' voluntary cooperation with CDR procedures and their outcomes. The theory of procedural justice has shown, when applied to other areas of the justice system that legitimacy can be built through a decision-making procedure being regarded as fair by its users.<sup>6</sup> This has a direct effect on people's satisfaction with, and evaluation of these decision-making authorities.<sup>7</sup> A theory of procedural justice might therefore be a way to develop a better understanding of how CDR procedures can be legitimated in the eyes of consumers.

Originally a facet of constitutional accountability systems,<sup>8</sup> ombudsmen have evolved in, and are now firmly part of, the private civil justice realm,<sup>9</sup> performing important

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<sup>3</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). O.J. L 165/63.

<sup>4</sup> A noteworthy driver of the new legislation on CDR is evidence of a large number of unresolved complaints. A study by UK Consumer Focus in 2012 estimated that out of 6.4 million consumer complaints to business in the UK, two million remained unresolved. Consumer Focus Report (2012) Consumer Detriment 2012 available at <http://www.consumerfocus.org.uk/publications/consumer-detriment-2012>.

<sup>5</sup> In this paper the term user and consumer are used interchangeably.

<sup>6</sup> Tyler, T. (1997). Compliance with Intellectual Property Laws: A Psychological Perspective, 29 N Y U J International L & Pol 219, 231; Paternoster, R., Brame, R., Bachman, R. & Sherman, L. (1997). Do fair procedures matter? The effect of procedural justice on spouse assault. 31 Law & society Review, 163-204,165; Hollander-Blumoff, R. & Tyler, T. (2008). Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential. Law & Social Inquiry Vol 33 (2), 473-500.

<sup>7</sup> Lind, A. (1982). The Psychology of courtroom procedure, in N.L. Kerr & R.M. Bray (eds) The Psychology of the Courtroom. New York Academic; Tyler, T. (1984). The Role of Perceived injustice in Defendants' evaluation of their courtroom experience. 18 Law & Society Review 51; Tyler, T.; Rasinski K., Spodick N. (1985). "Influence of voice on satisfaction with leaders: Exploring the meaning of process control". *Journal of Personality and Social Psychology* 48: 72-81.

<sup>8</sup> In 1809 the first ombudsman was established in Sweden; Seneviratne, M. (2002). Ombudsmen Public Services and Administrative Justice. Butterworths Lexis Nexis; Buck, T., Kirkham, R. & Thompson, B. (2010). The Ombudsman Enterprise and Administrative Justice. Aldershot Ashgate.

independent complaints-handling functions. Public sector ombudsmen assist in complaints citizens have about state institutions and private sector ombudsmen help consumers with grievances about products and services acquired from companies. The ombudsman is now a significant alternative dispute resolution pathway, separate to the courts. This paper looks at an example of a private sector ombudsman.

Little is known about people's compliance with and use of these fairly new institutions (authorities) for consumers. Tyler found in his research on procedural justice that citizen's voluntary compliance with the law (or with an authority) is linked to judgments about the legitimacy<sup>10</sup> of those authorities. He further found that public perceptions of the legitimacy of authorities are linked to judgments about the fairness of the procedure (and the outcome) of decision-making undertaken by these authorities. This means that elements of procedural justice perceptions involve evaluations of how authorities treat citizens.<sup>11</sup>

The body of literature that studies compliance with the law<sup>12</sup> puts an emphasis on procedural justice. This paper introduces procedural justice theory to a new context, that of ombudsman procedures. It aims to identify and evaluate the role that (perceived) fairness plays in forming users' (consumers') perspectives of ombudsman procedures ('procedural fairness'), and to test the theory that perceptions of procedural fairness are formed independently of perceptions of the fairness of outcomes ('outcome fairness').<sup>13</sup> The focus in this paper is on self-reported compliance, as one method of procedural justice, emphasising a 'bottom-up' (user) perspective of the procedure.<sup>14</sup> There is a limited body of literature to draw upon for insight into how disputants interpret issues of fairness and justice in the context of CDR. To begin to address this gap, and thereby to make a contribution to this field, this paper examines the emerging debate on CDR in Europe through the theoretical lens of procedural fairness.<sup>15</sup>

To gain an understanding of the empirical development of CDR schemes' procedures and to put Tyler's theory to the test, it is hypothesised that: *If there is evidence for fair and equal participation in a complaints procedure, then ombudsman users will be content (regardless of the outcome of their complaint) and this will, in turn, build legitimacy and*

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<sup>9</sup> Some private ombudsman models have developed over the past 10 years. Hodges, C., Benöhr, I. & Creutzfeldt-Banda, N. (2012). Consumer ADR in Europe. Hart Publishing.

<sup>10</sup> Legitimacy here is understood to be a universalistic claim, in line with procedural justice theory, rather than as 'legitimacy in context'; see Beetham, D. (1991) The legitimation of Power. Basingstoke: Palgrave Macmillan.

<sup>11</sup> Tyler, T. (1997). Procedural Fairness and Compliance with the Law. *Swiss Journal of Economics and Statistics (SJES)*, vol. 133, issue II, pages 219-240.

<sup>12</sup> Tyler, T. & Huo, Y. (2002). Trust in the law: Encouraging public cooperation with the police and courts. NY Russell Sage Foundation; Tyler, T (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review* 22, 301-355; Tyler, T. (2006). Why People Obey The Law. Princeton University Press.

<sup>13</sup> Tyler, T. (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review* 22, 301-355; Tyler, T.R. (2006). What do they expect? New findings confirm the precepts of procedural fairness. *California Court Review*, Winter, 22-24.

<sup>14</sup> This study takes the compliance with the 'top-down' EU legal quality requirements for CDR bodies as a given. The choice of case study emphasises this. The primary interest is in users' perception of fairness and building legitimacy. For future research in other CDR bodies, the compliance with procedural quality criteria might need to be established before turning to matters of users' perceptions.

<sup>15</sup> This paper is the starting point for a larger comparative project on users' perceptions of CDR ombudsmen in Europe.

*user compliance with the CDR scheme. Based on this, the guiding research questions are: What role does user participation and (perceived) fairness play in an ombudsman procedure? To what extent does knowledge of the outcome influence the perception of the procedure?*

The paper is divided into four parts. The first part, theoretical framework, introduces the concepts of CDR/ADR and places them within the legislative context, presents the theory of procedural justice and presents the background to the UK ombudsman. The second part, presents the methods by introducing the case study approach and the data. The third part is the data narrative which presents the analysis. The fourth part summarizes the findings and discusses their implications for CDR schemes in Europe and for further research.

## **THEORETICAL FRAMEWORK**

This part will introduce the concepts of ADR and CDR, and discuss legislative reforms that will lead to a big expansion of CDR. There is a need to base new and existing schemes on evidence to provide justice for consumers. However there is a lack of evidence to inform practice and how to evaluate CDR schemes. Here the theory of procedural justice can be useful. Mainly applied to formal dispute resolution contexts, perceived procedural fairness offers an explanation why people comply with the law. This approach is expected to hold true in the CDR context too, especially given some of the goals of CDR as opposed to court-based adjudicating. As one option to evaluate CDR schemes the case study is going to test this on a UK CDR context.

### **Models of dispute resolution: An introduction to CDR and its regulation in Europe**

For decades, the practice of ADR, an informal approach to resolving disputes has developed alongside formal dispute resolution systems (such as courts), without displacing litigation.<sup>16</sup> ADR has been traditionally applied to certain types of disputes, such as family law, where settlement (e.g. mediation<sup>17</sup>) has been proven to be more advantageous to the parties involved (by improving relationships, convenience, timeliness, and cost) than court decisions.<sup>18</sup> In European case law, the *Alassini v Telecom Italia SpA* case<sup>19</sup> shows an important development representing the shift towards CDR models of settlement. The case concerned the interpretation of Article 34 (out-of-court dispute resolution) of the Universal Service Directive.<sup>20</sup> The European

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<sup>16</sup> Hensler, D. R. (2004). Our Courts Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System. Santa Monica, CA: RAND Corporation; Menkel-Meadow, C. (1984). Toward another view of legal negotiation: The structure of problem solving. *University of California Law Review*, 31, 754-842; Menkel-Meadow, C. (1991). Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The Law of ADR". *Florida State University Law Review*, 19, 1-46.

<sup>17</sup> Mediation is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their dispute. Hopt, K. & Steffek, F. (2012). *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: OUP.

<sup>18</sup> Stipanowich, T. J. (2004) ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution". *Journal of Empirical Legal Studies* Volume 1, Issue 3, 843-912.

<sup>19</sup> Joined cases C-317-320/08 [2010] 3 C.M.L.R. 17 ECJ.

<sup>20</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal

Court of Justice ruled that even if domestic law made commencement of legal proceedings conditional on attempting settlement at mediation, this would not infringe Art 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>21</sup>

CDR is the umbrella term for ADR applied in consumer conflicts.<sup>22</sup> CDR, as part of the 'consumer redress landscape', is influenced by principles of access to justice, consumer protection and business regulation.<sup>23</sup> Previous to harmonisation directives, different models of CDR have developed across Europe in the field of consumer redress.<sup>24</sup> The field of CDR is underexplored in academic literature and only a few studies provide an overview of this rapidly developing area.<sup>25</sup> These studies reveal that CDR mechanisms in member states are at considerably different stages of development and lack common standards. The main identified problems and variations with CDR systems in Europe are gaps in coverage (within sectors and within member states), differences in application of the law and codes of conduct, access and awareness, and variations in procedural quality of the schemes.<sup>26</sup> The main incentive to encourage and develop CDR standards in Europe is to improve access to justice by providing substitutes to long and costly court procedures, which have proven to be unsuitable for low-value consumer complaints.<sup>27</sup> Studies have demonstrated that potential savings for European consumers are estimated at around €20 billion if they can refer their dispute to a CDR scheme, while businesses can save up to €3 billion when using ADR instead of going to court.<sup>28</sup>

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service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ L 108, 24.4.2002, 51.

<sup>21</sup> Which states that '...everyone is entitled to a fair and public hearing...'.

<sup>22</sup> Hodges, C. (2012). Consumer ADR in Europe. *Zeitschrift für Konfliktmanagement* 6, 195-197.

<sup>23</sup> OFT. 2010. *Mapping UK Consumer Redress: A Summary Guide to Dispute Resolution Systems*. [online] Available at: [http://www.oft.gov.uk/shared\\_of/general\\_policy/OFT1267.pdf](http://www.oft.gov.uk/shared_of/general_policy/OFT1267.pdf)

<sup>24</sup> Creutzfeldt, N. (2013). The evolution and origins of consumer dispute resolution systems in Europe. In C. Hodges & A. Stadler (Eds.), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*. Edward Elgar.

