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CONSUMER PROTECTION: DELIVERING REDRESS

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THE CRITERIA FOR EVALUATING MECHANISMS

1. Accessibility
2. User-friendliness
3. Speed/duration
4. Cost:
 - initial and net to the consumer and
 - total cost proportionality
5. Delivery of outcomes:
 - redress
 - changes in future trading behaviour/re-balancing the market to a level competitive playing field

Mechanisms: Increased Choice

- More Mechanisms
 1. Collective litigation
 2. Civil piggy-back on criminal
 3. ADR? Primarily individual but not collective
 4. Consumer Ombudsmen
 5. Regulatory redress

- The consequences of Pluralism:
 - Ability to compare: What are the results?
 - Are the opportunities being seized?

Little collective litigation across Europe: Why?

- Lack of adequate *funding*: collapse of state-funded legal aid, and no tradition of lawyer funding, but note growth of third party Litigation Funding (TPF)
- Adverse *cost-benefit* ratio: loser pays rules, modest damages, rare punitive/triple damages, modest compensatory damage
- More safeguards (hence barriers) in the EU system than US legal system: Catch 22!
- Culture that separates behavioural control (regulation) from litigation (compensation) [unlike private enforcement policy in USA], but is the EU model re-integrating redress and behaviour?
- Alternative pathways for mass problems

Litigation Model

- Injunctions actions:
 - Theoretically few problems, but the cases show some real practical problems
- Damages actions:
 - Wide variations in national procedural models
 - Widespread evidence of problems:
 - Funding/costs issues: need money or favourable cost-shifting
 - Certification hurdle: cause of delay and cost
 - Variable merits
 - Frequently long duration
 - Do consumers get good outcomes?
 - High transactional costs

Regulatory Redress Powers

1. Power to effect redress amongst the enforcement toolbox
2. Regulators viewing redress as a key objective
3. In practice: negotiated solutions

Denmark

- Consumer Ombudsman: unique opt-out class action since 2008 and antitrust 2010; no action yet brought, but the power constantly influences discussions

UK

- Sectoral powers: Financial services, Energy, Water, Gambling ...
- Consumer: 'Enhanced Consumer Measures' in Consumer Rights Act 2015

Ireland, Italy

- Financial services: cases by Central Banks

OFGEM secures £1.7 million for consumers following E.ON error

BT must pay nearly £100m to rivals after overcharging

OFFICE OF THE GAS AND ELECTRICITY
MARKETS (OFGEM) RESTORATIVE JUSTICE
POWERS IN ACTION—SECURING PAYBACK
OF AROUND £1.4 MILLION GBP FROM E.ON

