Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market

By Simon Walker CBE, Professor Christopher Hodges, Professor Robert Blackburn

Tuesday 23rd October 2018

Executive Summary

During and after the Global Financial Crisis ten years ago, there was intense pressure on UK financial institutions to reduce their risk exposure. A significant number of small and medium sized business customers, especially those which had borrowed substantially, often in regard to commercial property, were treated in a cavalier manner. Loans were called in, many businesses suffered financial distress and some collapsed.

Although their treatment by particular financial institutions may have been harsh, there is scant evidence of widespread criminality or any regulatory breaches. Commercial lending is not a regulated activity and the Financial Conduct Authority (FCA) clearly did not have the power to sanction the individuals involved.

In the wake of the financial crisis, regulatory standards have been substantially tightened - as have lending and capital requirements. The loans would never have been made in today's business environment, and the banks' approach could certainly be held to account. SME customer complaints now are relatively mundane and generally settled quickly and responsibly.

In any dispute between a financial institution and SME, there is a massive power imbalance. Only the richest businesses can contemplate taking a bank to court. A low-cost, rapid and independent vehicle is needed for arbitrating serious disputes between financial organisations and vulnerable companies, especially those employing fifty or fewer people with a turnover of a few million pounds a year.

The Financial Ombudsman Service today is heavily geared to complaints from individual consumers. A separate division with a clear business identity and appropriate skills should be set up under the statutory umbrella of the existing FOS. At the core of the new body will be real time data monitoring and feedback to the Financial Conduct Authority and appropriate government departments, which will enable potential problem areas to be identified at an early stage. An expert Financial Services advisory group should be brought together to advise this new vehicle on technical banking and legal issues.

All the extensions to jurisdiction announced following the FCA's consultation on SME access to the FOS in October 2018 should be implemented. In addition, the banks should agree to establish a mechanism on a voluntary basis to make a resolution capability available to businesses with turnover up to £10m. This mechanism should include some legacy disputes which have not been dealt with by any court or arbitration body

Finally, senior representatives of the major banks should support a formal process that seeks to achieve reconciliation and closure where they meet a representative sample of affected small and medium sized enterprises and listen to and acknowledge the loss experienced by those businesses and commit to a

new system of dispute resolution and other measures to ensure past issues do not infect their future relationship.

Introduction

In the wake of revelations about the treatment of small and medium-size enterprises (SMEs)[1] by a number of finance providers responding to the Global Financial Crisis of 2007-8, there have been several investigations[2] which have detailed the severe impact on the lives and businesses of those who were affected.

This report does not intend to cover that ground or discuss individual cases. Instead it will analyse the potential of non-court methods for the fair and effective settlement of future disputes between banks and their SME customers, as well as suggesting a way of bringing closure to some of the victims of past malpractice. Key to the methodology of dispute resolution is the ability of a system to provide rapid feedback to regulators and government departments.

It is important to divide the past from the future. The nature, practice and regulatory regime governing UK finance providers has changed over the past decade. Of course, we must learn from the past, but designing a system focused

[1] There are a number of thresholds in law and regulation below which businesses are considered to merit special attention or protection. EU thresholds range from those of the microenterprise definition (employing fewer than 10 people and with a turnover below 2 million euros) to those of the SME (up to 250 employees and a turnover up to 50 million euros and/or balance sheet of up to 43 million euros). For the purposes of this paper I am using the definition of a business with up to 50 employees and turnover of up to £6.5 m per annum, which matches the threshold past which businesses may opt out of ring-fencing, as described in the ringfenced activities order, or below which borrowers benefit from the protections set out in the Lending Standards Board's 'Standard of Business Lending Practice'. This is also the 'small business' threshold described in the FCA's consultation on the scope of the Financial Ombudsman Service.

[2] Including reports by Dr Lawrence Tomlinson, Clifford Chance, Sir Andrew Large and the Promontory Financial Group (UK) Ltd (with Mazars)

principally on historic problems would limit its capacity rapidly to identify future systemic issues as they begin to be manifested. Such an approach would also be to reject all regulatory reform since the crisis as insufficient to prevent that era's problems from recurring.

This Report

In April 2018 I was invited by UK Finance to undertake an independent assessment of alternatives to litigation in disputes between banks and small and medium sized businesses (SMEs). To assist in this exercise, I was helped by two distinguished academics, Professor Christopher Hodges, Professor of Justice Systems at the University of Oxford, and Professor Robert Blackburn, Director of the Small Business Research Centre at Kingston University.

Professor Hodges has produced a comprehensive summary of possible alternative dispute mechanisms to manage issues between banks and their business customers, with a particular emphasis on the need for the outputs to affect banking culture and future behavior. He also draws on concepts of restorative and transitional justice to discuss ways of providing emotional closure for those who have been victims of past abuse. This is published as part two of this review.

Professor Blackburn and his team have processed data from the major UK banks regarding complaints from SME customers and have also conducted qualitative interviews with SMEs who have current issues with their banks as well as with past claimants. In addition, they have incorporated data from a bespoke survey for this review undertaken by BDRC, the Charterhouse Business Banking Survey and the SME Finance Monitor. This is published as part three of this review

Objectives & Terms of Reference

The terms of reference given to me by UK Finance were extremely wide-ranging and encouraged me to seek input from SMEs, relevant trade associations, legal, regulatory and governmental organisations and those who saw themselves as victims of bad banking practice. I was offered assistance in making contact with individual banks but was given no steer on the outcome of my independent report.

In my previous roles as Director General of the Institute of Directors (IoD) from 2011 to 2017, and Chief Executive of the British Private Equity and Venture Capital Association (BVCA) between 2007 and 2011, I was at times extremely critical of UK banks and I have never hesitated to point out behaviour that I believed damaged public faith in this country's financial system.
I do however recognise the need for any market economy to have an efficient and properly regulated banking system in order for business and commerce to function. Notwithstanding the wrongs of the past, I regard my main challenge as recommending an appropriate and proportionate methodology for resolving future disputes between banks and their small and medium-sized customers which will also act as a brake on future wrongdoing.

This report then serves three purposes:
(i)To recommend ways in which banks and small and medium sized businesses can resolve future grievances and complaints. The emphasis is on fast, effective and fair dispute resolution wherever possible without incurring the expense of hiring lawyers and court action.

(ii)To help ensure that the excesses of the financial crisis in the first decade of this century cannot be repeated and that record-keeping and data flows about SMEs be used to monitor bank behaviour and culture and provide an early warning system of customer mistreatment.
(iii) To suggest a method of closure which might be acceptable to the individuals and their families who suffered because of poor SME-related banking practice following the 2007-8 financial crisis.

Since April 2018 I have undertaken a wide range of research and spoken to many individuals from banks, legal, accountancy and restructuring practices, financial regulatory authorities and ombudsmen, interest groups, business representative organisations, Members of Parliament and of the All Party Parliamentary Group on Fair Business Banking (APPG) many of whose participants were, or represented, victims of product mis-selling or unreasonable treatment by a number of banks during or after the Global Financial Crisis (GFC).

The APPG was set up in 2012 to campaign on the issue of interest rate hedging products (IRHPS). The Financial Conduct Authority identified failings in the sale of some of these products to unsophisticated customers and launched a review. The APPG subsequently expanded its remit to cover the mistreatment of customers of banks, particularly those of the Royal Bank of Scotland's Global Restructuring Group (RBS/GRG) and HBOS in Reading. I have focused much of my attention on these cases.

The Past

No one can fail to be moved by the experiences of those who suffered through mistreatment during and after the financial crisis and who believe it was caused

by their banks. In the course of compiling this report I have met small business owners – some now bankrupted – who told me they suffered because of poor banking practice over the period of the financial crisis. Their stories represent genuine human, family and business tragedies. Many lost their livelihoods as a result of what seems to have been callous, sometimes brutal treatment: one example cited to me has a customer told "I don't give a shit about your business".

The most harrowing feature of the parliamentary debates initiated by the APPG has been the victims' stories. As noted, the group was set up to bring victims together, to fight for the rights of those who suffered through banking abuses, to seek a public enquiry and to recommend alternatives to going to court to secure satisfaction.

The cases date back mainly to the 2007-2008 crisis. Individuals running SMEs were sold complex and high-risk products they did not understand and to which they were clearly unsuited. These products certainly offered upside potential, but customers were not given any proper explanation of their potentially terminal downside risk.

All this, and much else, is spelled out in detail in the Skilled Person's (section 166) report prepared by Promontory for the Financial Conduct Authority. In relation to RBS, 5900 small and medium-sized companies were managed by its restructuring group GRG between 2008 and 2013. Ninety per cent of those customers are said to have received some form of mistreatment, and in the representative sample examined by Promontory, inappropriate behaviour by RBS caused material financial distress in around 16% of them.

It should be noted however that “almost all customers who entered GRG were already exhibiting clear signs of financial difficulty” and that “over a third of the 5900 SME customers transferred to GRG during the review period were not viable at or around the time of transfer”.

It is important not to generalize about “the banks”. No doubt all banks faced strain during the GFC. But in terms of numbers, RBS business customers seem to have suffered disproportionately. According to Promontory, only 10% of businesses transferred into the GRG subsequently returned to the mainstream bank. The comparable figure for one of RBS’s main competitors was that 70% of companies going into its turnaround unit returned to the mainstream bank. There could be a number of explanations for this including other banks identifying problems at an earlier stage and/or dissatisfied customers taking an early decision to move from competitor banks. But RBS certainly saw a very different outcome to its banking peers.

Understandably most claimants represented by the APPG are very angry and frustrated. Many believe their lives have been wrecked – their businesses destroyed, their marriages broken and their health damaged by the way they have been treated. Established, often family, businesses went to the wall as collateral damage. Individuals are now bankrupt, and others have lost their houses. It is little surprise than they are angry and, sometimes, obsessive.

There is a considerable roll call of Members of Parliament who have represented their cases in strident terms. MPs are responsible to their constituents, not to banks, and there have been few voices raised to defend the financial sector.

At each of the parliamentary debates in the House of Commons during the past year, MPs from all wings of all parties told stories of shameful behaviour by the banks and demanded strong and immediate action.

What happened

The situation facing all the trading banks in the wake of the 2007-2008 crisis was fraught and unprecedented. It precipitated a major economic recession. Many businesses were not robust enough or adequately prepared to survive such circumstances. It was inevitable that there would be considerable collateral damage to customers, many of whom had gone out on a limb ahead of the financial crisis.