<sup>25</sup> Hodges, C., Benöhr, I. & Creutzfeldt-Banda, N. (2012). *Consumer ADR in Europe*. Oxford: Hart; Alleweldt, F. (2011). *Cross-Border Alternative Dispute Resolution in the European Union*. European Commission; Catholic University of Leuven; Knudsen, P. F. et al. (2009). *Cross-Border Dispute Resolution mechanisms in Europe- Practical Reflections on the need and availability*. ECC-Net; Alleweldt, F. *et al.* (2009). *Study on the use of Alternative Dispute Resolution in the European Union*. Brussels, Civic Consulting; Stuyck, J., Terryn, E., Colaert, V., Van Dyck, T., Peretz, N., Hoekx, N. & Tereszkievicz P. (2007). *Study on alternative means of consumer redress other than redress through ordinary judicial proceedings*.

<sup>26</sup> See Hodges et al (2012).

<sup>27</sup> Commission staff working paper executive summary of the impact assessment *Accompanying the document* Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR) SEC(2011) 1409 final

[http://ec.europa.eu/consumers/redress\\_cons/docs/summary\\_impact\\_assessment\\_adr\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/summary_impact_assessment_adr_en.pdf)

<sup>28</sup> SEC(2011) 1408 final COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT *Accompanying the document*: Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR) available at: [http://ec.europa.eu/consumers/redress\\_cons/docs/impact\\_assessment\\_adr\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/impact_assessment_adr_en.pdf)

On a EU level, since 2000 to date, in addition to the Mediation Directive of 2008<sup>29</sup>, a series of regulatory measures typically related to specific sectors, have included references to CDR.<sup>30</sup> These have evolved over the past decade from merely encouraging CDR to requiring traders to belong to a CDR scheme. Measures that *encourage* member states to establish CDR schemes are: the E-commerce Directive<sup>31</sup>, the Postal Services Directive<sup>32</sup>, and the Markets in Financial Instruments Directive (MiFID)<sup>33</sup>.

More recent EU legislation *requires* that adequate and effective CDR schemes are put in place in: the telecommunications sector,<sup>34</sup> the energy sector,<sup>35</sup> the Consumer Credit Directive,<sup>36</sup> and the Payment Services Directive.<sup>37</sup> The Services Directive<sup>38</sup> requires service providers to inform consumers whether they are members of a CDR scheme. On 29 November 2011 the Directorate General for Health and Consumer of the European Commission (DG Sanco)<sup>39</sup> issued a Communication<sup>40</sup> and two legislative proposals, one a draft directive on ADR<sup>41</sup> and the other a draft regulation on online dispute resolution (ODR).<sup>42</sup> The Commission's objective was '*to improve the functioning of the retail internal market and more particularly to enhance redress for consumers*'. Both proposals are based on Article 114 of the Treaty on the Functioning of the European Union (TFEU).

European legislation on consumer ADR<sup>43</sup> and ODR<sup>44</sup> was passed in 2013, to be implemented by July 2015 and January 2016 respectively. The 2013 legislation formalises DG Sanco's Communications and requires all EU member states to have full CDR coverage by 2015, followed by the ODR coverage in 2016. The legislation includes guidelines and procedural requirements for CDR schemes with which member states must comply.

The previous lack of EU-wide legislation has produced a landscape of CDR bodies with different backgrounds. Some schemes are laid down in national law, some are regulated by industry and others are set up voluntarily. In the UK, for example, despite a strong national policy and culture of self-regulation complementing a robust set of public

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<sup>29</sup> Directive n° 2008/52/EC. O.J., 24.5.2008, L 136, p. 3–8.

<sup>30</sup> It is important to make the distinction here that mediation is one technique of ADR but the Mediation Directive is not understood as CDR.

<sup>31</sup> Directive No 2000/31/EC; O.J., 17.7.2000, L 178, p. 1.

<sup>32</sup> Directive No 2008/6/EC ; O.J., 27.02.2008, L 52 p.3.

<sup>33</sup> Directive No 2004/39/EC; O.J., 30.4.2004, L 145/1, p. 33.

<sup>34</sup> Directives No 2009/136/EC and No 2009/140/EC; O.J., 18.12.2009, L337, p.11 & 37.

<sup>35</sup> Directives No 2009/72/EC and No 2009/73/EC; O.J., 14.8.2009, L 211, p. 55 & 94.

<sup>36</sup> Directive No 2008/48/EC; O.J., 22.5.2008, L 133, p.66.

<sup>37</sup> Directive No 2007/64 /EC; O.J., 5.12.2007, L319/1, p.32.

<sup>38</sup> Directive No 2006/123/EC; O.J.,27.12.2006, L 376, , p.36.

<sup>39</sup> Directorate General Health and Consumers of the European Commission.

<sup>40</sup> Communication from the Commission. Consumer solutions in the Single Market, COM(2011) 791/2.

<sup>41</sup> Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004: O.J., 9.12.2004, L 364/1 and Directive 2009/22/EC (Directive on consumer ADR), COM(2011) 793/2.

<sup>42</sup> Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 794/2.

<sup>43</sup> Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). O.J., 18.6.2013, L 165/63.

<sup>44</sup> Regulation (EC) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR). O.J., 18.6.2013, L 165/1.

regulatory authorities,<sup>45</sup> the CDR landscape is patchy. The UK Office of Fair Trading reported in 2010 that there are 95 discrete CDR schemes operating across 35 different economic sectors and that 'the current ADR provisions are not likely to meet consumers' needs'.<sup>46</sup> The 'Oxford study'<sup>47</sup> found that although CDR schemes in the UK are highly developed, they are sector-based, without a unified model, and that there are significant gaps in coverage of certain sectors. There are also variations in CDR procedures.

### **CDR procedures: definitions and terminology**

CDR includes a variety of techniques, though no shared classification exists among the various CDR schemes.<sup>48</sup> There are different approaches to techniques as well as terminology. For example, a procedure, made up of specific stages (mediation/agreement, arbitration/decision) can mean quite different things in different CDR schemes. To confuse the situation more, CDR schemes with comparable functions have different names, such as '*médiateur*' in France, 'ombudsman' in the UK, and 'conciliation body' in Germany.<sup>49</sup>

In this discussion of CDR procedures, two distinct approaches to definitions and terminology are relevant. The first is *labelling* the technique in a procedure, by identifying the CDR models according to the procedure leading to a *decision* (litigation, arbitration, expert adjudication, and ombudsman) or an *agreement* (mediation, conciliation and negotiation).<sup>50</sup> CDR scheme procedures are typically made up of a combination of techniques.<sup>51</sup> The second approach, which is adopted in this paper,

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<sup>45</sup> Hodges et al (2012) 263; OECD, EC and UK Better Regulation Task Force published a number of reports highlighting the advantages of self-regulation from 1999: *Commission Communication on 'A Strategic Review of Better Regulation in the EU'* COM (2006) 689, 14.11.2006; *The economics of self-regulation in solving consumer quality issues* OFT 1059 (London, Office of Fair Trading, 2009), available at [www.oft.gov.uk/shared\\_offt/economic\\_research/oft1059.pdf](http://www.oft.gov.uk/shared_offt/economic_research/oft1059.pdf); and *Better business practice. How to make self-regulation work for consumers and business*, PD 54/P/00 (London, National Consumer Council, January 2001).

<sup>46</sup> Ibid.

<sup>47</sup> Hodges et al (2012)

<sup>48</sup> See Hodges *et al* (2012).

<sup>49</sup> See for more detail about the German debate: Berlin, C. Verbraucher-ADR: Freiwilligkeit der Teilnahme und Verbindlichkeit des Ergebnisses im Lichte der AS-Richtlinie. *Zeitschrift für Konfliktmanagement* (ZKM) 4/2013, 108 ff; Berlin, C.. Alternative Streitbeilegung in Verbraucherkonflikten (CDR) in: Jürgen Klowait und Ulla Gläßer, *Mediationsgesetz Handkommentar*, Nomos-Verlag, Baden-Baden, 608-625).

<sup>50</sup> Hodges, C., Benöhr, I. & Creutzfeldt-Banda, N. (2012). (Introduction) Consumer ADR in Europe Oxford: Hart, 29-30. *Mediation*: mediation is conducted confidentially and consists of an independent third party actively assisting the parties in working towards a negotiated agreement of a dispute. *Conciliation*: this is a process similar to mediation but in which the neutral third party takes a more active role in putting forward terms of settlement or an opinion on the case. *Arbitration*: in arbitration an independent third party considers both sides in a dispute, and makes a decision that resolves the dispute. In most cases the arbitrator's decision is legally binding on both sides. *Adjudication*: like arbitration, adjudication involves an independent third party considering the claims of both sides and making a decision. This usually produces a decision that is binding on the company but not on the consumer. *Ombudsman schemes*: ombudsmen are independent, impartial intermediaries who consider complaints. The particular mechanisms of ombudsman schemes vary but they often combine neutral fact-finding, mediation and adjudication in various tiers. *Legal mechanisms*: formal legal action is usually the last resort employed by consumers to obtain redress. Consumers can, however, take legal action without going through other mechanisms if they wish.

<sup>51</sup> See: Hodges, C. (2012). Current discussions on consumer redress: collective redress and ADR. ERA Forum: Volume 13, Issue 1, 11-33.

moves beyond the *labelling* approach and applies a terminology according to the function and content of a procedure (*functional approach*).<sup>52</sup> The recent CDR Directive adopts a functional approach,<sup>53</sup> classifying different types of procedures as bringing the parties together to: a) facilitate an amicable solution (mediation); b) propose a solution (conciliation); c) impose a solution (arbitration); and d) employ a combination of these approaches.

The EU-level requirements for member states to have comprehensive CDR sector coverage will inevitably restructure existing European civil justice systems. One of the central challenges in this process is to achieve a high standard of decision-making, through procedural quality. Procedural requirements (binding principles) are detailed in the most recent CDR Directive, based on the principles of fairness, participation and legitimacy.