BT FACES
£94M IN
REPAYMENTS
FOR
OVERCHARG-
ING

**Barclays refunds
300,000
customers after blunder**

*Npower pays £3.5m
Ofgem penalty out to customers*

BT forced to refund
rivals £100m for
overcharging

**E.ON forced to hand back
£1.7m after overcharging**

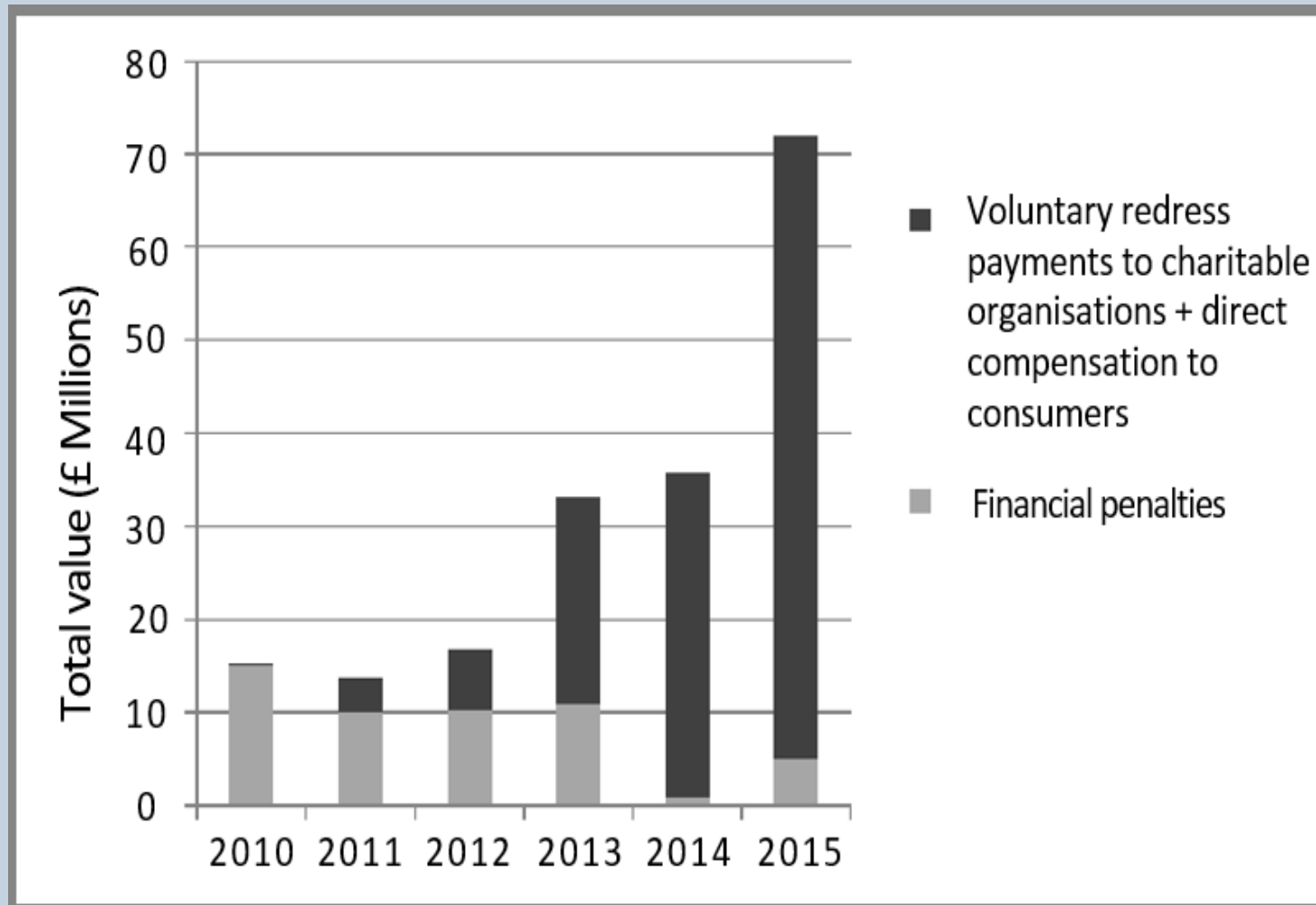
Redress Paid: UK Financial Services

- informal redress schemes: 21 schemes April 2014-Nov 2015: £131 million
- single firm scheme: eg Halifax variable interest rate tracker mortgages, £20 million
- consumer redress scheme: eg *Arch Cru* intermediaries
- 2014: Credit Suisse and Yorkshire BS: fined £3.8 million, customers to be contacted and offered ability to exit the product without penalty and with interest
- 2015: Affinion Int: card security products sold from 2005 @ £25, court approved scheme, £108.2 million paid to 533,000
- 2016: Motormile Finance: £154,000 paid and £414 Million debts written off re 500,000 customers; independent reviewer, new CEO
- 2016: RBS scheme for SME customers of its Global restructuring group; £400 million; overseen by judge

Redress Paid: UK Sectoral Regulators

- Ofcom 2007: GMTV dial-in competitions: fined £2 million, reduced as voluntary CEO resignation, systems changes, refunds offered, £250,000 to charity
- Ofwat 2014: Thames Water £79m price reduction, £7m spent on customers, fine £1
- Ofgem 2015/16: 13 cases, payments of £43 million to customers (£26m) & charities (£19m)
- Gambling Commission 2016: Betfred £443,000 paid to victims of criminal activities by an employee, £344,500 to social causes
- Environment Agency 2016: 10 proactive & 7 reactive cases, £403,000 paid to environment charities

Ofgem: shift from fines to redress



Consumer ADR as market regulation: The Ombudsman model

Some CADR mechanisms deliver redress and behavioural effects, some do not – it depends on *system design*

The Five Functions that Consumer Ombudsmen can deliver:

1. Consumer information and advice/Triage
2. Dispute resolution: individual and collective
3. Capture and Aggregation of data
4. Feedback of information
 - identification of issues and trends
 - publication
5. Pressure on market behaviour;
 - NB Directive 2013/11/EU, art 17

UK Financial Ombudsman Service

	Initial enquiries & complaints	New cases	Cases resolved informally by adjudicators	Cases resolved by ombudsmen
2014/15	1,786,973	329,509	405,202	43,185
2013/14	2,357,374	512,167	487,749	31,029
2012/13	2,161,439	508,881	198,897	24,332
2011/12	1,268,798	264,375	201,793	20,540
2010/11	1,012,371	206,121	147,434	17,465
2009/10	925,095	163,012	155,591	10,730
2008/09	789,877	127,471	105,275	8,674
2007/08	794,648	123,089	91,739	7,960
2006/07	627,814	94,392	104,831	6,842
2005/06	672,973			
2005	614,148			
2004	562,340			
2003	562,340			