In mid-2007 there had been a period of financial instability and many banks began to stop lending to each other due to fears of potential losses on high-risk US mortgages, leading to the credit crunch. The collapse and subsequent nationalisation of Northern Rock, Lloyds' takeover of Halifax Bank of Scotland (HBOS) and government control of Bradford and Bingley led to a febrile financial climate. Property values also fell rapidly. There were major problems in the commercial real estate sector where yields fell significantly, endangering the stability of loans where property had been required as collateral, and where its subsequent sale became the source of repayment.

Banks are never likely to be popular institutions, particularly at a time of financial crisis, and over the past two decades there have been a series of crises – payment protection insurance (PPI), Libor fixing, alleged money-laundering - that have damaged their public standing. The two best known examples which

have particularly impacted the UK SME sector relate to Royal Bank of Scotland and to Lloyds, which took over a failing HBOS, at the time Britain's biggest mortgage lender, in 2008. The two cases are different.

RBS

Following its expansion during the Fred Goodwin era, RBS had become by some measures the largest bank in the world. When the Bank had to be rescued by the British Government in October 2008 at a cost to taxpayers of around £45 billion, in the words of the Chancellor, Alastair Darling, "we were very clear that if RBS had collapsed it would have brought down the entire (financial) system" leading to "complete panic….and the breakdown of law and order".[i]

The immediate requirement for RBS's new management was to reduce the bank's size drastically and slash its balance sheet from over £2 trillion to £800 billion, a staggering cut. The urgency of that task meant that reducing the bank's exposure – which included calling in loans to small and medium-sized businesses - was seen by some as an easy early option.

More than half of what subsequently came to be widely known as RBS's Global Restructuring Group (GRG) cases involved commercial property. It is true to say that many SMEs which had previously borrowed to expand or invest had become over-extended. This is an important point. Although media reports have sometimes suggested banks were guilty of selling swaps to small shopkeepers, a very high proportion of the GRG and Interest Rate Hedging Products population of complainants involved property businesses.

Commercial property values fell significantly over the financial crisis. Loans which provided adequate collateral at the time they were made now had much less of a margin of security simply because valuations had dropped substantially.

There was also significant mis-selling of complex and sometimes unnecessary financial products which exacerbated downside risk for SME customers already in difficulties. Many of the extra fees required by the banks were excessive, particularly in the case of RBS. It is plausibly argued that individual bank employees were inappropriately incentivised to call in loans too quickly and with a distinct lack of sympathy for the plight of the businesses affected.

In November 2013, Lawrence Tomlinson, the entrepreneur-in-residence at the Department of Business, Innovation and Skills, published a report which accused Royal Bank of Scotland of "killing off" small firms in its GRG turnaround unit by charging exorbitant fees and withdrawing lines of credit. RBS appointed Clifford Chance to examine these claims. The Financial Conduct Authority, clearly concerned, sought a response from all the banks, and subsequently initiated a skilled person's section 166 review by Promontory Financial Group into RBS/GRG.

It is important to note that, whilst both reports were highly critical of RBS, neither found evidence of fraud or actions which were illegal (nor had Lawrence Tomlinson made this accusation).

The whole Global Restructuring Group saga reflects extremely poorly on the banking community. The obvious conflicts implicit in RBS's West Register which ended up owning some of the assets sold out of receivership also show bad judgement from the top.

Lloyds/HBOS

The situation with Lloyds/HBOS was very different. The frauds, which took place in HBOS's Reading branch over the period 2002-2007, referred victims to a turnaround consultancy where they were saddled with unmanageable amounts of debt before being taken over and asset stripped. There was clear criminality, and in 2017 six individuals, two of whom were bank employees, were sentenced to a combined 47 years in prison for fraud.[ii]

72 banking clients were affected including the entertainer Noel Edmonds who maintains he is owed £60 million by Lloyds and who has secured financial support for legal action from Therium, one of the world's longest-established litigation funders. [iii]

Responses by the Banks: Griggs and Blackburne

The banks initiated investigatory processes to assess complaints in these two areas with external supervision and the right of appeal in the hands of distinguished outsiders.

RBS: At the suggestion of the Financial Conduct Authority, RBS set up a complaints and compensation scheme with former High Court judge Sir William Blackburne providing external scrutiny. There was an automatic refund of complex fees and this process was completed in July 2017, with offers worth £115m made to 3,500 customers.

The bank assessed complaints via an internal process including legal input from a customer champion with the right of appeal to Sir William. This was opened in November 2016. The process is thorough, involving a significant number of

highly qualified individuals. It is extremely expensive for RBS. There is no reason to doubt that the system is intended to be fair, but it cannot – perhaps understandably - be said to be transparent. This is exacerbated by the level of control the bank had over the setting up of the scheme: understandably it may not have looked independent to some SMEs. The fact that the process is on paper and impersonal also means there is no direct opportunity for the victims' voices to be heard and this adds to the need for some sort of closure and catharsis mechanism.

To date, RBS has received 1,230 complaints from the 16,000 customers eligible to use the scheme, and a further 165 complaints from those outside its scope. The bank has so far issued a conclusion in 803 cases, upholding 370 in full or part and making offers of £10,033,437 for direct losses. The bank is currently receiving about 6 complaints a week, a number that has been in decline since its peak of 35 a week in December 2016, and it has given notice of the scheme's closure at the end of October.

In complaints to Sir William, the onus is on the bank to supply evidence. This enables him to rule on whether there have been actual losses from, say, inappropriate financial products being sold to a business. He would typically order repayment of all direct losses, improperly charged fees etc, with an 8 per cent per annum interest charge.

Appeals have been lodged against 40-45 per cent of the Bank's decisions. As at the date of his sixth quarterly report, Sir William had received 169 appeals and communicated a conclusion to 55 customers. He has upheld 15 appeals in full or in part.

Lloyds/HBOS: Lloyds appointed Professor Russel Griggs to administer a compensation scheme for affected customers. Professor Griggs has been working with several banks over some years as an independent reviewer of lending appeals and the outcome of lending applications.

Professor Griggs notes that the overwhelming bulk of complaints involve companies that were affected by a range of factors and were in trouble before they reached the bank. Complainants may speak of how wonderful their business's prospects may have been, but Professor Griggs is invariably dealing with the financial equivalent of a car crash where he assesses that both parties had some responsibility and he is adjudicating proportionality. However, he adds that Lloyds typically gives a formal apology to all its victims as well as financial compensation and that this can go a long way to resolving disputes.

Neither Sir William nor Professor Griggs has the power to order disclosure or to compel witnesses, but they can draw inferences from either parties' failure to present material or provide verification. In both cases their assessment operates on the principle of what constitutes fair and reasonable behaviour. This is an important point to which I shall return.

Why no legal sanctions

There is a widespread and understandable feeling that no directly-involved individual has "paid the price" for the financial crisis generally, let alone for these two important aspects of it. Given the damage to individuals, let alone taxpayers, it is unsurprising that there is a demand for heads on spikes.

However, there have certainly been consequences for the owners of the banks, particularly RBS, Lloyds and HBOS. Their shareholders lost most of their

investment and were sometimes wiped out. “Shareholders” in this context means the pension funds of ordinary consumers, who, in turn ended up paying to rescue the same banks in their other capacity, as taxpayers. One can understand the perception that management largely “got away with it” at everyone else’s expense. The Senior Managers’ regime discussed below gives the regulator some tools for dealing with this.

But although public indignation is understandable, there have been a number of detailed examinations and no tangible evidence that a provable crime was committed.

The Financial Conduct Authority has noted that “RBS fell well short” of the high standards it expects of those it regulates but concluded[iv] that it did not have the regulatory authority to discipline RBS or its senior managers over GRG. The GRG’s malpractice took place before the introduction of the Senior Managers’ Regime which would enable the FCA to tackle bosses at regulated firms. This is an approach the FCA has said it intends to use to hold banks to account for the way they treat SME customers in the future.[v]

The law distinguishes between corporate lending, which is not a regulated activity, and consumer lending, which is. Successive governments have resisted changing this. The consequence is that the GRG’s treatment of SMEs was governed by the commercial contract between bank and borrower, which was weighted heavily in the bank’s favour and did not oblige RBS to treat customers fairly.

It is unsurprising that Nicky Morgan, Chair of the Treasury Select Committee, has described the lack of regulatory or legal sanction as “disappointing and bewildering” and called for a change in the regulation of lending to SMEs.

Kevin Hollinrake, Chair of the All-Party Parliamentary Group on Fair Business Banking has also argued that the FCA's inability to take action is a threat to the integrity of the financial sector as a whole[vi].

I understand their regret. But the situation has changed: even without regulation of commercial lending, it would be possible to act against individuals under the Senior Managers & Certification Regime if this behavior took place today. Before the SM&CR regulatory action was "built around culpability or direct involvement, making it prone to miss senior people who might not have been directly culpable but should have been accountable."

Certainly, the banks' treatment of customers would today breach the Lending Standards Board's Standards of Lending Practice for business customers as well as the Institute for Turnaround's statement of principles for banks' business support units. Under the FCA's proposals in PS18/18, the voluntary codes and the SM&CR mutually reinforce each other, and I would certainly recommend that the FCA recognize the Lending Standards Board's code in the manner described in its July 2018 policy statement.[vii]However, even if it were to assuage the justifiable anger of GRG victims, regulatory action cannot be taken retrospectively. Any attempt to do so would almost certainly be successfully challenged in the courts.

Implications of past cases for future Bank-SME dispute resolution

Like others who have looked at these issues, I have seen no evidence to sustain accusations of any deeper conspiracy between the banks (or, indeed, within individual financial institutions) to damage SME customers for commercial gain, or that British banks, in their feverish reaction to the global financial crisis, were driven by planned systemic malpractice. Rather, individuals and

units within certain banks, particularly RBS, responded to the crisis in an ad hoc manner which was sometimes unreasonable and panicked, occasionally reprehensible, and almost always distressing for those affected.

What seems clear is that certain banks – particularly RBS - were callous and "mean" in the way they treated many SME customers. But meanness is not the same as breaking the law. The answer to the understandable outrage that no one went to prison for the financial crisis has to be that no criminal offence has been or is likely to be proved. While sharing the indignation and distaste of the critics of RBS and other banks, no reasonable person can argue that greed and sharp practice, if they are not illegal, justify punitive legal measures, particularly in retrospect.

In the area of contracts, it is worth noting that the courts have found no breach of contract by the banks in very many cases. Banking contracts themselves reflect the power imbalance between lender and borrower, and this is an important lesson for the future.

While it can be argued that the terms of contracts are properly seen as a competitive matter between banks, there is today a societal expectation of a level of fairness and reasonableness in negotiated agreements between commercial parties, especially where there is a big difference in sophistication and resources. It is hard to conceive of a commercial relationship more unbalanced in this regard than "distressed business v large bank".