### **Procedural quality criteria for CDR bodies specified in EU legislation**

The development of minimum quality criteria for CDR bodies took place in several stages, leading up to the 2013 CDR legislation. These stages were marked by Recommendations on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>54</sup>; on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes<sup>55</sup>; on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes<sup>56</sup>; and in March 2013, the consumer ADR directive<sup>57</sup>. Of these, the principal development can be seen in the recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.<sup>58</sup> The former contains a set of soft law recommendations for CDR (liberty; legality; effectiveness; independence; transparency; adversarial proceedings; representation). The latter contains recommendations for CDR on fairness, effectiveness, transparency, and impartiality. As a result of these recommendations, the directive on ADR sets out binding minimum quality standards to guide organization and procedure. These are: expertise, independence and impartiality (Art 6); transparency (Art 7); effectiveness (Art 8); fairness (Art 9); liberty (Art 10); and legality (Art 11).<sup>59</sup> The aim of the legislation is to create a level playing field for CDR and to strengthen the confidence of both consumers and traders in CDR procedures. The directive sets out minimum quality criteria for CDR schemes but does not tell the

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<sup>52</sup> See Hopt & Steffek, p 16.

<sup>53</sup> 2013 consumer ADR directive, (21) p 65.

<sup>54</sup> 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. O.J. 30/03/1998, L 115/31.

<sup>55</sup> 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. Official Journal L 109 , 19/04/2001, 0056 – 0061.

<sup>56</sup> COM (2011) 793 Proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

<sup>57</sup> Position of the European Parliament adopted at first reading on 12 March 2013 with a view to the adoption of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

<sup>58</sup> It is outside of the scope of this paper to map and evaluate the details of developments leading to the final 2013 ADR directive and its minimum standards quality criteria.

<sup>59</sup> 2013 directive on consumer ADR.

member states how to implement them in the national context, which is common for EU legislation. This leaves the question open of how a uniform high standard of procedures and decision-making can be achieved. Here the theory of perceived justice in the quality of decision-making might be useful.<sup>60</sup>

## **Theory of procedural justice**

The theory of procedural justice, arising chiefly from the work of Tyler,<sup>61</sup> provides a useful framework for evaluating whether CDR systems meet quality standards for fairness and legitimacy. The theory of procedural justice explores the quality of both adversarial and inquisitorial legal systems. This body of literature developed out of a confluence of disciplines, applying findings from social psychology (mainly experimental research) to legal and political settings. It has been widely applied in the field of criminology (policing and prisons), for example, by investigating how the quality and fairness of decision-making procedures through citizens' direct encounters with law enforcement officials shapes their general perceptions of the legitimacy of the system.<sup>62</sup>

### **Procedural justice: process fairness, outcome fairness and legitimacy**

For successful evolution, functioning and development, institutions need legitimacy.<sup>63</sup> Procedural justice forms a central element of how individuals reach judgements about the legitimacy of authorities.<sup>64</sup> According to the theory, individuals assess the fairness of a process by which a decision is reached. Judgements about procedural justice are distinct from those about distributive justice (outcome fairness), as well as from outcome favourability (how good the outcome is for the party).<sup>65</sup> Procedural justice explores the perception of a fair procedure in relation to the outcome. If a procedure is perceived as fair, 'individuals have the sense of control over the outcome, thereby promoting commitment to the decision'.<sup>66</sup>

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<sup>60</sup> In this paper the quality principles (expertise and impartiality, transparency, effectiveness, fairness, independence, legality, liberty and representation) are treated as a unit of procedural criteria. A more detailed analysis of the individual principles is subject to future studies and is not in the scope of this paper.

<sup>61</sup> Lind, E. & Tyler, T. (1988). *The Social Psychology of Procedural Justice*. Plenum Press NY; Tyler, T. (2006) *Why people obey the law*, Princeton University Press.

<sup>62</sup> For example: Tyler, T. (1988). What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures. *Law & Society Review*, Vol. 22, No. 1, 103-136; Jackson, J., Huq, A. Z., Bradford, B.; Tyler, T. (2013). Monopolizing force? Police legitimacy and public attitudes toward the acceptability of violence. *Psychology, Public Policy, and Law*, Vol 19(4), 479-497; Bradford, B., Quinton, P., Myhill, A. & Porter, G. (2013). Why do 'the law' comply? Procedural justice, group identification and officer motivation in police organizations. *European Journal of Criminology*, Vol 11; Jackson J, Bradford B, Hough M, Myhill A, Quinton P and Tyler TR (2012) Why do people comply with the law? Legitimacy and the influence of legal institutions. *British Journal of Criminology* 52(6): 1051-1071.

<sup>63</sup> Easton, D. (1965). *A framework for political analysis*. Englewood Cliffs: Prentice-Hall.

<sup>64</sup> Tyler, T. (2006) *Why people obey the law*, Princeton University Press.

<sup>65</sup> Tyler, T., Boeckmann, R., Smith, H. & Huo, Y. (1997). *Social Justice in a diverse Society*. Westview Press, 75-76.

<sup>66</sup> Korsgaard, M.A., Schweiger, D. M. & Sapienza, H. J. (1995). Building Commitment, Attachment, and Trust in Strategic Decision-Making Teams: The role of Procedural Justice. *Academy of Management Journal*, Vol 38, No 1 60-84, p. 68.

Procedural justice research originally focused on court-based procedures (formal settings).<sup>67</sup> It then expanded into areas of non-judicial interactions (for example between citizens and the police),<sup>68</sup> as well as informal justice, examining for example non-judicial legal authorities and institutions that settle disputes<sup>69</sup> as well as mediators.<sup>70</sup> Research has showed that satisfaction with dispute resolution decisions and outcomes was independently influenced by judgments and evaluations about the fairness of the dispute resolution process.<sup>71</sup>

The development of ADR methods brought with it the question of legitimacy: would citizens accept, and be satisfied with, tribunal decisions,<sup>72</sup> if they perceive the procedure to be unfair? Studies have explored how ADR procedures operate, as well as how participants reacted to ADR models.<sup>73</sup> In the development of procedural justice research, there is now an equal weight given to subjective issues of fair processes as well as to the question of outcome fairness.<sup>74</sup>

'Procedural justice is the study that questions people's personal evaluations of the justice of procedures – whether they are fair or unfair, ethical or unethical, and otherwise accord with people's standards of fair process for social interaction and decision-making. The two key dimensions of procedural fairness judgments are fairness of decision making (voice, neutrality) and fairness of interpersonal treatment (trust, respect)'.<sup>75</sup>

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<sup>67</sup> Thibaut, J. & Walker, L. (1975). *Procedural Justice*. Erlbaum Hillsdale NJ; Leventhal, G.S. (1980). What Should Be Done with Equity Theory?, in K. J. Gergen, M.S. Greenberg, and R. H. Weiss (eds.)

<sup>68</sup> Tyler, T. & Folger, R. (1980). *Distributional and procedural aspects of satisfaction with citizen-police encounters* in *Basic Applied Psychology* 1, 281-292; Tyler, T. (1988). What is procedural Justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review* Vol 22 1, 103-135.

<sup>69</sup> Tyler, T. & Caine, A. (1981). The Influence of Outcome and Procedures on Satisfaction with Formal Leaders. *Journal of Personality and Social Psychology* 41, 642; Tyler, T. & Folger, R. (1980). *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*. *Basic and Applied Social Psychology* 1, 281; Casper, J., Tyler, T. & Fisher, B. (1988). *Procedural Justice among Felony Defendants*. *Law & Society Review* Volume 22 Issue 3, 483-507.

<sup>70</sup> Pruitt, D., Peirce, R., McGillicuddy, N., Welton, G. & Castrianno, L. (1993). Long term success in Mediation. *Law and Human Behavior* 17 (3), 313-330.

<sup>71</sup> Thibaut & Walker 1975.

<sup>72</sup> Genn, H. (1993). *Tribunals and Informal Justice*. The Modern Law Review 56 3 Blackwell Publishing, 393-411.

<sup>73</sup> Adler, J., Hensler, D. & Nelson, C. Nelson (1983). *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Programme*. (Rand Corporation, Santa Monica CA; Lind, E. (1986). *The Court-Annexed Arbitration Programme in North Carolina*. Rand Corporation, Santa Monica, CA; McEven, C. & Maiman, R. (1987). *Small Claims Mediation in Maine: An empirical assessment*. *Maine Law Review* 33:237-268; McEven, C. & Maiman, R. (1984). *Mediation in Small Claims Court: Achieving compliance through consent*. *Law Society Review* 18:11-49; Sibey, S. & Merry, S. (1986). *Mediator settlement strategies*. *Law and Policy* 8: 7-32.

<sup>74</sup> For an overview: Tyler, T. & Lind, E. (1986). *Procedural processes and legal institutions*. Paper presented at the International Conference on Social Justice in Human Relations, University of Leiden, The Netherlands; Walker, L. & Lind, E. (1984). *Psychological studies of procedural justice*. In Stephenson, G. M., and Davis, J. H. (eds.) *Progress in Applied Social Psychology*, Vol. 2, Wiley, New York, 293-313; Lind, E. (1982). *The psychology of courtroom procedure*. In Kerr, N. L., and Bray, R. M. (eds.), *The Psychology of the Courtroom*, Academic Press, New York; Tyler, T. (1984). *The role of perceived injustice in defendant's evaluations of their courtroom experience*. *Soc. Rev.* 18, 51-67; Lissak, R. & Sheppard, B. (1983). *Beyond fairness: The criterion problem in research on dispute intervention*. *Journal of Applied Soc. Psychology* 13, 45-63; Menkel-Meadow, C. (1984). *Toward Another View of Legal Negotiation: The Structure of Problem Solving*. 31 *UCLA Law Review* 754; Menkel-Meadow, C. (1983). *Legal Negotiation: A Study of Strategies in Search of a Theory*. *AM. B. FOUND. RES. J.* 905.

<sup>75</sup> Tyler, T. (2011). *Mechanisms of Legal Effect: Theories of Procedural Justice; A methods Monograph for the Public Health Law Research Programme Temple University Beasley School of Law* 2011 available at:

According to this approach, subjective assessments of procedural fairness are unrelated to the satisfaction of those people who 'win' their case. The importance of telling one's story (voice) (*procedural level*) carries more weight than compensation (*outcome level*) that might emerge from a resolution forum.<sup>76</sup> Thus, process control contributes to perceptions of procedural fairness.<sup>77</sup> Process control can be influenced through establishing quality criteria for procedures, which have a positive effect on building and maintaining legitimacy.