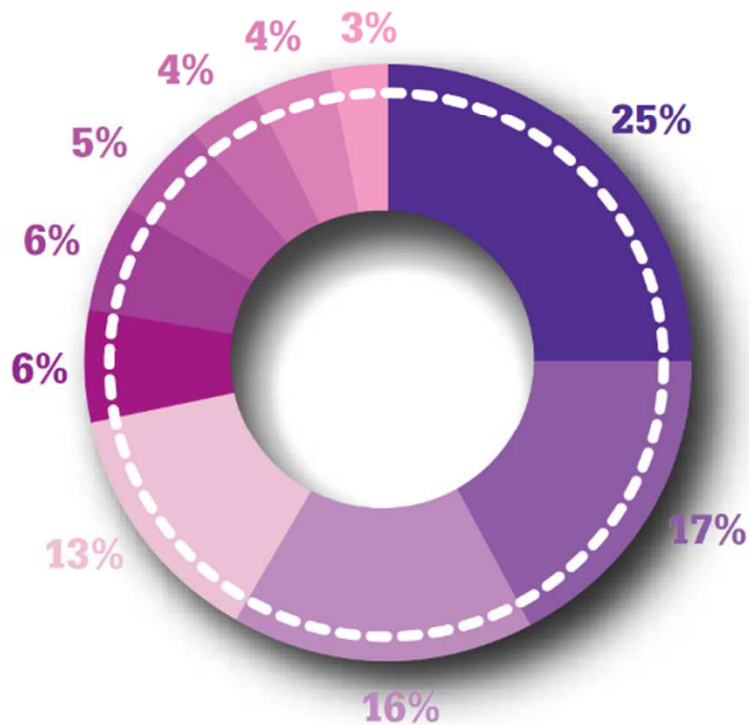
Belgian Consumer Ombudsman Service

Total complaints in 2015: 2,921	June	July	August	September	October	November	December
In French	152	124	113	133	141	115	139
In Dutch	337	242	280	248	197	339	361

Total complaints in 2015	2921
Registered complaints in 2015	2174
Total complaints dealt with and closed in 2015	1242
Questions in writing for information	123
Complaints outside competence CMS	747

Belgian Consumer Ombudsman Service

Classification per category



- 25% Guarantee
- 17% Defective product
- 16% Undelivered product or service
- 13% Product or service does not correspond to order
- 6% Partial delivery and performance
- 6% Unjustifiable billing
- 5% Other problems related to the delivery of a good
- 4% Customer service
- 4% Breaking the contract
- 3% Wrong billing or order form

Belgian Consumer Ombudsman Service: 2015

- average handling duration: 38 days
- categories of cases with the shortest average handling duration
 - safety: 6 days
 - agreements and sales: 9 days
 - invoice: 17 days
- categories of cases with the longest average handling duration:
 - postponed deliverance: 68 days
 - fraudulent clauses and conditions: 52 days
 - guarantee: 50 days

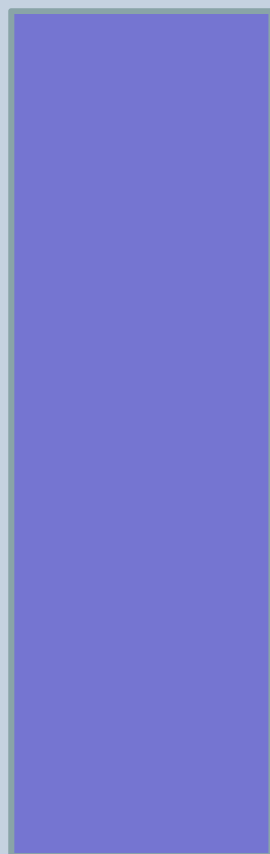
Collaboration between Ombudsman and Regulator

1. Ombudsman identifies a number of similar claims – a trend;
applies a consistent approach to resolution
2. Ombudsman publishes information on complaints activity
3. Reactions:
 1. Traders: ability to correct
 2. Consumers: buying choices, switching
 3. Competitors: market response
 4. Media/market comment: reputation
 5. Regulators: appropriate scrutiny and action
4. Regulator discussion with companies:
 1. Power to make trader review records and pay redress, with claims over to the ombudsman
 2. Power to impose redress scheme
 3. Oversight of voluntary/scheme redress: enforced
 4. Consumers may go spontaneously to ombudsman