Following financial scandals, the Australian parliament has passed legislation outlawing what it considers unfairly unbalanced contracts between banks and customers. Where the 'customer' is a consumer, the EU and the UK have unfair

terms provisions (in the UK's case in the Consumer Rights Act). The same does not exist for businesses, no matter how small.

Australia has legislated for a number of specific requirements in contracts, including a plain English summary containing the most salient features, no enforcement of provisions to call in loans below $A3 million (approximately £1.7 million) if interest payments have been kept up to date, and no foreclosing on agricultural loans on the basis of loan-to-value ratios for a period. It has also given the Australian Securities and Investments Commission the power to challenge unfair business-to-business terms, just as the FCA here can challenge unfair business-to-consumer terms.

The UK environment is changing. It is no longer acceptable for banks to point purely to the principle of caveat emptor when dealing with SMEs. Unless UK banks voluntarily ensure contracts are not hopelessly one-sided, they are inviting legislative action. It is to its credit that over the past year the UK financial sector has funded a working group to address the issue of contracts with the APPG on Fair Business Banking and this should be prioritised.

The UK cases which have engendered deep public distrust of the banks, caused media and political outrage and led to the original creation of the All-Party Parliamentary Group on Fair Banking are different. They are historic, dating back to the Global Financial Crisis.

There will always be some dishonest individuals working in the financial sector, as there are in any commercial arena. For their clients the implications of such wrongdoing can be immediate and devastating. It is self-evident that any financial institution's culture must be wholly alive to, and intolerant of, employee dishonesty. HBOS failed lamentably in rooting out criminality. After

Lloyds Bank had taken over HBOS, the merged entity took far too long to acknowledge its responsibilities and has been accused of trying to cover up its failure.

Many companies in sensitive legal situations properly observe the caution advocated by their lawyers, but their credibility is damaged when they give too little weight to the need for transparency and candour to their customers. In 2017 Lloyds appointed Dame Linda Dobbs, a retired High Court Judge, to consider the adequacy of its investigation. But current indications are that she will not report back until 2019, and the bank is holding back from explaining its position fully until then. There is great public interest in issues of banking integrity and it only fuels conjecture when a business shelters behind an enquiry for so long.

An important lesson - Difficulties for those seeking redress

Victims clustered under the APPG umbrella are united by the difficulty of securing legal representation. Even before questions of cost, this was fraught. For companies that have gone into administration or liquidation, and individuals who have been bankrupted, litigation is a non-starter. There would be no point in individuals who had lost their companies pursuing claims: an insolvent business is managed in the interests of its creditors, not its shareholders.

Receivers and liquidators will shy away from the costs and delays involved in legal action, and the former owners, while incurring costs, would be unlikely to benefit from any positive settlement.

This raises genuine issues of unfairness to victims who were directors and shareholders. The Government's 2016 Review of the Corporate Insolvency

Framework recognised a number of concerns about the regime and the APPG is compiling a report on these issues for BEIS. It is worth noting that the Australian review also covered insolvency. At present banking regulation is an HMT competency whereas insolvency is a BEIS competency, whereas the Australian Treasury owns both. It is worth considering whether BEIS and HMT should have a formal understanding on how they work together on the subject.

These are important policy issues and deserve proper consideration, but, as with so many issues, it is difficult to see how past unfairnesses can be unravelled retrospectively by resort to legal process.

There are also complaints of businesses being effectively prevented from having lawyers act for them, if their firm is currently or even potentially on a bank's "panel" of approved law firms. This applies particularly in Scotland where I was told it could be almost impossible to find a non-conflicted lawyer although this is disputed.

Banks are also accused of stringing out particular cases where they are at real legal risk, then settling just before going to court with confidentiality agreements which prevent public scrutiny. If true, this means that only the weakest cases are taken through full legal processes, a practice of "unnatural selection" which ensures that any actual case law will favour financial institutions.

Finally, there is the sheer scale of legal costs. Many, perhaps most, APPG complainants would not be able to pay any legal fees, such are their straitened circumstances. The fact that simply launching court action is estimated to cost £10000 and that costs can rapidly mount to £100,000 inhibits all but the wealthiest businesses. Timing and cashflow is also critical. Spending £100,000

to recover millions may be a good investment, but if a business is failing the cash is simply not there and no one will lend it. As Professor Hodges points out, the World Bank estimates that taking a dispute to court might cost a UK business 44% of its claim.[viii] The situation is compounded by the fact that the loser-pays cost basis of British law magnifies the claimant's potential downside, since the bank's costs will invariably be substantial. Applicants may have some control over their own costs, but they will have no influence over the bank's.

Litigation funding by private entities is starting to get under way in the UK though funded actions are normally required to be worth at least a potential £5 million, and sometimes £10 million. Litigation funders will take around 30% of any damages recovered. Noel Edmonds, the most high-profile Lloyds/HBOS victim, is reported to have secured litigation funding for his case against Lloyds. But it is hard to see this being a way through for any but a tiny number of SMEs.

Lessons from the past - Closure

The banks have done themselves few favours. Lloyds/HBOS and RBS's early denials and subsequent limited transparency in their appeal processes has fuelled suspicion and a sense of grievance. One has a sense of firms instinctually determined not to give the slightest acknowledgement of responsibility.

Lawyers understandably advise a client not to admit guilt but as has been apparent in many corporate and medical scandals, when combined with delay in reaching a conclusion, this prolongs and exacerbates a sense of victimhood in those who have suffered. It feeds their frustration and postpones the ability of all affected, including those in the financial sector, to move on.

This is a key reason why the need for some process to provide closure is so important. A sense of those with power closing up, being seen not to listen and declining accountability is guaranteed, as Professor Hodges suggests, to turn complainants into victims.[ix] Equally inevitable is a rapid appeal to regulators and government departments for intervention. Notwithstanding major regulatory and behavioural change over the past decade, the clamour for new sanctions based on past malpractice continues unabated.

In other ways, the banks have acknowledged the past. Cultural weaknesses have been addressed and customer complaints today are addressed promptly, proportionately and with adequate appeal mechanisms. But the continuing grievances of the historic victims of the 2008-2009 era make it difficult for public perception and trust levels to match today's reality.

The banking industry has a chance to emerge from these affairs with some credit, and to rebuild trust with the public – and particularly their small and medium-sized business customers.

There has been a gap – a failure to provide a (metaphorical, if not actual) "day in court" where victims' stories can be told, wrongs acknowledged, remorse articulated, and assurances given of behavioural and cultural change. Equally important is an understanding of concrete measures and a monitoring process designed to observe and track any malpractice which may appear to be systemic.

This is not a matter of paying out money – and it is important that customers who have suffered recognise this and harbour no such expectation of a closure process. English law is not properly equipped to measure and compensate for

stress, emotional damage, broken marriages and nervous breakdowns as a result of commercial transactions. Measuring the damage done would be subjective and in many cases any compensation would go straight to creditors of those whose businesses went bust.

There are part-parallels in the enquiries into other human tragedies which provide a lesson in these situations which involved financial deprivation. Those who have suffered need to be heard in order to achieve closure. It is highly desirable that Britain's banks show a willingness at senior level to meet with those who suffered most from the excesses of 2008-10, to hear their stories and acknowledge their hurt. The alternative is that the banks may find themselves facing a parliament-initiated process which runs on for years until the victims have what has been described as "something akin to a 'day in court'"[x].

The Present

Today's Banking environment

Banking practice has changed markedly since the events of a decade ago. It is striking that while examples of alleged maltreatment of customers are readily discoverable for the first decade of the 21st century, there are few if any complaints of similar treatment over the past five years.

The qualitative research undertaken by the Kingston University team (part 3 of this report) shows the sort of issues that arise between banks and their SME customers in the current environment. This is borne out by subjective interviews with bank complainants and the contrast with those dating from the GFC era. I have personally examined hundreds of random anonymised complaints from

SMEs about their banks. Most recent complaints are about delays and incompetence, undoubtedly irritating and damaging to businesses, but indicative of inefficiency and miscommunication rather than an intention to deliberately fleece customers. The Legal Services Board's surveys of small business needs (2013, 2015 and 2017) document a falling trend in the share of small businesses with financial services disputes.

Banks may well have been on best behaviour over the past five years. There could be a number of reasons for this, including regulatory constraints. Moreover, the banks have dropped many of their more contentious and complex financial products and these are simply no longer available to small and medium-sized businesses. The majority of those SMEs affected by the crash era scandals simply would never have been given the loans they received then in today's marketplace. Perhaps most powerfully, the sector has been chastened by changes in public attitude – a deeply-held public distrust of financial institutions – and by the fines and penalties handed out by governments and regulators in the UK and other countries.

SMEs today still have grievances with their banks but in the main these are attributable to issues like IT problems, delays in implementing instructions, responsibility for third-party fraud, and disagreements about who said what to whom. These issues, the overwhelming source of each year's average 135,000 complaints to Britain's banks (out of perhaps 125 million interactions), may be indicative of weaknesses, but they are not the systemic and institutional failings of a decade ago.

During the past three decades, the banking system has changed irrevocably, largely as a consequence of automation and globalisation. The days of local branches and individual bank managers are over for any but the most affluent

personal and business customers. The internet has come between bank and customer and all accounts have been commoditised. For many people under thirty-five, their only experience of personalised service is via technology rather than a human relationship. The era of individually personalised banking is not coming back.

These changes have exacerbated the general climate of distrust towards banks. Previous levels of personal acquaintance and understanding have been lost with personnel changes. The local branch account manager who knew and understood a customer's business challenges when an ongoing facility was sought has largely disappeared.

The tighter regulatory regime has had other perhaps unforeseen impacts: trade groups have told me that SME-focused bankers now shrink from giving advice because of regulation. They suggest a business cannot ask "I'm thinking of doing this. What do you reckon?" and hope for a genuinely thoughtful reply. Individual bank staff are understandably worried about being seen as shadow directors if their answers are construed as advocating or advising against a course of action.

The abolition of the Business Link service in 2011 has also meant that many SMEs have nowhere to turn for the sort of advice that was available a decade ago. Some Local Enterprise Partnerships have engaged with banks regionally over support for SMEs, but this is extremely patchy and leaves real gaps that are beyond the scope of this review but certainly worth policy consideration.

Current Banking Complaints from SMEs

All organisations get things wrong but, because of the number of customers, volume of transactions and dependence on detailed data, banks are always likely to make more mistakes, in total if not pro rata, than most businesses. Over the past three years research compiled for this report (see part 3) finds that small businesses, including sole traders and partnerships, generated 415,000 complaints, an average of 135,000 annually. Two-thirds of these were upheld and resolved within the banks' own systems, usually within a day and with half involving the payment of some financial redress. This would seem to demonstrate that it is wrong today to regard Britain's banks as institutionally unresponsive. In respect of current complaints, the banking sector has cleaned up its act.