Procedural justice literature has shown that public perceptions of the *fairness* of the justice system are more significant in shaping the system's legitimacy than is the perception that the system is effective.<sup>78</sup> In relation to legal decision-making institutions research has found that people attribute legitimacy and voluntarily follow rules out of a sense of duty and obligation after 'fair treatment'.<sup>79</sup>

### **What is a fair procedure? The participation model approach**

There are many views of what makes a procedure fair. In the procedural justice discourse there are three main schools of thought on the theoretical norms that constitute fairness: the *outcome (accuracy) model*, the *balancing model* and the *participation model*.<sup>80</sup> The first, the outcome/accuracy model asserts that the aim of a dispute resolution is the correct application of the law to the facts, resulting in correct outcomes.<sup>81</sup> The second, the balancing model assumes that a fair procedure can be measured through the balance between costs and benefits that the procedure produces. The third, the participation model assumes that the very idea of a correct outcome must be understood as a function of process that guarantees fair and equal participation.<sup>82</sup> The participation model provides the best theoretical basis for an assessment of fairness and legitimacy of an ombudsman procedure.<sup>83</sup> Other significant elements

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<http://publichealthlawresearch.org/methods-guide-type/monograph/method-guide/mechanisms-legal-effect-theories-procedural-justice>; Lind, E. & Tyler, T. (1988). *The Social Psychology of Procedural Justice*. Plenum Press NY; Tyler, T., Rasinski, K. & Spodnick, N. (1985). The influence of Voice on Satisfaction with Leaders: Exploring the meaning of process Control. 48 *Journal of Personality and Social Psychology* 72; Tyler, T. (1988). What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures. *Law & Society Review* Vol. 22, No. 1, 103-136.

<sup>76</sup> Vidmar, N. (1981). Justice motives and other psychological factors in the development and resolution of disputes. In M Lerner & SW Lerner (eds) *The Justice Motive in Social Behaviour*. NY Plenum Press.

<sup>77</sup> Vidmar, N. (1991). The Origins and Consequences of Procedural Fairness [review of Lind, A & Tyler, T *The Social Psychology of Procedural Justice* New York Plenum 1988]. American Bar Foundation.

<sup>78</sup> Tyler & Huo 2002; Tyler 2003, 2007.

<sup>79</sup> See Tyler, T & Huo, Y *Trust in the Law* Russel Sage Foundation NY 2002. A recent study looks at users (students) perceptions of the process of ombuds and the fairness of the process, in an academic setting. Harrison, T., Hopeck, P., Desrayaud, N. & Imboden K. I. The Relationship between conflict, anticipatory procedural justice and design with intentions to use ombudsman processes, *IJCMA* 42, 1, 56-72

<sup>80</sup> Solum, L. (2004). *Procedural Justice*. Public law and Legal Theory Research Paper Series no. 04-02. Available at: <http://ssrn.com/abstract=508282>, 54 ff.

<sup>81</sup> This approach has many limitations (eg according to this model, if two procedures have comparable outcomes, they would be equally just).

<sup>82</sup> See Solum ft 78

<sup>83</sup> For example, participation has been shown to be essential for the normative legitimacy of adjudication processes. Bone, R. (1993). Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity. 46 *Vanderbilt Law Review* 561, 625; In relation to legal authorities research has found that: "fair treatment"-persons attribute legitimacy to legal authorities and voluntarily follow rules out of a sense of duty and obligation when legal authorities treat them fairly. See Tyler, T & Huo, Y *Trust in the Law* Russel Sage Foundation NY 2002. A recent study looks at users' (students') perceptions of the process of

(accuracy and cost) that together form a theory of procedural justice are also relevant to the legitimacy of an ombudsman. However, an assessment of accuracy and cost-benefit balance of the ombudsman process are beyond the scope of this study.

When evaluating the fairness of decision-making procedures, can people objectively evaluate procedures after they know the outcomes? This is the central question behind Rawls' concept of 'behind the veil' judgements.<sup>84</sup> Rawls suggests that fair assessments can only be made if people do not know the outcome of the procedure they are evaluating. Tyler's study challenged this view by looking at '*behind the veil*' and '*in front of the veil*' evaluations of fair decision-making.<sup>85</sup> Tyler's study found that in both experiments: (1) people evaluated the process without knowing the outcome; and (2) people evaluated the process knowing the outcome: 'knowledge of the outcome does not change the way people define the meaning of the fairness of a procedure'.<sup>86</sup> These findings have been applied to other contexts since then, supporting Tyler's findings.<sup>87</sup>

These findings mirror the 'fairness heuristic',<sup>88</sup> when 'people evaluate the fairness of a procedure by comparing the elements of that procedure to their template of fairness'.<sup>89</sup> That, however, cannot constitute a general model of a fair procedure, because different procedural criteria are regarded to be appropriate to different situations.<sup>90</sup> For example, in the context of dispute resolution Tyler found that people put great emphasis on *voice* when judging procedural fairness.<sup>91</sup> Current research holds that a process is perceived as *fair* by its users who have had the chance to tell their story (voice), the perception of fairness will have behavioural consequences and lead to decisions being accepted, even if participants do not achieve their desired outcomes.<sup>92</sup> Tyler's findings are based on the concept that procedural fairness requires that those affected by a decision have the option to participate in the process by which it is made.<sup>93</sup>

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ombudsmen and the fairness of the process, in an academic setting. Harrison, T., Hopeck, P., Desrayaud, N. & Imboden K. I. The Relationship between conflict, anticipatory procedural justice and design with intentions to use ombudsman processes, IJCA 42, 1, 56-72.

<sup>84</sup> Rawls John (1971) *A Theory of Justice*, Oxford University Press, London

<sup>85</sup> Tyler, T. The relationship of the outcome and procedural fairness: How does knowing the outcome influence judgments about the procedure?. *Social Justice Research*, December 1996, Volume 9, Issue 4, 311-325.

<sup>86</sup> Ibid p 311.

<sup>87</sup> See 'fair process effect': Folger, R. (1977). Distributive and procedural justice: Combined impact of "voice" and improvement on experienced inequity. *J. Pers. Soc. Psychol.* 35: 108-119; Folger, R., Rosenfield, D., Grove, J., and Cockran, L. (1979). Effects of "voice" and peer opinions on responses to inequity. *J. Pers. Soc. Psychol.* 45: 268-273; Tyler, T. R., and Caine, A. (1981). The influence of outcomes and procedures on satisfaction with formal leaders. *J. Pers. Soc. Psychol.* 41: 642-655.

<sup>88</sup> Lind E. A. , Kulik, C. T., Ambrose, M. & de vera Park, M. V.(1993). Individual and corporate dispute resolution: Using procedural fairness as a decision heuristic. *Administrative Science Quarterly* 38, 224-251.

<sup>89</sup> See 43 p 324.

<sup>90</sup> Tyler, T. (1988). What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures. *Law Soc Rev.* 22,301-355.

<sup>91</sup> Tyler, Tom; Rasinski Kenneth, Spodick Nancy (1985). "Influence of voice on satisfaction with leaders: Exploring the meaning of process control". *Journal of Personality and Social Psychology* 48: 72-81.

<sup>92</sup> Tyler, T. & Huo, Y. (2002). *Trust in the law: Encouraging Public cooperation with the police and courts.* NY Rusell Sage Foundation.

<sup>93</sup> Michelman, (1977). Formal and Associational Aims in Procedural Due Process. In *Due Process J* Pennock & J Chapman, (eds). *Nomos*, 18, 126; L Guinier, L.(1991). No Two Seats: The Elusive Quest for Political Equality, 77 VA L review 1413, 1489.

In summary, procedural justice drives the satisfaction that people have with their outcomes and theorists can therefore predict future adherence to outcomes and agreements.<sup>94</sup> If this theory holds true in the context of CDR procedures it will have significant impact on the current deliberations on how to ensure that the procedural requirements set by the 2013 ADR Directive are met. The UK case study provides the data for an initial theory testing.

## UK case study

The hypothesis is tested on the case study of ‘Ombudsman Services: Communications’ (OS:C)<sup>95</sup>, a United Kingdom (UK) private sector ombudsman that has handled consumer complaints about telecommunications companies for more than a decade. One reason for choosing this case study was OS:C’s relative longevity in a new and developing area. Further, the scheme has undertaken several procedural adjustments in reaction to customer complaints over the years and therefore provides a valuable example of a CDR scheme that already meets the requirements of the EU directive.<sup>96</sup> Although the case study chosen for this paper is one particular ombudsman scheme, the findings can inform future research on other CDR models that are required by the EU directive.

The case study approach provides the empirical basis to test the theory in an everyday (CDR) setting. Research in this field is still in its infancy. The Oxford study<sup>97</sup> provided the most recent overview of CDR systems in ten European member states. Building upon that, this paper takes a closer look at one model of CDR, thereby develops empirical evidence and identifies future directions for research. The purpose of this paper is not to present a comparative empirical data analysis<sup>98</sup>, but rather to introduce an established theory to a new area of inquiry. Although this paper focuses in detail on one CDR scheme, the approach can be transferred and applied to other schemes.<sup>99</sup>

The telecommunications sector in the UK is serviced by two CDR schemes; Ombudsman Service: Communications and CISAS.<sup>100</sup> Both provide CDR for different telecommunication companies in the UK, and are controlled by Ofcom the telecoms

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<sup>94</sup> Lind, A. & Tyler, T. (1988). *The Social Psychology of Procedural Justice*. Springer 63-65; Hollander-Blumoff, R & Tyler, T (2008). *Procedural Justice in Negotiation: Procedural fairness, outcome acceptance and integrative potential*. 33 *Law & Society Inquiry* 473, 478-79.

<sup>95</sup> <http://www.ombudsman-services.org/communications.html>.

<sup>96</sup> The objective here is not to test if, in fact, a specific CDR procedure meets the procedural requirements (quality criteria), rather it is to consider the importance of user participation in the procedure that will lead to consumer satisfaction, as well as build legitimacy. As established above, this study presumed that a (perceived) fair procedure is made up of high quality standards and user participation. Further, if these procedural criteria are met, they have the ability to build legitimacy. For the sake of this analysis it is assumed that the quality standards are met in the chosen case study, which leaves us to study user participation.

<sup>97</sup> Hodges et al (2012).

<sup>98</sup> In depth comparisons and analysis of other ombudsman schemes are not yet possible as the empirical data is not available. The author is in the process of gathering primary data including actual evidence of user behaviour to be able to gain a better understanding of different ombudsman procedures in various European States and to test various hypotheses

<sup>99</sup> Preliminary analysis of existing consumer satisfaction results from UK schemes (Financial Ombudsman Service and Legal Ombudsman) reinforce the trend observed in the case study presented below, that there is no clear evidence of procedural fairness being judged independent of outcome fairness.