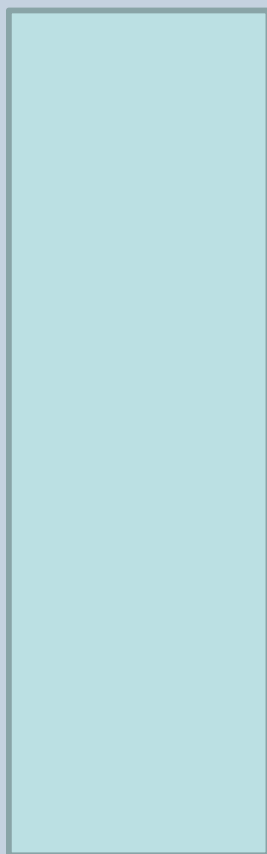
Personal Injury Redress Schemes

- New Zealand Accident Compensation Scheme
- Swedish Road Traffic Injuries Commission
- Swedish Patient Compensation
- Swedish Drug Insurance
- Danish Industrial Injuries Board
- Danish Road Traffic Injuries Commission
- Danish Patient Compensation
- Danish Drug Compensation
- Finnish Workers Compensation
- Finnish Motor Vehicle Insurance Commission
- Finnish Patient Insurance
- Finnish Drug Insurance
- Norwegian Patient & Drug Compensation
- Norwegian Workplace Insurance
- *L' Office National d'Indemnisation des Accidents Médicaux, des affections iatrogènes et des infections nosocomiaux (ONIAM)*
- Polish No-Fault Medical Liability Scheme
- German Pharmapool
- German medical Schlichtungsstellen
- Irish Personal Injuries Assessment Board
- Japanese Pharmaceutical Injury Compensation Scheme
- U.S. no fault motor vehicle injuries schemes: Florida, North Dakota, Colorado
- Vaccine Injury Compensation Schemes: eg UK, USA, Ebola,
- The Industrial Injuries Disablement Benefit (IIDB)
- The Armed Forces and Reserve Forces Compensation Scheme
- The Criminal Injuries Compensation Scheme
- The Mesothelioma Compulsory Insurance Fund and Compensation Scheme
- The Coal Workers Pneumoconiosis Scheme 1974
- The Coal Health Compensation Schemes
- The Thalidomide Trust
- The Skipton Fund for Hepatitis C and HIV
- The vCJD Trusts
- *The ABPI Guidelines for Compensation in Clinical Trials and Healthy Volunteers*
- The ABHI Clinical Investigation Compensation Guidelines
- The General Dental Council's dental Complaints Service
- The NHS Injury Costs Recovery (ICR) scheme
- NHS Complaints
- The Parliamentary and Health Service Ombudsman
- NHS Redress Act 2006
- ICI Eraldin
- Dow Corning breast implant scheme
- Trilucent breast implant scheme
- J&J ASR hip reimbursement programme

Evolution from a 2 pillar model of enforcement



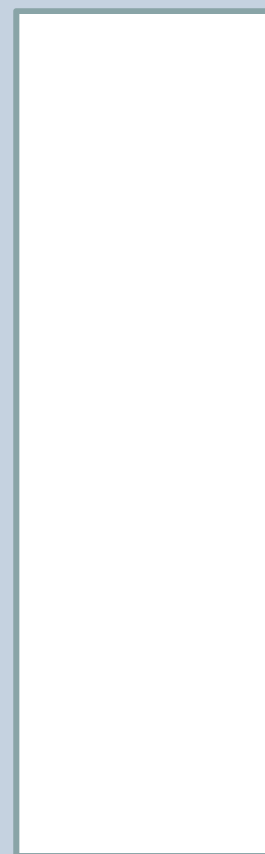
Public
Regulation



Co-
regulation



ADR



Private
Litigation

Conclusions I

The clear winners in relation to satisfying the criteria (access to justice, user-friendliness, speed, cost, outcomes) are regulatory redress and consumer ombudsmen

The mass litigation model comes in last place. Is the mass litigation model capable of satisfying the criteria of access, speed, cost, outcomes?

Policymakers should adopt *new technology*:

- Consumer Ombudsman model
- Regulators with redress powers

because they:

- Attract/process many individual cases
- Are capable of recognizing similar cases, and then processing them collectively and consistently
- Are capable of aggregating data and feeding it back to affect trading and market behaviour

Conclusions II

The underlying socio-political issues relate to

- a) What mechanisms best affect behaviour, performance and innovation?
- b) How to generate maximal individual involvement and performance data whilst avoiding polarisation of the polity?
- c) Should the cultural style be based on collaboration and solidarity rather than on adversarial polarization?