Today's banking environment differs fundamentally from the pre-2010 era in key aspects which are critical to customer interests. Capital requirements are much higher, regulation is appropriately much stricter and banks, humbled by fines and public opprobrium, are competing with each other in an appropriate manner. To say that the situation is different today is not to excuse or diminish the excesses of the past. It is important that regulators and politicians are permanently on guard against fresh malpractices. It is vital that this is built in to any future system of dispute resolution. Real time data monitoring is the most crucial element of any institutional efforts to rectify future wrongs, as noted by Professor Hodges.[xi]This is an area I shall return to in more detail.

SMEs and why they're not borrowing

One consequence of tightened regulation is secured lending on property is treated more favourably in terms of capital adequacy. Banks are effectively encouraged to lend against concrete assets rather than making loans to businesses wishing to expand. This can be difficult for less established SMEs. It

is important to note that banks are supposed to offer *secured* debt. They are not providers of risk capital, even if in pre-crash days they may have behaved as if they were.

The SME sector is crucial for the economic health of the British economy, providing as it does 60% of the country's jobs and 47% of its turnover. It is particularly important as an engine for economic growth and productivity. While large companies have shed jobs over the past thirty years, the SME sector has actually increased employment numbers. Smaller firms must have access to capital in order to grow and fulfil their potential, particularly in an era when boosting exports is an economic imperative. The inability of many flourishing British start-ups to "scale up", as their US and, increasingly, European competitors manage to do is a real threat to Britain's ability to participate fully in the global economy and a brake on the country's economic growth.

Over the past decade UK companies, particularly SMEs, have shown a marked reluctance to borrow for expansion. SME business leaders tend to choose debt over external equity, and to be unwilling to pay properly for risk capital.

British business has been said to be sitting on a cash pile of anything up to £800 billion. According to SME Finance Monitor (BDRC), in 2017 only one in three SMEs was willing to borrow to finance growth compared to half of SMEs two years earlier. Only one in six companies not already using external finance said they were prepared to do so, down from a quarter in 2015. A full 50% of businesses have no external borrowing.

According to the Competition and Markets Authority, the big four banks account for 90% of business loans, making UK SMEs far more dependent on their banks than American businesses. Some business groups, notably the

Federation of Small Businesses (FSB) argue that deep distrust of banks as institutions significantly explains this aversion to borrowing. Although this is unlikely to be the whole explanation, reluctance to borrow being a longstanding feature of the UK business landscape, institutional distrust cannot help.

There are several other explanations, starting with the obvious political and business uncertainty unleashed by the Euro crisis and moving on to the European referendum and the economic upheaval surrounding Brexit. Moreover, British managers are more risk averse than their American counterparts. Given this innate reluctance it is particularly important that access to borrowing is available when solid or potentially high-performing businesses are seeking to expand. "Normalising" a durably beneficial relationship between banks and SMEs is an economic imperative.

Before 2007 lending to small businesses was hotly contested. Major banks aggressively tried to sign up new customers, poach business from competitors, and at times seemed to vie with each other to look generous and accommodating. In the case of Lloyds/HBOS around 90 per cent of the SMEs which subsequently ended up in difficulties were either completely new clients or had been persuaded to switch over from a competitor (quite possibly without much resistance from the previous bank if the customer had been perceived as "difficult").

Cases of businesses with an annual turnover of £30,000 being offered loans and overdraft facilities of £250,000 before the financial crisis have been spoken of. To many (perhaps naïve) business owners, the commercial property market at the time looked like a one-way bet, and the temptation for small businesses, to invest in bricks and mortar (and indeed for banks to lend), was considerable.

All this has changed. Tiny businesses which a decade ago might have secured substantial loans are now unlikely to get an overdraft of more than 10 per cent of turnover. A combination of greater regulation strengthened capital requirements, simple, sensible prudence and perhaps fear of public scrutiny has meant that UK banks are much more circumspect about lending to SMEs.

Profile of current SME complaints about banks

On the basis of data commissioned for this report there continue to be many complaints from SMEs about their bankers. Over the period 2015-2018 there were 415,000 complaints. The bulk (56%) of these were from firms with annual turnover below £250,000, and 93.5 per cent had turnover below £6.5 million, the cut-off points for Financial Ombudsman Service eligibility under the extension now agreed by the FCA[xii].

Businesses with a turnover between £6.5 million and £25 million generate 6000 complaints a year – an important gap in the market, as many of these firms, particularly those below £10 million, will lack their own dedicated legal resource making the cost of litigation a real burden.

The majority of complainant firms are private limited companies, followed by sole traders and partnerships. This reflects the fact that limited companies are likely to be more exposed, having multiple bank accounts and using a range of different bank services.

A large proportion of complainant firms are well-established: 60 per cent are more than five years old and 41 per cent are over ten years old. Only 6.9 per cent had been established in the previous year. The overwhelming bulk are in

services, with fewer than 10 per cent in manufacturing and a very small proportion in primary sectors.

The geographic spread reflects the UK economy with London as the biggest area for complaints. One in ten affected businesses have multiple locations. What is noteworthy is the nature of current complaints. Far and away the largest category is for general administrative or customer service issues (35%) followed by errors and "not following instructions" (19%) and delays and time scales (16%).

Complaints about unsuitable advice (1.8%) and product disclosure (1.3%) are now a long way behind. It is likely that the most serious abuses in the past – product mis-selling, interest rate hedging products and most of the practices involved in RBS/GRG – would have fallen into these categories.
These figures confirm much of the anecdotal evidence presented. External factors now represent a significant part of the threat. One bank noted that arguments around responsibility for third party fraud-related losses are currently its single largest source of complaints. While seriously problematic and the cause of genuine dispute, these cannot be said to represent banks systematically ripping off unsophisticated customers.

Almost two thirds of complaints were sustained through the banks' own complaints processes. Just over half of firms had compensation paid by the banks and a third received redress for financial loss. The message to customers has to be that if something does go wrong, it is worth formally complaining to your bank.

Only just over one per cent of firms in dispute with their bank took their case to the Financial Ombudsman Service with almost a third of those cases upheld by

the FOS. Only a tiny fraction of cases involved customers managed by a turnaround unit and an equally small number (.4 per cent) involved customers in financial difficulty.

Over half of firms making a complaint received some form of compensation. In half of these cases the amount was below a thousand pounds, though some were significantly higher, including four that were over £500,000.

The banks' speed in dealing with complaints also seems to have improved. Nearly two-thirds were resolved through the bank's own internal procedures on the day the complaint was made. A fifth took between a day and a month and fifteen per cent between one and six months. A relatively small proportion – less than half a per cent – took more than six months to resolve.

All this needs to be seen in the context of banks taking customer complaints rather more seriously than they did before the financial crisis and, indeed, often requiring what might once have been minor grumbles to be formalised as complaints.

A very recent survey by BDRC[xiii], the UK's largest independent research consultancy, commissioned for this review, also appears to reflect fewer complaints from SMEs about banks. 79 per cent of customers reported no complaints, nor had they thought about complaining in the last five years. Of those who did complain, 71 per cent were satisfied with the resolution of the matter. Six in ten claimed that the issue had no negative impact on the running of their business and most did not seek compensation. The complaints process appears to be working.

One per cent of SME customers took the complaint "further" rising to 5 per cent of those with turnover above £5 million. Day-to-day banking issues, branch closures, and third-party fraud or attempted frauds were the source of the vast bulk of complaints. Refusals to lend and requests for early repayment were notable causes for dissatisfaction amongst customers who regarded their complaint as unresolved.

BDRC also reported separately for the Competition and Markets Authority on individual banks[xiv]. This is part of a regulatory requirement mandated by the FCA to monitor service quality.

The new, smaller challenger banks - Handelsbanken and Metro - scored well above the established banks for business customers. Royal Bank of Scotland, TSB, Clydesdale and The Co-operative Bank were weaker when business customers were asked how likely they would be to recommend them to other SMEs, perhaps reflecting branch closures, IT difficulties and other well-publicised problems. Other large banks – Barclays, Lloyds and NatWest – generally fared respectably. The range of customer opinion – between 47 and 84 per cent of each individual bank's SME customers would recommend their bank to another SME – reflects the relative normalisation of competition within the banking sector when compared with similar surveys in other areas of the economy. Scores for trust as measured in the SME Finance Monitor also show more positive customer views with 78 per cent of SMEs with over 50 employees scoring their bank between 8 and 10 on a scale of 1-to-10.

Perhaps peripherally, a debt advice charity reports that the proportion of problem debts attributable to overdrafts, personal loans and credit cards, typically bank products, has fallen from seventy to thirty percent of their clients over the past decade.[xv]

There will be understandable speculation about the extent to which any improvement represents sustained cultural change as opposed to the banks' collective response to public pressure, concern about potential negative publicity, and regulatory threats made more real by the substantial fines levied on the banking sector over the past decade. But there does appear to have been genuine change. It is vital to maintain surveillance to choke off misconduct, but it would be a distraction at this stage to put in place a regulatory and redress mechanism designed to fight the last war when politicians and regulators ought to be setting up a system that monitors and prevents the next one.

The Future

Lessons from the past

While there is legal and technical continuity between the corporate identity of the big banks and their forerunners from the era of the banking crisis, their culture, senior management and ownership have changed out of all recognition. They are effectively new organisations.

There is no doubt that past weaknesses must be addressed. These include the length of time taken to resolve disagreements and the affordability and disproportionate cost of seeking redress through judicial process.

Historic wrongs need to be addressed separately in a way that does not prevent regulators arriving at a workable methodology for the kinds of disputes that are arising now in a changed economic and regulatory landscape. The policy priority must be the establishment of a system of lending and dispute resolution that works towards 2020 and beyond. The development of a system to manage

bank-SME relationships for the coming decades should take account of but not be anchored in misdemeanours which took place in a context which no longer dominates.

The reality is that banks exist to lend and to make a profit. The small business community must keep in mind the rational basis for the bank-client relationship and recognise that, while treating customers fairly is necessary business practice, the *primary* responsibility of any privately-owned financial institution is to shareholders rather than customers. To a business, the bank is a supplier which should be risk-rated like any other supplier. The Federation of Small Business criticises advertising messages that portray banks as "cuddly and friendly". Projecting a bank as a "friend" can actually mislead SME owners into thinking a banking relationship is not commercial. It is.