<sup>100</sup> <http://www.cisas.org.uk>

regulator. This paper focuses on Ombudsman Service: Communications because it provides CDR for several sectors (telecommunications receiving most complaints) and this is a likely design for the implementation of the consumer ADR directive in some member states.

### **Ombudsman Services: Communications**

Ombudsman Services (OS) was founded in the UK in 2002.<sup>101</sup> It has steadily extended its coverage to the telecommunications sector (established 2003)<sup>102</sup>; energy (established in 2006),<sup>103</sup> property (established in 2007),<sup>104</sup> copyright licensing (established in 2009),<sup>105</sup> and most recently, the government's Green Deal (since 2013).<sup>106</sup> OS is free to use for consumers and its decisions are binding on the member companies complained about. In 2010/11, OS: C received 103,702 contacts, an average of 412 per working day. 13,165 complaint forms were issued, of which 10,789 (82 per cent) were returned.<sup>107</sup> The average number of complaint forms issued each month was 1,097.

OS is funded by industry on a 'polluter pays' basis, through a combination of subscription and case fees. Case fees are the charge to consider a complaint, which is not dependent on outcome. This acts as an incentive for companies, that is, by improving their customer service and resolving more complaints in-house they stand to minimise disputes referred to OS and thus pay less case fees. Since the concept of private sector ombudsmen is fairly new, the telecommunications division of OS, separately operating as 'Ombudsman Services: Communications' (OS:C) (existing for 10 years, and formerly known as Otelo) provides a good case study for a procedural analysis,<sup>108</sup> particularly as it has had to evolve and adapt to address an increasing volume and variety of complaints

On its website, OS:C lists the guiding principles of its decision-making process as: independence; fairness; impartiality; openness; transparency; effectiveness; accessibility; consistency; measured performance; official approval; and accountability.<sup>109</sup> These principles reflect (and go beyond) the quality criteria specified as minimum standards in the European Consumer ADR Directive.<sup>110</sup>

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<sup>101</sup> Since then OS have successfully resolved over 65,000 complaints.

<sup>102</sup> OS:C deals with 75% of the telecom complaints, there is another telecom CDR scheme CISAS (<http://www.cisas.org.uk/>) which creates some problems. See: Hodges, C *et al* (Hart 2012).

<sup>103</sup> Approved by Ofgem, the UK gas and electricity regulator, to provide redress under the terms of the Consumers, Estate Agents and Redress Act, 2007.

<sup>104</sup> Approved by the Office of Fair trading (OFT) as an estate agent redress scheme, work meets the requirements of the Consumers, Estate Agents and Redress Act, 2007.

<sup>105</sup> Resolve complaints about bodies that either own or administer the licensing of copyright materials on behalf of third parties.

<sup>106</sup> <http://www.ombudsman-services.org/green-deal.html>

<sup>107</sup> If a complaint can be considered by Ombudsman Services: Communications, the service will issue a complaint form for the complainant to sign and return. The complaint form gives the participating company permission to release any information it holds on the customer. See OS (2011) sector report, available at: <http://www.ombudsman-services.org/downloads/Communications%202011%20AR.pdf>

<sup>108</sup> The fact that OS covers several sectors provides a unique chance to learn from collected data and experience and implement changes across sectors; react to the market and feedback to companies and regulators, thereby influencing behaviour.

<sup>109</sup> <http://www.ombudsman-services.org/communications.html>

<sup>110</sup> Criteria in the 2013 directive are: expertise, independence and impartiality; transparency; effectiveness; fairness; liberty; and legality.

## **Procedural development: towards settlement rather than decision-based models of dispute resolution**

OS:C has, over the past 10 years, altered its decision-making procedure in an effort to meet the quality expectations of its users. In the beginning OS: C applied traditional methods, which consisted of paper-based investigation systems followed by a written report with the option to appeal. OS focused on mediation as a technique and identified cases that would fit that approach. Since 2011, a conciliation stage has been included that relies more heavily on a documentary process than an in-person process. The reason for adding this stage was that a mediation hearing potentially caused inconvenience to a consumer or trader due to the time invested in travelling.<sup>111</sup> Using documents as the principal means of correspondence (via the internet) or communicating over the phone provided a user-friendlier alternative. A case handler makes a summary of each side's case, which is then used as a basis for a final report and decision. The most common reason for accepting a complaint is that the companies complained about do not deal with the grievance within the set timeframe of eight weeks.<sup>112</sup>

If the ombudsman reaches a decision to make an award, and the consumer accepts it, the telecommunications company must take action. This can include an apology, a service or practical action, an explanation or a financial award (the average award is £80). To help prevent a similar problem reoccurring, OS: C makes recommendations (known as feedback)<sup>113</sup> to the company to encourage it to change its policies and procedures. If the consumer accepts the ombudsman's proposal the company must follow the action the ombudsman decided. If the consumer does not accept the decision or does not respond to the ombudsman within 28 days, the consumer loses the right to the solution offered but still can complain through other pathways, such as court action.

The drive to create a more streamlined procedure occurred in response to the increasing variety and volume of complaints received. The procedures have become more flexible not only to better manage the complaints more effectively, but also to improve the standards of service. Major influences in this are factors of cost, efficiency, timing and user-benefit.<sup>114</sup> Another product of the change is that response deadlines have been shortened and OS:C is working on developing realistic targets for producing final decisions.

"In the past 18 months OS: C developed faster processes, such as our mutually acceptable settlement (MAS) process that allows us to resolve cases without the need for formal investigation. We've introduced short form reports (SFRs) that focus on the key elements of a complaint and the reasons for our recommendation(s), which have been widely accepted. And we

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<sup>111</sup> Mediation is an oral procedure and conciliation a written one.

<sup>112</sup> OS:C only looks at a grievance if the company complained about has dealt with it first, or the company has not replied within an appropriate timeframe. This applies to all other CDR schemes.

<sup>113</sup> Feedback is a valuable tool to improve behaviour. OS has a system to capture all incoming complaints and aggregate the information. Through this, complaint trends can be identified and directly fed back to the companies to help them improve their arrangements as well as to regulators to make them aware of market developments. This does not only regulate behaviour but increases customer satisfaction and helps business improve.

<sup>114</sup> This approach also includes collaboration with member companies to predict complaints.

have a three stage investigation process that resolves most disputes quicker than the previous two-stage process.”<sup>115</sup>

OS:C’s annual report (2011) further states that it is important to put special weight on the three-stage investigation process, as most of the cases are accepted at the first or second stage and do not have to be dealt with by an ombudsman. A reason to introduce this system was to help the participating organisations to clear their big complaints backlogs and to be able to resolve new complaints faster. As a result, the ombudsman team is spending less time producing final decisions and more time guiding investigation officers, setting standards within the organisation and developing their own knowledge of the industries.

Summing up, a high volume of cases has led to a shift away from formal procedures towards more time and cost efficient<sup>116</sup> practices. In other words, OS:C gives priority to informal settlements instead of formal decisions. This substantial change in the decision-making procedure is a direct reaction to consumers (users) demands. This trend towards informal settlement is an example of how a flexible dispute resolution procedure can meet its users’ demands with the aim of creating a higher level of satisfaction.

Getting the complaints process right benefits all concerned. Research shows that the consumer is much more likely to be positive about the experience and stay with the service provider if both the company and the ombudsman have efficient and effective complaints handling procedures.’

Lewis Shand Smith, Chief Ombudsman of Ombudsman Services  
(2011).

### ***Stages of the complaint-handling procedure***

The current complaint handling system at OS:C, subsequent to the changes outlined above, is as follows. The consumer has to approach the company complained about first. If no satisfactory solution is achieved after eight weeks, or if the company issues a deadlock letter as a final position on a complaint, the consumer can approach the ombudsman. Then, the following discrete stages are implemented by OS:C:

1. *Verbal acceptance:* as a simplifying measure, OS:C no longer requires the consumer to sign and return a complaint form. Rather, the complainant’s authority to pursue a particular complaint is given verbally over the phone.<sup>117</sup>
2. *Early resolution:* if a complaint can be resolved simply, without the need for a case file and within five days, OS:C contacts the consumer via email or phone. If both parties then agree to the solution this becomes the binding ombudsman

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<sup>115</sup> OS:C sector report (2011) available at: <http://www.ombudsman-services.org/downloads/Communications%202011%20AR.pdf>

<sup>116</sup> ‘We cannot afford to use old techniques. The cost of the Local Government Ombudsman has just been cut by the government by 37% but areas of jurisdiction been added. There is an expectation and impatience by customers to get a quick resolution: we are required by the regulator to complete energy and communication disputes within 6 weeks.’ Lewis Shand Smith, Chief Ombudsman. The regulator appoints the Ombudsman. We report to regulators on complaints, performance, and systemic failure every month. We report potential breeches of regulations and suggest investigations.

<sup>117</sup> Calls are normally recorded, when a complaint is accepted for resolution OS:C will assess the information and decide the most appropriate way to proceed.

settlement.<sup>118</sup> Both parties will receive confirmation of this in writing (usually within 48 hours).

3. *Mutually Accepted Settlement (mediation)*:<sup>119</sup> this relates to cases that are more complex and take more than five days to resolve. A case file will be requested. After obtaining information from both sides, an investigation plan is prepared. Both parties will then be contacted by phone to discuss the complaint and try to reach an agreement. If both parties agree this becomes the ombudsman's decision with the proposed resolution being enforceable, and both parties will receive confirmation in writing.
4. *Ombudsman Services decision (traditional)*: OS:C contacts both parties, typically by phone, to explain the decision and the reasons for the decision. If either party considers there is an error in fact or has new information that was not previously available, this may be added for consideration. OS: C then will check to see if this affects the outcome before the decision is finalised. OS:C will contact both parties again to explain if there has been any change to the decision or if it remains the same. If the complainant accepts the ombudsman services decision, the decision is enforceable.

Although managing a high volume of cases, it is necessary for OS:C to maintain a high quality of decision-making and high standards of procedure, even if cases are settled rather than decided upon. As noted, procedural justice literature suggests that the quality of a procedure is directly related to users' perception of its fairness and this influences both their acceptance of the outcome and of the CDR scheme itself.

