

Independent review of administrative law: call for evidence

UK Finance response

23 October 2020

Introduction

1. UK Finance is the collective voice for the banking and finance sector. Representing more than 250 firms, we act to enhance competitiveness, support customers and facilitate innovation.
2. We welcome the opportunity to respond to the call for evidence issued by the Independent Review of Administrative Law Panel. To discuss our submission, please contact Matthew Conway, Director, UK Public Affairs, at matthew.conway@ukfinance.org.uk.

Judicial review in banking and finance

2. We are responding to the call for evidence in general rather than specific terms and in the context of its application to the regulation of banking and finance by, in particular, the Bank of England (including the Prudential Regulation Authority), the Financial Conduct Authority (FCA) and the Payment Systems Regulator.
3. Judicial review is the mechanism through which banking and finance regulators are meant to be held accountable under the law to those who are or could be affected by their actions. In theory, it allows market participants to challenge a regulator that has acted unlawfully in the way that it has come to a decision. Judicial review enables challenge both to the way in which a regulator has created rules and to how it has interpreted and enforced existing rules.
4. However, as is commonly recognised, the practical application of judicial review as an accountability mechanism in banking and finance is limited. The importance of maintaining effective engagement with regulators that exercise close oversight of their activities and decisions means that larger firms in particular are loathe to pursue a judicial challenge. The dual nature of, for example, the FCA as both a supervisor and an enforcement authority does not help in this regard. We note that judicial review of the decisions of banking and finance regulators is rare in comparison to those of economic regulators of other sectors (e.g. Ofcom in respect of electronic communications).
5. In addition, time, cost and resource considerations should not be underestimated, and these factors, in combination with the uncertainty of outcome involved, further deter challenges to regulators' decisions by judicial review.

6. Nonetheless, judicial review is currently the principal, if not only mechanism, available to market participants in the event they wish to challenge a decision of a banking and finance regulator. Given this, and notwithstanding the shortcomings of judicial review as a challenge mechanism, we believe it would be severely detrimental if the route to judicial review and/or the judicial-review process itself were made even more onerous. On this basis, we would strongly advocate that any changes proposed avoid putting in place additional barriers or restrictions that would act as a further deterrent to judicial review.