It will rightly be argued that bad practice can recur, and that the UK economy needs monitoring systems which ensure future abuse is identified early and dealt with rapidly. Proper and timely reporting to the Financial Conduct Authority, HM Treasury and other appropriate institutions needs to be built in to settlement procedures so that valuable information regarding high-risk commercial practice prompts a speedy regulatory response. Too much information about poor practice appears to have been lost in a fog of private settlements and non-disclosure agreements. An ombudsman mechanism with built in feedback to the regulator would have advantages over court-based solutions in this respect.

The establishment of a monitoring council that brings together SME representatives, Ombudsman, lenders, the Lending Standards Board and others could foster collaboration, ensure processes are optimal and effective and act as an early warning mechanism.

It is instructive that the first judgment in a payment protection insurance case (Price v TSB Bank) was in 1993 but because of a ten-year confidentiality clause, it was only released a decade later, leading to the Citizens Advice "super-complaint" to the Office of Fair Trading in September 2005 and the subsequent unravelling of the whole £44 billion PPI structure .[xvi] It must be probable that the PPI scandal would have caused far less pain to banking customers and indeed the banking system if the outcome of that case had become public at the time.

Lending to Businesses and to Individuals

There is a clear distinction between regulating lending to private individuals and to companies. There is a legal presumption that dealing with individuals needs close oversight and regulation precisely because financial matters are complex and private persons will not have the sophistication to make proper judgments. They can be hoodwinked and the principle of 'caveat emptor' is inappropriate.

This is not the case for businesses. There is an understandable assumption that the director of a company ought to have a degree of financial literacy and business savvy. The trade associations I met readily accepted that any firm should have someone in the business who understands how to finance the company.

Commercial lending is not regulated, although the Lending Standards Board, to which the major banks are signatories, requires lenders to treat all customers fairly and honestly. There are currently 20 signatories, and greater adoption – both amongst product providers and debt purchase and debt collection firms – would be highly desirable. As noted earlier, the Financial Conduct Authority's

Senior Managers Regime – introduced since the financial crisis – requires senior employees to be fit and proper to carry out their business. It may be inferred from the FCA's references to the SMR that it would have used these powers against senior managers at RBS/GRG had they been applicable at the time.

The APPG on Fair Business Banking proposes that the legal right to take action under Section 138D of FSMA currently available only to "private persons" should be extended to SMEs below a certain threshold by amending the "private persons" definition, which could be done by secondary legislation without requiring parliamentary approval.[xvii] In 2014 the Law Commission considered the possibility of such an extension but stopped short of recommending change, regarding it as a matter for the Government after proper research and debate.

The APPG also argues that banks should have the same duty to SMEs as they do to private individuals, requiring banks to pay due regard to an SME's interests in commercial lending. This is a tenable position, but it represents a major shift in current law with significant implications across a wide range of existing business relationships. It will certainly require primary legislation and is likely to consume a great deal of parliamentary time. These options should be kept under review, but should not, in my view, stand in the way of a quicker, practical fix that can resolve disputes between banks and their SME customers – especially if – as I believe - this approach ensures monitoring and regulatory feedback in a way legal remedies are unlikely to match.

It is a reasonable expectation that someone setting up a company should have more commercial sophistication than an ordinary consumer of financial services. Limited liability companies also provide their directors with significant personal protection in the event of a business failing, and this needs

to be balanced against the protection given to individuals. A frequent problem for SME owners is that many - particularly early in a company's existence - blur the differences between business and owner. They are likely to go to their personal bank when the business is set up, employ personal funds to get operations going and provide working capital, and may treat company cash as their own.

There is discussion to be had around these issues. As noted, the FCA Senior Managers Regime would give some flexibility to make subjective assessments if any business is unfairly treated. Professor Hodges refers to the focus on 'whole firm' activities and the requirement to observe proper standards of market conduct.[xviii] But freedom of commercial contract is an important principle. It is difficult to accept that such a major change should be slipped through without proper legislative scrutiny.

Requirements in a redress system

It is easy to see why any attempt to remedy the sort of wrongs imposed on SMEs after the financial crisis cries out for alternative non-legal methodology. Court processes are simply too expensive, too slow and too cumbersome for all but the largest businesses. The requirement is for a procedure that is fast, simple and cheap. But there is a balance to be achieved. Professor Hodges notes early on that "the truth cannot be escaped that seeking a forensically accurate outcome in every individual case – especially cases with small value or inherent complexity takes time and money".[xix]

Defining Vulnerable Businesses

At present there is a gap in coverage of businesses. Boundaries are always difficult, but they are necessary. Where they are set will be crucial in any speeded-up dispute resolution system. The key concern should be for SMEs

unable to access or pay for legal redress because of cost and length of time involved in court processes, or because of serious damage caused by the diversion of management time needed for the functioning of the business.
If a company has a certain level of turnover, say £10 million annually, one can assume that it is likely to have, if not in-house legal capability, then at least the ability to buy in legal skills and to be capable of resolving issues via legal processes. I note here the Legal Services Board's and BDRC's survey suggesting that businesses are more likely to spend money on legal resources when their annual turnover reaches £5-10 million.[xx] It seems reasonable to expect also that companies of this size should have the skills to select and acquire appropriate financial advice in the first place, and their scale will mean they are less likely to be pushed around.

There are a number of methods of providing faster, cheaper, fairer access to dispute resolution outlined in detail by Professor Christopher Hodges. They are not mutually exclusive options and it could make sense for a combination of different approaches to be used particularly if easy-to-implement changes fail.

Possible mechanisms – ombudsman v tribunal

Most SMEs will be particularly attracted by Alternative Dispute Resolution procedures which operate in a non-adversarial fashion where a neutral third party helps to develop a binding solution quickly and at lowest cost. Mediation and other forms of ADR also have the advantage of potentially preserving a commercial relationship notwithstanding specific contractual difficulties. This is unlikely to be the case if the parties end up in court or another adversary procedure. Ombudsman systems are the most widely recognised form of alternative dispute resolution for consumers. The concept originated in

Scandinavia to provide a check on government activity in the interests of the citizen and spread widely across Europe.

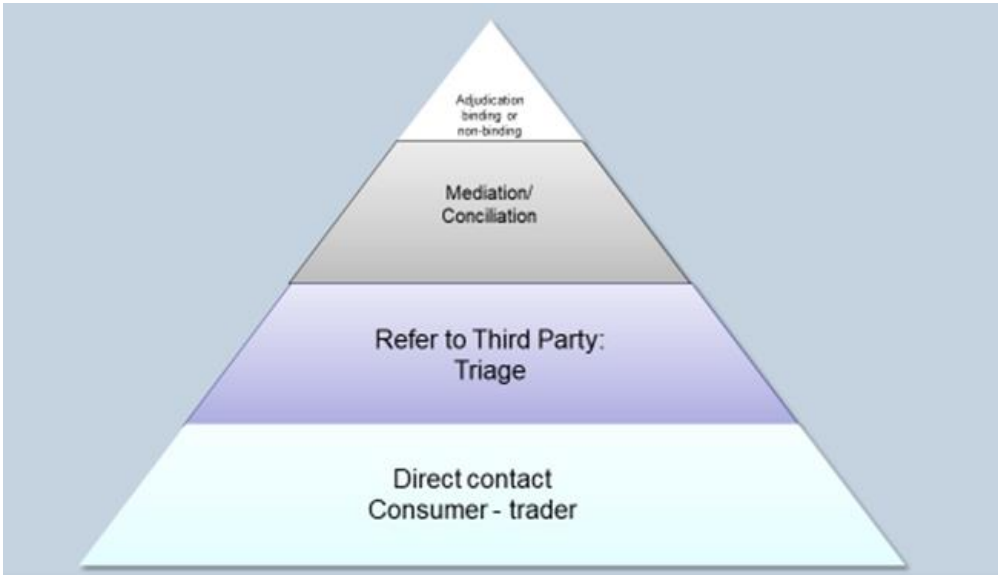
In Britain the system is well-established. Ombudsmen operate in the legal, motor vehicle, furniture and university sectors, as well as in previously nationalised industries like energy, rail and telecommunications. The Pensions Ombudsman was created under the UK Pension Schemes Act in 1993. A number of trade groups within the financial sector evolved from the 1960s and these were merged to form the Financial Ombudsman Service (FOS) under the Financial Services and Markets Act in 2000.

A particularly relevant example is the Asset Based Finance Association, part of UK Finance, which deals with complaints over factor invoicing and discounting, activities which are designated commercial and hence unregulated. The Association's Lending Code sets the standards members must meet and an independent complaints process, overseen by Ombudsman Services, adjudicates complaints. ABFA's Professional Standards Council, with a majority of independent members and independent chair, considers issues referred to it by ombudsmen as well as overall behaviour. Although a voluntary arrangement, 98% of the industry are members and abide by its rulings even if technically they are beyond its scope. Beyond its statutory role, the Financial Ombudsman Service also operates a voluntary jurisdiction, which mirrors the rules of its compulsory jurisdiction, but requires firms to opt into it, e.g. in the case of freight forwarding disputes.

Ombudsman facilities are generally free to consumers. In the UK, as Professor Hodges outlines[xxi], costs tend to be paid by the trade sector and/or individual defendants. With the Financial Ombudsman Service there is an annual charge on firms levied through the FCA and a charge of £550 for each case handled

annually. This per-complaint cost in itself operates as a mild incentive to financial businesses to settle modest claims on terms favourable to the customer rather than see them progress to the FOS.

A particular attraction of the ombudsman model is the integrated pathway it offers for dispute resolution – as shown in Professor Hodges' pyramid model [xxii].



In 2017/8 the FOS received 1.45 million enquiries. It received 340,000 new complaints (of which 55 per cent concerned PPI) and resolved 400,000 complaints. Over ninety per cent of these cases were settled at the triage and mediation/conciliation stage meaning that only 32,780 – i.e. the top of the pyramid above - required an ombudsman's decision.[xxiii] Nearly three-quarters of all complaints were resolved within three months. In 2017-2018 the FOS resolved 72% of all complaints excluding PPI cases within three months.

It is worth noting that the FOS can refer a case to the courts or another ADR provider (with the complainant's consent) either because it belongs there or

because it raises a point of law and is thus a useful test case. This is unusual, but it seems a good model.

It is important to note that over half of all FOS cases (55%) concern PPI and that 85 per cent of these are brought by Claims Management Companies (CMCs). Further PPI claims are being barred from November 2019 and there are plans underway to reduce staff numbers as that deadline nears – more than half of staff are currently dedicated to PPI claims. At present about one in ten complaints to financial services firms are eventually handled formally by the FOS and many more consumers are given guidance and information when they contact the service. [xxiv] But beyond PPI it may well be argued that the Financial Ombudsman Service is currently underutilised by SMEs

A Financial Services Tribunal System

The idea of a Financial Services Tribunal has been endorsed by the All-Party Parliamentary Group on Fair Business Banking. The proposal has been set out at some length by barrister Richard Samuel using the analogy of Employment Tribunals, which were originally created as Industrial Tribunals in the 1960s[xxv]. The structure would have an independent legal chair and two specialist advisers representing different and ostensibly opposite interests, presumably banking and small business. The employment tribunal model seeks to represent the competing parties' sectoral interests on the panel (which of course should be and be seen to be neutral and unbiased).