## METHODS

The case study approach<sup>120</sup> provides the empirical basis to test the theory in an everyday (CDR) setting. Secondary datasets, annual reports and customer satisfaction surveys, available in the public domain, were used for this analysis. The content of these documents was analysed to identify the notion of procedural justice criteria in detecting procedural assessments. A benefit of using secondary datasets is that they are publicly available and allow for a retrospective analysis. Annual reports (provided by the company) and customer satisfaction surveys (undertaken by an independent company) mirror the changes over time and allow for an analysis of the data, and identification of the necessary direction of future research. A further advantage of using secondary data is that the procedure of data collection has been carried out with mandatory, publicly legitimised access to data and institutions that might not be available to an independent researcher. The author's use of secondary data analysis facilitated a good understanding of the different data collection techniques employed. The empirical analysis enabled an initial theory testing in the field, followed by a rational assessment of the need for further inquiry, and re-evaluation of the theory within the field of CDR.

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<sup>118</sup> The official term OS:C use is *decision*, but adapted to the definition of techniques, this paper defines it as settlement.

<sup>119</sup> During 2010/11 approximately 29 per cent of OS:C cases were resolved through MAS. The remainder went through to *formal investigation*, where a case file is requested from the participating company and an investigation officer issues a report. It is expected that the number of informally resolved cases will rise as the process becomes embedded (annual report 2011).

<sup>120</sup> Yin, R.K. (1994). *Case Study Research: Design and Methods*, 2<sup>nd</sup> ed. Sage, 13.

Customer satisfaction surveys (2004-2011) and annual reports (2004-2013) were systematically analysed for evidence of procedural fairness criteria. The research questions guided the analysis.

The customer satisfaction surveys have changed over time in the kind of detail they ask, distribution means (paper based and online) as well as their response rate. For example, in 2004 some 159 enquirers and 131 complainants were surveyed by post and 21 complainants were interviewed by telephone. In 2005 some 203 enquirers and 289 complainants were surveyed by post and a further 98 enquirers were interviewed by telephone. In 2006 some 205 enquirers completed a postal survey and 98 telephone interviews with enquirers were also undertaken. In 2008 a total of 307 enquiries and 498 complainants responded to the survey representing response rates of 31% and 50% respectively. In 2010 a total of 375 complainants and 181 enquirers were surveyed using a self-completion method (postal and web options were offered) representing response rates of 37% and 18% respectively. A total of 209 website visitors responded to a survey held on the Otelo website. In addition 21 member companies completed a web survey and 4 of these took part in a telephone follow up. In 2011, research was undertaken between February and April 2011. A total of 365 complainants and 214 enquirers were surveyed using a self-completion method (postal and web options were offered), representing response rates of 37% and 21% respectively. In 2012/13 OS:C commissioned an independent research company to run quarterly customer satisfaction research. This replaced the annual postal survey, as used in previous years. This time telephone interviews were conducted with consumers who have contacted and used OS (all sectors). There were 1,215 interviews and the data can be analysed by sector and by the type of service received. This has enabled more robust and detailed feedback, permitting a more finely grained analysis of customers' views.<sup>121</sup>

## **DATA NARRATIVE- 'key drivers of satisfaction' and procedural fairness**

Focusing on the complainants' responses about the procedure and outcome (rather than the member companies), the main findings are discussed through the lens of procedural justice.

OS:C (and its earlier incarnation as Otelo) has conducted annual satisfaction surveys of its users since 2004. The surveys targeted members of the public who had approached Otelo /OS:C. The survey was sent out by post and some additional telephone interviews were conducted.<sup>122</sup> In 2010/11 a web option was added to the postal survey and telephone follow-up.<sup>123</sup>

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<sup>121</sup> Ombudsman Services Annual Report 2012/13 available at: <http://www.ombudsman-services.org/downloads/OS%20Annual%20Report%202013.pdf>.

<sup>122</sup> The response rate has grown over the years: In 2004 159 enquirers and 131 complainants were surveyed by post and 21 complainants were interviewed by telephone. In 2005 some 203 enquirers and 289 complainants were surveyed by post and a further 98 enquirers were interviewed by telephone. In 2005 some 203 enquirers and 289 complainants were surveyed by post and a further 98 enquirers were interviewed by telephone. In 2006 some 205 enquirers completed a postal survey and 98 telephone interviews with enquirers were also undertaken. In 2008 a total of 307 enquiries and 498 complainants responded to the survey representing response rates of 31% and 50% respectively.

<sup>123</sup> In 2010 a total of 375 complainants and 181 enquirers were surveyed using a self-completion method (postal and web options were offered) – representing response rates of 37% and 18% respectively. A

The surveys reported that:

‘...complainants were satisfied with most aspects of the process, though a number were disappointed with the outcome. Some complainants were unclear about the nature of the Otelo “investigation,” expecting further contact during this process. More information on the process and on possible outcomes could be given on the website and in the leaflet. [...]Complainants wished to have more detailed final reports, including a summary of evidence from both sides of the story.’<sup>124</sup>

More focused questions about satisfaction with specific aspects of the *process* were asked to separate satisfaction with ‘process’ from satisfaction with ‘outcome’. The 2004 and 2005 surveys suggested that complainants’ satisfaction with the outcome of their case may colour views of the process and this is particularly the case for complainants who feel the outcome achieved is negative. ‘Unsurprisingly, those with very positive outcomes are more likely to be satisfied; for instance, almost all of those who feel the outcome was completely in their favour are satisfied compared to less than 1 in 10 who feel the outcome was completely against them’.<sup>125</sup>

This prompted, in the following years, further examination of the factors affecting general satisfaction with procedures. In summary, the key factors identified as leading to overall satisfaction are: explanation given at the start of the process; kept updated and overall level of service; and ease of access to an Investigating Officer along with the speed and efficiency of the process.

In 2008, ‘a very substantial 94% of those who felt that the outcome of their case was completely in their favour were satisfied with Otelo and 81% (or over 4 out of 5) were very satisfied. Only 3% of the complainants who said the case had been settled completely in their favour were dissatisfied and none were very dissatisfied.’ [...] ‘In contrast, a very substantial 85% of those that felt the case had been decided completely against them were dissatisfied, with most very dissatisfied (71%). Only 3% of this group were satisfied and none very satisfied.’<sup>126</sup>

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total of 209 website visitors responded to a survey held on the Otelo website. In addition 21 member companies completed a web survey and 4 of these took part in a telephone follow up. In 2011, research was undertaken between February and April 2011. A total of 365 complainants and 214 enquirers were surveyed using a self-completion method (postal and web options were offered) – representing response rates of 37% and 21% respectively.

<sup>124</sup> Craigforth Consultancy (2004). Otelo Office of the Telecommunications Ombudsman Report on Customer Satisfaction; available at: <http://www.ombudsman-services.org/downloads/CustomerSatisfactionSurvey2004.pdf>; similar to the 2004 report, The main focus of the 2005 and 2006 Customer Satisfaction Research remains simple and broadly in line with previous research undertaken in 2004 and 2005: Craigforth Consultancy (2006) Office of the Telecommunications Ombudsman Customer Satisfaction 2006; available at: [http://www.ombudsman-services.org/downloads/Customer\\_Satisfaction\\_Survey%20otelo2006.pdf](http://www.ombudsman-services.org/downloads/Customer_Satisfaction_Survey%20otelo2006.pdf); Craigforth Consultancy (2005) Office of the Telecommunications Ombudsman Customer Satisfaction 2005; available at: <http://www.ombudsman-services.org/downloads/CustomerSatisfactionSurvey2005.pdf>

<sup>125</sup> Ibid Annual Report 2004 and 2005.

<sup>126</sup> Craigforth Consultancy (2008) The Ombudsman Service Limited Office of the Telecommunications Ombudsman Customer Satisfaction; available at: [http://www.ombudsman-services.org/downloads/FinalOtelo2008%20\(3\).pdf](http://www.ombudsman-services.org/downloads/FinalOtelo2008%20(3).pdf). In 2007 similar conclusions were reported: Craigforth Consultancy (2007) Office of the Telecommunications Ombudsman Customer Satisfaction

The data, so far, supports two distinct observations. Firstly, consumers are not very satisfied with the level of participation and information they receive from the dispute resolution procedure. Secondly, user satisfaction is clearly linked to the outcome of the case. This then directed the focus of inquiry towards asking more detailed questions about perceived procedural fairness. From 2010 onwards, a new category of 'key driver analysis' was introduced into the survey to establish which elements of the Otelo experience were more important in driving overall satisfaction. Key drivers of satisfaction were the *overall level of service, aspects of the report's recommendations* and the *comprehensiveness of information*.

With the focus on understanding if procedures can be perceived independently of the outcomes by the users, data from 2010<sup>127</sup> and 2011,<sup>128</sup> confirmed the importance and higher satisfaction level for consumers having a voice and participating in the process to reach an outcome, mostly independent of the outcome itself.

'...the key driver of satisfaction is to receive a fair hearing for the complaint and balanced recommendations for this. However, the actual outcome itself was not key - suggesting respondents are capable of scoring OS:C highly where an outcome goes against them and vice versa.' It is not clear from the data, however, how many cases this applies to. They might be the exception, rather than the trend.<sup>129</sup>

The 2012/13 the annual report presents findings of the more detailed telephone questioning of customer satisfaction with OS procedures. The four key areas were customers' expectations, timings, communications and fairness. Consumers (71%) were satisfied with the explanation that was given at the start of the procedure. Concerning timings 61% were satisfied with the speed of initial response on the phone, 54% of respondents whose complaints were accepted were satisfied with the speed of the process, and 59% of respondents whose complaints were accepted were satisfied with the time it took to reach resolution. Consumers (89%) knew what to do after the initial contact, indicating a high level of satisfaction with communication during the procedure. Regarding perceived fairness, 66% of respondents who experienced early resolution and/or mutually acceptable settlement agreed that OS mediation was handled fairly. 53% of respondents whose complaints were fully investigated agreed that the investigation officer's report was fair and reasonable.

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2007; available at: <http://www.ombudsman-services.org/downloads/Customer%20research%20ReportJune2007.pdf>

<sup>127</sup> Hinde, J. (2010). DJS Research Ltd Office of the Telecommunications Ombudsman Customer Satisfaction 2010 July 2010, available at: <http://www.ombudsman-services.org/downloads/CustomersurveyOtelo2010.pdf>.

<sup>128</sup> Hinde, J. (2011). DJS Research Ltd Ombudsman Services: Communications Customer Satisfaction 2011 A Research Report available at: <http://www.ombudsman-services.org/downloads/Communications%20Customer%20Sat%20Report%202011%20-%20DRAFT%2024.06.pdf>.

<sup>129</sup> This is also an observed phenomenon in other CDR schemes. For example, two German CDR bodies (Insurance Ombudsman and the Conciliation Body for Public Transport) receive phone calls and letters from consumers who have been told that they do not have a case or who received an unfavourable outcome. These consumers have thanked the ombudsmen for the time they took to listen to them and to explain the reason behind the refusal of their cases or the unexpected outcome. However, there is no reliable documentation of numbers.