Tribunals are expensive for government and for participants. In practice tribunals will require lawyers, both as specialist Chair, and, particularly, in acting for parties in the dispute. It is favoured by many politicians who believe

that the decisions will somehow be more acceptable if both employers and trade union officials are involved.

Although lawyers are not a requirement for claims, in practice they are usually involved and invariably at the employer's expense. This helps to explain why employment tribunals are far from universally popular with employers, particularly SMEs. The cost-free element for individuals of bringing an employment claim has meant that virtually any dismissed or made redundant for any reason may feel incentivised to bring a claim against an employer well beyond any statutory compensation. The consequence has been that many employers have ended up making unjustified payments merely to avoid legal costs and the waste of management time.

The 2013 introduction of modest charges for bringing an employment tribunal claim resulted in an 80 per cent drop in cases taken to employment tribunals, but since the Supreme Court ruled these fees unlawful in 2017, fresh actions have again moved upwards. The system's infrastructure is considerable.

It is sometimes argued by proponents of employment tribunals that they have changed the whole nature and balance of employer-employee relations over the decades in which they have existed. I am not convinced by this. For a start there are many other factors that have contributed to the changed nature of employer-worker relations, including societal change and the end of an era of deference.

The direct costs of the Employment Tribunal system are around £27 million per annum on fees and salaries, with each appeal costing around £750. This is not in itself prohibitive, but the addition of legal costs for the parties involved also needs to be taken into account. The absence of loser-pays means the risk for an SME will be much less than with a court hearing, but the imbalance between

legal firepower is likely to remain. As outlined below, decisions would have to be made on the basis of strict legality rather than what was "fair and reasonable". Equally critically, judicial bodies do not feedback data about complaint levels and results to regulators and government departments: that is not their job.

As Professor Hodges points out[xxvi], creating a new Tribunal system as a pathway between an ombudsman system and the courts and mandating that certain financial services disputes are brought into its jurisdiction would require primary legislation at a point where there is no time foreseeable on the parliamentary agenda. I support the principle of setting up a specialist legal-banking advisory body with some of the characteristics of a tribunal to advise a business ombudsman service. If ombudsman methods fail I would not rule out the creation of a new halfway house in terms of judicial processes simply to provide cheaper, quicker and easier alternatives to going to court.

The Choice between Alternatives

For the present the best interests of the SME sector in terms of fairness, speed, cost, and efficiency would be served by an Ombudsman system rather than creating a new legal outlet. On a purely practical level, I believe such a system could be up and running by the middle of 2019, whereas creating a Financial Service Tribunal regime is likely to take some years.

However, the primary reason for this conclusion is the basis of decision-making. Legal tribunals are required to apply the law explicitly and precisely. Tilting the balance for me is the ombudsman's ability to use a "fair and reasonable" test in a dispute. Because an ombudsman provides a non-legal service, it is not bound by the strict legality of a contract or situation. It is, as

Professor Hodges notes, generally the case that the fairness standard assists individual consumers rather than the converse, and it is likely the same will be true for SMEs.[xxvii]

If a contract, drawn up by a bank's skilled lawyers, empowers the bank to act in a particular way, the tribunal, like the court, will have no option but to take a legalistic view on how the bank has behaved. By contrast, an ombudsman can look at the contract - and the situation - and rule on whether the provisions and the actions taken were "fair and reasonable" under the circumstances. This should benefit even those larger SMEs who can reasonably be expected to have, or buy in, legal advice.

As Professor Hodges points out[xxviii], in 99 per cent of RBS/GRG compensation cases the conduct of the bank was contractually legal, and the question relates to the bank's actual treatment of the SME. The bank may have had the legal power to take a particular action, but an ombudsman's decision can take into account whether the original contract was fair, and whether the bank behaved in a reasonable manner.

Meeting the CBI's Enterprise Forum in Birmingham I was given several examples of banks behaving in a cavalier manner to stereotypical SMEs. The actions included precipitately calling in a loan where repayments had been scrupulously maintained, because the decline in property values enabled the bank to argue that its loan to value ratio had been breached an APPG member gave me a similar example of a loan-to-value ratio breach which the bank had used, he claimed, to require full repayment by 10am the next morning. Another historic case involved doubling the interest rate on a loan and charging a substantial additional fee for borrowing which had previously been serviced

perfectly adequately and continued to be repaid (at the new rate) until it was paid off three years later.

Calling in loan facilities is nowadays much less common, but in these situations, as the businesses readily acknowledged, the bank is acting within its contractual rights and a legal application is unlikely to prove successful. An ombudsman hearing these cases could however find that the bank had not been "fair and reasonable" either in requiring that clause in the contract or in the way it was implemented. The ombudsman can deal with "meanness" as well as legality. The distinction is important: a "fair and reasonable" test will put SMEs in a much stronger position than if they rely solely on contractual or common law rights.

A second reason is access to data and information flows and the ability to identify wider and systemic issues. An ombudsman can aggregate and feedback data to regulators and government department and have much more direct involvement in behaviour and culture (although this requires first rate management information, often dependent on technology, which needs to be prioritised). Tribunals make individual decisions in particular cases. Feeding back information is not their role.

As Professor Hodges points out[xxix] the collection of data from individual queries, complaints, disputes and decisions, and the aggregation of that data and its analysis to identify patterns of poor practice and trends, enables direct intervention with an organisation or industry to agree changes in culture or practice. This feedback loop can incentivise positive behaviour and bring changes in organisational culture. As Professor Hodges notes, the proactive intervention of the Groceries Code Adjudicator is a prime example of this[xxx].

Legal processes may lead to a financial settlement but rarely specify changes in how things are to be done in future.

Time is another factor. Tribunals will, in practice, require the expense and time involvement of lawyers even if there is no filing charge. Ombudsman services are typically free and conducted without lawyers, which will assist the speed of dealing with complaints.

The adversary nature of court or tribunal processes also makes permanent what may be a temporary breach between parties. Anecdotally a significant number of the complaints surveyed for this review involved SMEs who remained customers after the dispute with their bank was resolved. This is unlikely to be true if lawyers have been brought into play.

It may be argued that tribunals, unlike ombudsmen, can summon witnesses and require documents to be presented. Ombudsmen can only request data and attendance, although they can draw an adverse inference from a refusal. In practical terms the distinction is rarely significant. As Professor Hodges[xxxi] notes it is very unusual for a court to use its power to require a document to be produced, and an informed ombudsman can bring to bear expert knowledge of what evidence ought to exist. If necessary, a standards framework can be added to back this up.

Finally, there is the suggestion that the fear of negative media coverage from an adverse public ruling by a court or tribunal has some deterrent effect on bank behaviour. Leaving aside arguments about the nature of deterrence, I find this questionable. Most financial sector legal cases are relatively dull and unlikely to attract press notice unless particularly extreme behaviour – or a celebrity - is involved.

More importantly, as Professor Hodges points out, 95-99 per cent of legal cases in court are settled by defendants before being decided by a judge or tribunal[xxxii]. Not only does this limit the likelihood of media attention, but it means that data that would be useful to regulators and ministers in the formation of future case law or regulation is entirely lost.

While a tribunal decision is enforceable on both parties, the finding of an ombudsmen is binding on the organisation complained about but may leave a complainant who is still dissatisfied with the option of taking the matter to court.

For all these reasons it seems to me that SMEs which end up making formal complaints would be better served by a quick and easy investigatory process resolved by an ombudsman, probably on paper without any need to be present, let alone a requirement for legal advice or representation.

In a courtroom, tribunal or ombudsman situation there will be an onus on the bank to demonstrate the reasonableness of its position. However, in only one of these situations will the "reasonableness" determine the decision. And in only one will the data surrounding the complaint feedback to rule-makers to prevent the repetition of behaviour such as that which followed the GFC.

What might have been appropriate in the immediate wake of the Lloyds/HBOS and RBS/GRG scandals is not in my view the right vehicle for the very different level and character of complaints about the banks today. I am with Professor Hodges in his view that it would "complicate justice rather than promote it".[xxxiii] The creation of a new tribunal vehicle solely for dealing with the financial

sector would represent a significantly burdensome and bureaucratic addition to current UK legal infrastructure.

Finally, there is the practical argument. As noted, creating a new framework for financial service tribunals would require primary legislation. Getting new legislation through parliament in the throes (and even the aftermath) of Brexit is likely to be difficult. Without other checks while we wait for legislation, rapid remedies for new cases would not be available. There is benefit in creating a facility which can be up and running before any future round of economic upheaval.

What sort of an Ombudsman is Required?

The most easily available option would be simply to use the Financial Ombudsman Service (FOS) which, as outlined, is a statutory body created under the Financial Services and Market Act of 2000. By itself, this would seem to me an inadequate response.

FOS's board is appointed by the Financial Conduct Authority. As noted, it is funded by the UKs financial services sector through a combination of statutory levies and case fees paid by financial businesses that are regulated by the Financial Conduct Authority (FCA) and by law are automatically covered by the ombudsman service.

The FCA has just concluded a consultation to examine raising the FOS's scope from what are effectively micro-enterprises to a larger segment of SMEs. This was described to me as a "no brainer" and I endorse the change.

To date only micro-enterprises - businesses, with a turnover below £2 million and no more than ten employees - could go to the FOS. The FCA has suggested the thresholds should move to £6.5 million, an annual balance sheet below £5 million and up to 50 employees.[xxxiv] Its proposals should result in around 210,000 more SMEs being able to refer unresolved disputes with financial services firms to the Ombudsman. This would mean around 99 per cent of all SMEs in the UK would be eligible, with only the very largest out of scope. It is likely to mean up to 1500 additional SME disputes going to the Ombudsman each year[xxxv].

The maximum compensation the FOS can order a firm to pay is £150,000 which will not always be sufficient to compensate losses sustained by a complainant. It should be noted that the FOS often hands out a formula for calculation of an award rather than specifying the amount itself. The maximum level was relatively recently raised and has been kept under review. The FOS has in past cases noted it would have awarded more had this been within its power, and asked banks to "put matters right" for a claimant, usually without specifying an amount. This usually seems to have been done and it is likely that the banks could be persuaded to accept this approach as routine.