In 2014 OS:C introduced a consumer action monitor, to be able to '*gain insight into consumer attitudes to goods and services they buy and use*'.<sup>130</sup> Fieldwork was conducted between 3-5 January 2014, conducting 2,023 telephone interviews. The data reveals two interesting aspects for the purpose of this discussion. Firstly, that consumer complaint behaviour varies according to what they buy (most complaints are in the energy sector 17%, followed by retail 16%, telecoms 14%). This means that consumer's personal attachment to the service they are complaining about might influence the perception and expectation of the procedure. Secondly, the data showed barriers to complaint-behaviour, influenced by consumers' low levels of trust in big business and politics to take their problems seriously. There is a perception that big companies are favoured by the legal system. This will influence a consumer's initial decision whether to approach a CDR scheme.

The data provided us with a puzzle. First, it demonstrated that the ombudsman procedure is flexible and can develop according to its users' needs, unlike the courts, for example. In the case of OS:C the data showed that user participation (having a voice) is a crucial part of perceiving the procedure as fair, which seems to have an effect on the overall confidence in the system: 'on average, two thirds of consumers claimed that their confidence in dealing with the company had increased after their experience with OS'.<sup>131</sup> This, according to Tyler's theory ought to be reflected in the perception of the procedural stages.

More recent data, from 2012/13 onwards, provides more nuanced evidence regarding procedural stages by asking questions about separate aspects of the procedure: expectations, timings, communications and fairness. Although the customer feedback generally was very positive, less positive feedback related to speed of resolution of complaints. This might be connected to the reoccurring feature that outcomes are a key driver for customer satisfaction. The data showed that it is crucial to manage customers' expectations and make sure that they have a realistic view of potential outcomes from the start. This might influence the perception and acceptance of the outcome and with that, the whole procedure.

Having said that, the data does not mirror Tyler's findings, that fairness of procedure and outcome are perceived independent of each other. Rather the available dataset suggests that a negative outcome clouds the perception of the procedure leading to it. What other factors then might contribute to the perception of fairness in a CDR procedure? This preliminary study has shown the need for a richer inquiry as many questions about CDR procedures are raised. Further, an in-depth analysis of the case study allowed identifying the (rather surprising) notion that the established theory of procedural justice is not able to provide convincing evidence, in the context of the case study, of ombudsman users being able to differentiate procedural fairness from outcome fairness.

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<sup>130</sup> [http://www.ombudsman-services.org/downloads/CAM\\_Research\\_Report.pdf](http://www.ombudsman-services.org/downloads/CAM_Research_Report.pdf)

<sup>131</sup> Ombudsman Services Communications Sector Report 2011. <http://www.ombudsman-services.org/downloads/Communications%202011%20AR.pdf>

## DISCUSSION

This paper describes a preliminary theory testing study, set to ask whether procedural fairness is important in the context of CDR and how it might help to explain users' acceptance of decision-making and legitimacy. The exploratory case study, representing a new field of academic inquiry, showed that there is great need for more comparative empirical data to be able to draw conclusive evidence about users' perceptions of CDR systems, their compliance with CDR and the their legitimacy. Nevertheless, in line with the theory, the case study confirmed a strong link between the quality of a procedure, users' involvement and the overall level of satisfaction with the CDR scheme. This is a clear indication that procedural fairness does matter. However, the data could not clearly separate the perceived process fairness from outcome fairness. Although the theory provides that perceived fairness should result in acceptance of adverse outcomes, this initial study found no evidence to support this.

With a focus on the procedure, the findings of this study support the argument that given the nature of a CDR model is to mediate (reach a settlement through negotiation), rather than to reach a final decision (which is typically not binding on the consumer), perceptions of the procedure itself carry more weight than perceptions of the fairness of the outcome. To be clear, the data does not suggest that outcomes are unimportant but rather that procedural justice judgments make a distinct contribution to people's reactions to the process and the negotiated outcome.<sup>132</sup> Having established this, the next step will be to test in more detail for evidence to support the claim that the quality of treatment received is more important than the objective outcome, and what effect that has on legitimacy.

The data indicated clearly that the outcome, especially an outcome not in favour of the consumer, cast a shadow over the perception of the procedure as a whole. Future empirical research ought to test for additional factors as indicators for quality and perceived fairness of a procedure. These include, for example, user participation, institutional decision- justification and speed of decision-making. Further, the quality criteria for a CDR procedure, set out in the legislation on ADR ought to be put to the test. On this basis, the notion of how process and outcome fairness are related to each other might vary between the different models (techniques) of dispute resolution being applied; for example between formal and informal [legal] procedures.<sup>133</sup>

Following Tyler's approach this paper hoped to draw conclusions about the legitimacy of an ombudsman institution through people's judgements of procedural fairness of decision-making and resulting voluntary compliance. Although the data suggests that people do perceive the ombudsman as procedurally fair, contributing to the institution's legitimacy, it does not appear to tell the whole story. What other factors might contribute to building and maintaining legitimacy in an ombudsman setting? The concept of legitimacy in this context needs further exploration.

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<sup>132</sup> See: Hollander-Blumoff, R & Tyler, T. (2008).

<sup>133</sup> Lind, E. & Tyler, T. (1988). *The Social Psychology of Procedural Justice*. Plenum Press NY; Shetovski, D. (2004). Procedural preferences in Alternative Dispute Resolution. *Psychology, Public Policy and Law* 10 (3), 211-49.

## **Preliminary conclusions and future inquiry**

This paper has focused on a 'bottom-up' approach, placing emphasis on perceptions and self-reported experiences. This explorative study clearly showed that the theory of procedural justice was not able to provide conclusive evidence to solve the puzzle of measuring compliance with, and legitimacy in, ombudsmen procedures. Rather, it provides a very useful starting point on which to explore a new and evolving area of scholarly investigation, and paves the ground for future investigation and theory building.

The universality of the meaning and applicability of procedural justice criteria needs to be scrutinized carefully. There may be different sets of criteria that are more important for different types of dispute resolution techniques, within different (legal) environments. Here, a fundamental question about the meaning of justice needs to be considered. The notion of 'justice' varies according to the nature of the dispute, institutions involved, and cultural beliefs and values.

The current landscape of CDR schemes throughout Europe is irregular. There are different approaches to dispute resolution techniques, procedures and usage. More research is needed to be able to make recommendations about how to best set up a fair and efficient CDR scheme. People's perceptions of procedural justice criteria form a starting point to this inquiry and have uncovered a puzzle. This exploratory study has found that with respect to the substantial body of literature establishing a causal link between procedural justice and the resulting acceptance of a decision cannot be fully transferred to the CDR setting. *Why?* This is particularly curious given the importance of procedural justice to the CDR framework.

Future inquiry needs to put to test the perceived procedural fairness in an everyday setting of further CDR schemes. This comparative assessment includes testing the basic procedural justice requirements determined by the existing body of literature: input (voice) – neutrality – respect/politeness – trust.<sup>134</sup> Questions guiding future research are: If the findings of this paper hold true for other CDR schemes, why then is the model of procedural justice not fully transferable to the CDR procedure? Why is there no evidence that a procedure is perceived independently of the outcome? Has this to do with: (1) the nature of a procedure aimed at settlement; (2) the type of problem complained about; (3) the value of the claim; (4) managing the expectations of consumers; (5) the impact of a complaint on personal circumstances; or (6) different cultural approaches to dispute resolution?

Over the next two years, EU member states must set up horizontal sector CDR coverage and valuable empirical data can be collected for further analysis. Although the expectation is that member states ought to guarantee high procedural standards for 'consumer ADR entities' with the quality criteria set out in the consumer ADR directive, the transition does not promise to be easy. Within the existing CDR schemes there is a vast diversity of procedural approaches, differing national legal cultures and no long-standing, generally applicable, expertise to draw from.

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<sup>134</sup> See for more detail: Hollander-Blumoff, R. & Tyler, T. (2008) 492.

## Bibliography

- Adler, J., Hensler, D. & Nelson, C. Nelson (1983). Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Programme. (Rand Corporation, Santa Monica CA.
- Alleweldt, F. *et al.* (2009). Study on the use of Alternative Dispute Resolution in the European Union. Brussels, Civic Consulting.
- Alleweldt, F. (2011). Cross-Border Alternative Dispute Resolution in the European Union. European Commission.
- Beetham, D. (1991) The legitimation of Power. Basingstoke: Palgrave Macmillan.
- Berlin, C. (forthcoming 2013). Verbraucher-ADR: Freiwilligkeit der Teilnahme und Verbindlichkeit des Ergebnisses im Lichte der AS-Richtlinie. Zeitschrift für Konfliktmanagement (ZKM) 4/2013, 108 ff.
- Berlin, C. (forthcoming 2013). Alternative Streitbeilegung in Verbraucherkonflikten (CDR) in: Jürgen Klowait und Ulla Gläßer, Mediationsgesetz Handkommentar, Nomos-Verlag, Baden-Baden, 608-625.
- Blumoff, R & Tyler, T (2008). Procedural Justice in Negotiation: Procedural fairness, outcome acceptance and integrative potential. 33 Law & Society Inquiry 473, 478-79.
- Bone, R. (1993). Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity. 46 *Vanderbilt Law Review* 561, 625.
- Buck, T., Kirkham, R. & Thompson, B. (2010). The Ombudsman Enterprise and Administrative Justice. Aldershot Ashgate.
- Casper, J., Tyler, T. & Fisher, B. (1988). Procedural Justice among Felony Defendants. Law & Society Review Volume 22 Issue 3, 483-507.
- Craigforth Consultancy (2004). Otelo Office of the Telecommunications Ombudsman Report on Customer Satisfaction; available at: <http://www.ombudsman-services.org/downloads/CustomerSatisfactionSurvey2004.pdf>;
- Craigforth Consultancy (2005). Office of the Telecommunications Ombudsman Customer Satisfaction 2005; available at: <http://www.ombudsman-services.org/downloads/CustomerSatisfactionSurvey2005.pdf>
- Craigforth Consultancy (2006). Office of the Telecommunications Ombudsman Customer Satisfaction 2006; available at: [http://www.ombudsman-services.org/downloads/Customer\\_Satisfaction\\_Survey%20otelo2006.pdf](http://www.ombudsman-services.org/downloads/Customer_Satisfaction_Survey%20otelo2006.pdf)
- Craigforth Consultancy (2007). Office of the Telecommunications Ombudsman Customer Satisfaction 2007; available at: <http://www.ombudsmanservices.org/downloads/Customer%20research%20ReportJune2007.pdf>.
- Craigforth Consultancy (2008). The Ombudsman Service Limited Office of the Telecommunications Ombudsman Customer Satisfaction; available at: [http://www.ombudsman-services.org/downloads/FinalOtelo2008%20\(3\).pdf](http://www.ombudsman-services.org/downloads/FinalOtelo2008%20(3).pdf).
- Creutzfeldt, N. (2013). The evolution and origins of consumer dispute resolution systems in Europe. In C. Hodges & A. Stadler (Eds.), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*. Edward Elgar.
- Easton, D. (1965). A framework for political analysis. Englewood Cliffs: Prentice-Hall.