The FCA is now consulting[xxxvi] on proposals to increase the binding award limit that can be imposed by the FOS, which was raised from £100,000 to £150,000 in 2012. It suggests the possibility of the limit rising to £350,000 from 1st April 2019. This is closer to the binding limit available to the Australian Financial Complaints Authority and seems to me a sensible starting move. In the longer term, the Australian limit of $1 million – roughly £600,00 – would seem to me to be appropriate. A very large penalty and compensation payments regime should require judicial oversight, but the threshold is open to debate. Australia seems a good parallel.

There are ombuds-alternatives to the FOS. Ombudsman Services is a non-profit company limited by guarantee which holds mandates as the energy ombudsman (from OFWAT) and communications ombudsman (from OFCOM) in the regulated sector, as well as for invoice finance and asset-based lending. This last sector supports 40,000 UK businesses, including larger SMEs, with combined sales turnover of £287 billion and has some parallels with the banks.

Ombudsman Services has grown significantly over the past decade and has a strong reputation. Like Professor Hodges I have considerable respect for its operations and, if a reframed dedicated structure carved out within the FOS was not practicable, combining Ombudsman Services' offering with an enhanced data system could provide a possible alternative.

Why the Financial Ombudsman Service?

In my judgment the first resort ought to be to use the resources and statutory framework, though not necessarily the name, branding and website supplied by the existing Financial Ombudsman Service. I would propose creating a separate facility effectively by structuring the current FOS as two pillars, one for consumers and the other for SMEs, each with an independent identity.

The FOS has the practical advantage of being the statutory body already charged with personal and SME complaints. It already has the existing infrastructure, employee numbers and budget to take on an explicitly broadened dispute resolution role for SMEs and banks. It is substantially the largest ombudsman body in the world, with over 3500 staff and a budget for the current financial year approaching £300 million. It has been said to be the largest employer of law graduates in the United Kingdom.

The statutory powers of the FOS, its compulsory status and the FCA's legal power to bring currently unregulated financial services activity into its remit by simple rule change make this an attractive way of future proofing ADR provision in the financial sector. The FOS has grown massively in the wake of the PPI scandal and the bulk of its employment growth is entirely due to that cause. There are consequent plans in train to reduce staff numbers. By far the simplest option available to create an alternative resolution framework for banks and SMEs would be to strengthen and redirect this resource.

The FOS is not a perfect organisation and over the past year in particular it has attracted significant press and political criticism. Following a critical Dispatches programme on Channel Four in March, Richard Lloyd, former head of the Consumer Association conducted a review of the Financial Ombudsman Service. While establishing that some charges of underqualification and inexperience were valid, he did not sustain the very strong challenges that had been raised.

The FOS undoubtedly has weaknesses and its board and senior management need to revamp and get a grip on the organisation. Its detailed business offering has slipped back as it has been swamped by mass issues largely brought on behalf of individual consumers by claims management companies.

The Service does not currently provide a viable forum for an expanded volume of financial business complaints. As its website suggests, it is primarily a consumer vehicle aimed at relatively unsophisticated individuals detached from commerce. It needs reshaping and reinvigorating, as it recognises. The FCA also acknowledges the need to hire extra staff and consultants with the necessary skills and expertise, which is why it has published "near-final" rules

in its paper on SME access.[xxxvii] However, it cannot make sense to write off an existing statutory organisation with 3500 staff and a funded budget of hundreds of millions when SME oversight is clearly within its defined remit. Moreover, because the FOS has existing infrastructure, employee numbers and resource it would be relatively straightforward for the Government to endorse the creation of a suitable vehicle, noting that staff numbers are currently projected to fall as the cut-off date for new PPI claims approaches in November 2019.

The Remaining Gap for Larger SMEs

Implementing the proposals outlined in the FCA's consultation will leave a technical gap for companies with turnover above £6.5m per annum but still below £25 million. On the basis of the banks' data from 2015-2018, there were around 4000 complaints a year of any sort from companies in the £6.5- £25 million size bracket. Of these complaints, 70 per cent were upheld and settled by the banks. But this is a very broad range of businesses.

It might reasonably be thought that companies with an annual turnover above £10 million should generally be in a position to resort to the courts if they have substantial claims well above the FOS threshold. As things stand a small number of complaints from these larger companies (12) were in fact taken to the FOS over that period even without its having the ability to make a binding judgement.

There will be vulnerable SMEs with turnover above £6.5 million which are unable to take complaints to a freshly empowered business ombudsmen carved out of the FOS. There will also be some firms, probably businesses such as hotels, nursing homes or investment property portfolios with low turnover relative to assets, where claims could be in excess of an increased maximum

binding award. These gaps will need to be closely monitored. But, certainly at present, I think the number of claims affected is likely to be low, and, from a national perspective the cost of setting up a tribunal system to fill the notional gap would be disproportionate.

As previously stated, at present the maximum sum the FOS can order a defendant business to pay is £150,000 plus interest. In practice the FOS does occasionally recommend that a defendant business pays a sum in excess of that amount – often a figure calculated to put right the damage a complainant has suffered. The payment is then at the defendant business's discretion, and in most cases that request is met.

I propose that the banks, on a voluntary basis, agree to establish and fund a voluntary ombudsman scheme that is available to businesses that are not 'eligible complainants' to the FOS by regulatory mandate. The voluntary scheme should be made available for businesses with turnover between £6.5m and £10m and in certain cases outside of the compulsory jurisdiction. This should largely fill the perceived gap.

A potential and in my view desirable mechanism for delivery would be via the FOS voluntary jurisdiction. I recognise that this will require proper commitment from the banks.

I also recommend that the banks consider whether a voluntary scheme could be established to review bank disputes that have arisen since the Financial Crisis. Any scheme should be limited to those who have previously lodged a formal complaint. It should exclude those that have already been dealt with by a court, tribunal, arbitrator or other external dispute resolution scheme, and those which are the subject of legal proceedings.

The standard EU definition of an SME goes much further than the proposed FCA extension covering businesses with annual turnover not exceeding 50 million euros, a balance sheet of 43 million euros and 250 employees. It seems to me appropriate to let the dust settle on the changes consulted upon but, if they are working well, to consider moving towards higher thresholds. If the system proves effective there is no reason why the aperture should not be as wide as possible.

A Banking Ombudsman Facility created within the FOS

The Financial Ombudsman Service recognises the need to up its game in order to provide a viable forum for business complaints. My recommendation is that a division under the FOS governance structure should be created alongside the existing FOS organisation. In line with the FCA's existing consultation on the FOS (see below), it should handle all eligible SME disputes including its micro-enterprise function. Importantly, it will have a new identity and a new website and its communications focus will be directed squarely at SMEs.

It should not be necessary to establish a separate legal persona given the existing structure of FOS within the Financial Conduct Authority's field of authority, albeit with operational independence. It would make sense to review governance, with a view to setting up an advisory board, whose members would have business and legal backgrounds. The banking ombudsman facility management should have appropriate experience in dispute resolution and a mandate to ensure the organisation can quickly reach and gain the confidence of a wide SME audience.

The Small Business Commissioner, whose responsibilities are currently largely focused on late payment issues, could be an ex-officio member of the advisory board. In several Australian states the Small Business Commissioner has emerged as a key champion of businesses across a much broader range of issues than late payment, as in the UK.

It would be made clear that the role of FOS under its current leadership is to help individual consumers to resolve complaints. A cadre of senior managers should be appointed to the new entity. Their role would be to refocus the carved-out organisation on its SME target audience A key responsibility would be an HR function with the capacity to identify and develop existing suitable FOS staff, and where necessary bring in external talent in order to help equip it with appropriate legal, business and banking capability. Additional costs for the new entity should be modest but could, if necessary, be recovered through the existing financial industry levy.

A Specialist Adjunct to the Banking Ombudsman Facility

The Financial Ombudsman Service has itself always recognised the need for occasional deep expertise – either legal, financial or both – and for additional inputs from the courts in extremely complex cases or on points of law.

One way of finessing this would be to create a separate advisory body to provide expert help where required on matters of legal or banking expertise. This panel might be chaired by a retired judge. It would also provide high-level guidance in situations akin to interest rates swaps where there is a need for mass redress in a multitude of analogous cases. It is important to distinguish this proposed vehicle from the suggestion that a nationwide regime should be established along the model of employment tribunals. But it would have the

benefit of meeting the wishes of those who believe current ombudsmen staff lack the deep expertise required for highly technical business disputes involving SMEs.

The new banking ombudsman facility would give concurrent priority to the collection of data and feedback to the regulator and government departments. Whichever approach is adopted for the resolution of banking disputes, it seems to me vital that findings and a feedback loop to regulators and government departments is built in to the system. Given the history of cultural problems in the financial sector and the potentially devastating consequences of any repeat of the 2008-10 banking crisis, an early warning system such as this information stream would provide needs to be built in to the accountability regime developed.

It is important that the data generated by the banking ombudsman facility is captured, both to identify and bring to a rapid close any truly damaging practices. This focused data collection would also monitor bank activity and customer complaints to give an early warning system against any repetition of past malpractice.

At present the Financial Ombudsman Service sits on a great deal of data but its ability to generate management information from its database is relatively limited. It is critical that a new business-focused operation develops a semantic model that allows for the fastest possible machine reading of processed complaints.

Technology has the power to help this process. Professor Hodges refers to the consumer intermediary resolver.co.uk which currently receives and classifies customer complaints to 25,000 businesses, and to several leading regulators and

ADR schemes[xxxviii]. Resolver does not itself adjudicate in disputes between a customer and a commercial entity, but its ability rapidly to flag up problem areas as they emerge on a granular basis would provide a suitable filter for the FCA, Treasury and BEIS to be alert to future systemic and cultural banking problems.

Resolver does not make the decisions in disputes between a customer and a commercial entity. But it does classify complaints and demographics and can forecast with some accuracy the propensity of wronged – or just mildly irritated – customers to carry a complaint forward. It also classifies the results afterwards, so the information loop is constantly updated. Resolver or a similar service would seem to provide an attractive approach for the IT era. The eventual possibility of being able to handle many routine complaints online via algorithms is clearly time-saving and potentially beneficial. I would strongly urge consideration for a secure and IT-driven monitoring and data system through Resolver or a similar product.

Closure & Emotional Release

For many SME owners, one of the real complexities is the intermingling of their personal and business personas. A business may have been family-owned or set up by people who have put their whole lives into it. They have invested considerable emotional capital: a dispute threatening its existence threatens them too. And yet the reality is, by choosing a corporate identity and moving into a business-to-business environment, they have lost the protection and sympathy available to individual human beings harshly treated by an impersonal commercial adversary.