- Folger, R. (1977). Distributive and procedural justice: Combined impact of “voice” and improvement on experienced inequity. *J. Pers. Soc. Psychol.* 35: 108–119.
- Folger, R., Rosenfield, D., Grove, J., and Cockran, L. (1979). Effects of “voice” and peer opinions on responses to inequity. *J. Pers. Soc. Psychol.* 45: 268–273.
- Genn, H. (1993). *Tribunals and Informal Justice*. The Modern Law Review 56 3 Blackwell Publishing, 393-411.
- Guinier, L. (1991). No Two Seats: The Elusive Quest for Political Equality, 77 VA L review 1413, 1489.
- Harrison, T., Hopeck, P., Desrayaud, N. & Imboden K. I. The Relationship between conflict, anticipatory procedural justice and design with intentions to use ombudsman processes, *IJCMA* 42, 1, 56-72.
- Hensler, D. R. (2004). *Our Courts Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*. Santa Monica, CA: RAND Corporation.
- Hinde, J. (2010). DJS Research Ltd Office of the Telecommunications Ombudsman Customer Satisfaction 2010 July 2010, available at: <http://www.ombudsman-services.org/downloads/CustomersurveyOtel02010.pdf>
- Hinde, J. (2011). DJS Research Ltd Ombudsman Services: Communications Customer Satisfaction 2011 A Research Report available at: <http://www.ombudsman-services.org/downloads/Communications%20Customer%20Sat%20Report%202011%20-%20DRAFT%2024.06.pdf>
- Hodges, C. (2012). Consumer ADR in Europe. *Zeitschrift für Konfliktmanagement* 6, 195-197.
- Hodges, C., Benöhr, I. & Creutzfeldt-Banda, N. (2012). *Consumer ADR in Europe*. Oxford: Hart.
- Hodges, C., Benöhr, I. & Creutzfeldt-Banda, N. (2012). (Introduction) *Consumer ADR in Europe* Oxford: Hart, 29-30.
- Hodges, C. (2012). Current discussions on consumer redress: collective redress and ADR. *ERA Forum*: Volume 13, Issue 1, 11-33.
- Hopt, K. & Steffek, F (2012). *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: OUP.
- Hough, Mike and Jackson, Jonathan and Bradford, Ben and Myhill, Andy and Quinton, Paul (2010) *Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice*, 4 (3). pp. 203-210.
- Jackson, J., Huq, A. Z., Bradford, B.; Tyler, T. (2013). Monopolizing force? Police legitimacy and public attitudes toward the acceptability of violence. *Psychology, Public Policy, and Law*, Vol 19(4), 479-497.
- Knudsen, P. F., Stanczak, P., Vicari, F. & Sciallis, E. (2009). Cross-Border Dispute Resolution mechanisms in Europe- Practical Reflections on the need and availability. ECC-Net. <http://www.eccbelgie.be/images/downloads/ADR-report-final.pdf>
- Korsgaard, M.A., Schweiger, D. M. & Sapienza, H, J. (1995). Building Commitment, Attachment, and Trust in Strategic Decision-Making Teams: The role of Procedural Justice. *Academy of Management Journal*, Vol 38, No 1 60-84, p. 68.
- Leventhal, G.S. (1980). What Should Be Done with Equity Theory?, in K. J. Gergen, M.S. Greenberg, and R. H. Weiss (eds.)

Lind, E. (1982). The psychology of courtroom procedure. In Kerr, N. L., and Bray, R. M. (eds.), *The Psychology of the Courtroom*, Academic Press, New York.

Lind, E. (1986). The Court-Annexed Arbitration Programme in North Carolina. Rand Corporation, Santa Monica, CA.

Lind E. A., Kulik, C. T., Ambrose, M. & de vera Park, M. V.(1993). Individual and corporate dispute resolution: Using procedural fairness as a decision heuristic. *Administrative Science Quarterly* 38, 224-251.

Lind, E. & Tyler, T. (1988). *The Social Psychology of Procedural Justice*. Plenum Press NY.

Lissak, R. & Sheppard, B. (1983). Beyond fairness: The criterion problem in research on dispute intervention. *Journal of Applied Soc. Psychology* 13, 45-63.

McEwen, C. & Maiman, R. (1984). Mediation in Small Claims Court: Achieving compliance through consent. *Law Society Review* 18:11-49.

McEwen, C. & Maiman, R. (1987). Small Claims Mediation in Maine: An empirical assessment. *Maine Law Review* 33:237-268.

Menkel-Meadow, C. (1983). Legal Negotiation: A Study of Strategies in Search of a Theory. *AM. B. FOUND. RES. J.* 905

Menkel-Meadow, C. (1984). Toward another view of legal negotiation: The structure of problem solving. *University of California Law Review*, 31, 754-842.

Menkel-Meadow, C. (1991). Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The Law of ADR. *Florida State University Law Review*, 19, 1-46.

Michelman, (1977). Formal and Associational Aims in Procedural Due Process. In Due Process J Pennock & J Chapman, (eds). *Nomos*, 18, 126.

Paternoster, R., Brame, R., Bachman, R. & Sherman, L. (1997). Do fair procedures matter? The effect of procedural justice on spouse assault. *31 Law & society Review*, 163-204,165.

Pruitt, D., Peirce, R., McGillicuddy, N., Welton, G. & Castrianno, L (1993). Long term success in Mediation. *Law and Human Behavior* 17 (3), 313-330.

Rawls John (1971). *A Theory of Justice*, Oxford University Press, London.

Seneviratne, M. (2002). *Ombudsmen Public Services and Administrative Justice*. Butterworths Lexis Nexis.

Shetovski, D. (2004). Procedural preferences in Alternative Dispute Resolution. *Psychology, Public Policy and Law* 10 (3), 211-49.

Silbey, S. & Merry, S. (1986). Mediator settlement strategies. *Law and Policy* 8: 7-32.

Solum, L. (2004). Procedural Justice. Public law and Legal Theory Research Paper Series no. 04-02. Available at: <http://ssrn.com/abstract=508282>, 54 ff.

Stipanowich, T. J. (2004) ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution". *Journal of Empirical Legal Studies* Volume 1, Issue 3, 843-912.

Sternlight, J. R. (2007) Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad, 56 DePaul L. REV. 569.

Stuyck,J., Terryn, E., Colaert, V., Van Dyck,T., Peretz, N., Hoekx, N. & Tereszkieicz P. (2007). Study on alternative means of consumer redress other than redress through ordinary judicial proceedings. Catholic University of Leuven.

Thibaut, J. & Walker,L. (1975) Procedural Justice. Erlbaum Hillsdale NJ.

Tyler, T. (1984). The role of perceived injustice in defendant's evaluations of their courtroom experience. *Soc. Rev.* 18, 51-67.

Tyler, T (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review* 22, 301-355.

Tyler, T. (1996). The relationship of the outcome and procedural fairness: How does knowing the outcome influence judgments about the procedure? *Social Justice Research*, Volume 9, Issue 4, 311-325.

Tyler, T. (1997). Compliance with Intellectual Property Laws: A Psychological Perspective, 29 *N Y U J International L & Pol* 219, 231.

Tyler, T. (2003). Procedural justice, legitimacy, and the effective rule of law. In M. H. Tonry (Ed.), *Crime and justice: A review of research*. Vol. 30, Chicago London: University of Chicago Press, 431-505.

Tyler, T. (2011). *Mechanisms of Legal Effect: Theories of Procedural Justice; A methods Monograph for the Public Health Law Research Programme Temple University Beasley School of Law* 2011 available at: <http://publichealthlawresearch.org/methods-guide-type/monograph/method-guide/mechanisms-legal-effect-theories-procedural-justice>.

Tyler, T, Boeckmann, R., Smith, H. & Huo, Y. (1997). *Social Justice in a diverse Society*. Westview Press, 75-76.

Tyler, T. & Caine, A. (1981). The Influence of Outcome and Procedures on Satisfaction with Formal Leaders. *Journal of Personality and Social Psychology* 41, 642.

Tyler, T. & Folger, R. (1980). *Distributional and procedural aspects of satisfaction with citizen-police encounters* in *Basic Applied Psychology* 1, 281-292.

Tyler, T. & Lind, E. (1986). Procedural processes and legal institutions. Paper presented at the International Conference on Social Justice in Human Relations, University of Leiden, The Netherlands.

Tyler, T.; Rasinski K., Spodick N. (1985). "Influence of voice on satisfaction with leaders: Exploring the meaning of process control". *Journal of Personality and Social Psychology* 48: 72-81.

Tyler, T (1988). What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures. *Law & Society Review* 22, 301-355; Tyler, T.R. (2006). What do they expect?: New findings confirm the precepts of procedural fairness. *California Court Review*, Winter, 22-24.

Vidmar, N. (1981). Justice motives and other psychological factors in the development and resolution of disputes. In M Lerner & SW Lerner (eds) *The Justice Motive in Social Behaviour*. NY Plenum Press.

Vidmar, N. (1991). The Origins and Consequences of Procedural Fairness [review of Lind, A & Tyler, T *The Social Psychology of Procedural Justice* New York Plenum 1988]. American Bar Foundation.

Walker, L. & Lind, E. (1984). Psychological studies of procedural justice. In Stephenson, G. M., and Davis, J. H. (eds.) *Progress in Applied Social Psychology*, Vol. 2, Wiley, New York, 293-313.

Yin, R.K. (1994). *Case Study Research: Design and Methods*, 2<sup>nd</sup> ed. Sage, 13.

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) OJ L 165/63.

Regulation (EU) 524/2013 of the European Parliament and of the council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L165/ 1.

98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. OJ L 115/31.

2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes COM (2011) 793 . O J L 109 0056 – 0061.