I noted earlier that many APPG victims had lamented the absence of a metaphorical, if not literal, “day in court” to tell their story. The emotional stress and impact on mental health of their treatment has been considerable. As the aftermath of a number of scandals reminds us (admittedly in very different contexts) those who have suffered personally from the actions of professionals can only achieve closure if some sort of truth and reconciliation process results in those who were at fault acknowledging and recognising the consequence of their actions. As referred to in the second part of this review, the Bishop of Liverpool wrote eloquently in the Gosport Hospital Enquiry of the stress suffered by individuals who, when raising legitimate questions and concerns met with obfuscation from those in power and authority. The result was consuming frustration and anger among the victims, which, in turn made those in authority less inclined to build a bridge towards them and investigate their concerns thoroughly.

Several reports have now been written about the excesses of the financial crisis. Their findings have been damning in terms of the professionalism and behaviour of some banks and its impact on individuals. I do not believe there is point in setting up a further public enquiry into what happened, particularly but not exclusively in relation to RBS, in the wake of the Global Financial Crisis. Cavalier behaviour is shameful even if it is not criminal and cannot result in legal sanction. There is a residual responsibility on today’s senior management to acknowledge the mistakes of their predecessors and commit to ensuring there is no repetition of the past.

I propose that a formal process is agreed and scheduled at which key representative figures from the All-Party Parliamentary Group on Fair Banking are given the opportunity to tell their stories to the senior management of the major UK banks and the banks are given the opportunity to respond openly.

This should in no way be re-run of an inquiry, but an opportunity for all parties to understand what happened, to acknowledge the pressures and the wider hurts suffered, and to arrive at reconciliation and closure. The process should be chaired by a senior retired figure – perhaps a former Treasury minister or select committee chair - who combines understanding of financial markets with empathy for the victims of mis-selling. At the end of their testimony the banks should respond, express regret and commit themselves to an era where these situations will not be repeated. The discussion should then move on to current day circumstances and to ways in which such malpractices - and any fresh abuses - can be stopped in the future. A further output could be the establishment of the monitoring council suggested earlier which might meet six-monthly in order to provide independent oversight of future process.

This is not a matter of seeking fault. Many of those with the most tragic stories took chances and risks at a time when no one foresaw the economic crisis to come. Opportunities that might have succeeded in better times, failed disastrously. The financial sector went from a position of relative laxness and the easy availability of funding, to a dramatic tightening forced by the need to ensure its continued existence. The truly criminal activities have been punished in the courts. I have seen no evidence of systemic “dark arts” or criminal conspiracies among or between the banks.

But the financial sector ought to recognise what happened, how things went wrong and that for many SMEs the personal and business are inextricably intertwined. This is not about monetary compensation, but a matter of acknowledging wrongs done, and pain felt. It would do credit to our largest banks if they were to take part in such a process.

SUMMARY AND CONCLUSION

- After considering carefully what happened to UK SMEs at the time of the Global Financial Crisis and reviewing the nature and number of complaints from SMEs about their banks today, my recommendation is to create a business banking facility clearly labelled as such. Ideally it would remain under the technical and budgetary aegis of the FOS using its existing resources, and some of its professional staff, but it should have its own senior management and corporate identity. The Financial Ombudsman Service does not currently – perhaps understandably - look or behave as if helping business is its principal focus. A business and banking ombudsman pillar within the FOS framework needs to present itself very differently if it is to win the confidence of the SME community. It should be possible to do so, with personnel changes and re-training.
- Other parts of the ombudsman or small business infrastructures, including Ombudsman Services and the Small Business Commissioner, should be involved in helping to create and strengthen the banking ombudsman facility as a separate division of the FOS.
- An expert and specialist advisory body involving senior legal, banking and business practitioners should be set up in order to consult and advise on technical legal and banking issues and to give guidance on business mass claims.
- I entirely support the changes proposed to the scope of the Financial Ombudsman Service in the FCA's consultation paper and believe they

should be implemented in full for the proposed banking ombudsman facility.

- I further recommend that UK banks agree, on a voluntary basis, to establish and fund a voluntary ombudsman scheme for businesses that are not 'eligible complainants' to the FOS. The voluntary scheme should be made available for businesses with turnover between £6.5m and £10m and consideration could be given to cases outside of the compulsory jurisdiction. Such a scheme could ideally also be overseen by the new banking division ombudsman service under the overall aegis of the FOS.
- I also recommend that the banks consider whether a voluntary scheme be established to consider bank disputes that have arisen since the Financial Crisis.
- I would suggest that this voluntary scheme be limited to those who have previously lodged a formal complaint. It should also exclude those that have already been dealt with by a court, tribunal, arbitrator or other external dispute resolution scheme, and those which are the subject of legal proceedings.
- Once the new banking ombudsman regime has bedded down – say two years after it has been created, and subject to its satisfactory operation – I recommend that the size of business within its scope should be reviewed, and that its binding authority to make an award be raised to a limit of £600,000.
- The data links between the banking ombudsman facility and the FCA and appropriate government departments will be critical. I recommend that *resolver.co.uk* or a similar service be engaged to process data including enquiries, complaints and ombudsman's rulings in order to provide an early warning system against future mis-selling or malpractice.

- I recognise that the banking ombudsman facility will only be able to review future complaints for businesses which would not have met FOS's current, microenterprise criteria. I do not recommend retrospective capability for the new body but recommend that banking microenterprise claims predating the date of its operation (but falling within the current 6/3-year FOS time limits) should be assessed by the new service.
- I propose that a process is agreed that provides an opportunity for stories to be heard by the most senior management of the major UK banks and the banks given the opportunity to respond openly.
- The discussion should then move on to current day circumstances and to ways in which such malpractices - and any fresh abuses - can be stopped in the future. A helpful output would be the establishment of a monitoring council of stakeholders, including SME representatives, to work in collaboration, ensure processes are optimal and effective, to deal with prevailing issues and ultimately act as an early warning mechanism.
- UK Finance should continue to work with the APPG on its joint Contracts Working Group.
- As part of this process, special attention should be given to measures to address the imbalance between banks and business customers. Australian measures including a requirement for a plain language summary and the prohibition of calling in debt on the basis of loan-to-value covenants where all payments have been kept up to date should be considered.
- UK Banks should commit not to onsell debt to institutions which are not signatories to the Lending Standards Board's code of practice, unless they will commit to maintaining equivalent standards. The sector should urge all debt collection agencies and debt purchase firms to register with the Lending Standards Board.

- UK Banks should commit themselves to showing restraint in taking security for a business loan on the sole residence of a borrower.
- The UK banking sector should work with the APPG in its report for BEIS and the Insolvency Service in response to the Government's Review of the 2016 Corporate Insolvency Framework to ensure that insolvency should not in future effectively automatically prohibit company owners and directors from seeking redress.
- UK Finance should examine ways of co-ordinating member banks' complaints data in order to ensure broad comparability.
- In order to foster trust in the financial sector, the UK banking industry should monitor closely any claims that member banks are using legal panels in order to limit access to justice in parts of the UK where there are a relatively small number of law firms, or that efforts are being made to string out legal proceedings improperly.

---

[i] Alistair Darling Interview Business Insider, 28th May 2018
[ii] FT July 4th, 2018 HBOS Fraud Victims set to accept compensation from Lloyds
[iii] Times July 1st, 2018
[iv] Times August 1st, 2018
[v] Andrew Bailey, FCA press release (date)
[vi] Letter from Andrew Bailey, Chief Executive FCA, to Kevin Hollinrake MP 17 September 2018
[vii] Industry Codes of Conduct and Feedback on FCA Principle 5 Policy Statement PS 18/18 July 2018
[viii] Part 2, Page 12
[ix] Part 2, page 42
[x] Letter from Andrew Bailey, Chief Executive FCA, to Kevin Hollinrake MP 17 September 2018
[xi] Part 2, page 35
[xii] FCA press release October 16th, 2018
[xiii] BDRC survey of 750 SMEs conducted for UK Finance September 2018
[xiv] BDRC survey for Competition and Markets Authority, August 2018
[xv] Money Advice Trust data
[xvi] Ned Beale Journal of International Banking Law and Regulation 2018
[xvii] p40 APPG report.
[xviii] Part 2, page 40
[xix] Part 2, page 4
[xx] Part 2, Page 13
[xxi] Part 2, page 11
[xxii] Part 2, page 11
[xxiii] FOS Annual Review, 2018
[xxiv] Report of the Independent Review of the FOS, Richard Lloyd July 2018
[xxv] R Samuel Capital Markets Law Journal 2016 11(2), 12(3) and 2018 13(1)
[xxvi] Part 2, page 32
[xxvii] Part 2, page 27
[xxviii] Part 2, page 27

[xxix] Part 2, page 37
[xxx] Part 2, page 19 citing the GCA's action on Tesco supplier payments and references to the CMA
[xxxi] Part 2, page 25
[xxxii] Part 2, page 24
[xxxiii] Part 2, page 29
[xxxiv] FCA Press release 16/10/2018
[xxxv] FCA written evidence to Treasury Select Committee Inquiry into SME Finance 2018
[xxxvi] FCA Consultation Paper CP18/31 October 2018
[xxxvii] FCA Policy statement PS18/21 October 2018
[xxxviii] Part 2, page 15

CENTRE FOR SOCIO-LEGAL STUDIES

University of Oxford
Manor Road, Oxford, OX1 3UQ
Tel: +44 (0)1865 284220 Fax: +44 (0)1865 284221
Email: christopher.hodges@csls.ox.ac.uk Web: www.csls.ox.ac.uk

1. Independent Review of SME/Bank Dispute Resolution in the UK

MECHANISMS

Professor Christopher Hodges[1]

DRAFT 12.9.18

SUMMARY

This paper aims to outline the options for mechanisms to achieve three goals. The goals are:

1. To resolve future disputes between banks and their SME customers in a swift and economic and effective manner;
2. To use the outputs of such a dispute resolution system to improve practice by both banks and SMEs, so that lessons are identified quickly, fed back, applied, and behaviour and culture are improved where necessary;
3. To assist in bringing emotional closure to those historic cases where owners of SMEs and others have suffered deep harm to their lives.

These three goals present at first glance different problems, and they do require different approaches and to achieve different outcomes. In simplistic terms, the respective outcomes might be described as paying money as compensation for breaches of law of fairness; using data to drive engagement; and manifesting recognition and genuine apology for harm caused, irrespective of legal liability.

The paper identifies a range of possible mechanisms that are state-of-the-art in relation to each of the three issues. It looks at the following three areas identified above:

1. Part B notes Courts, Small Claims, Adjudication in the construction sector, Arbitration, ADR alongside courts, Tribunals, the forthcoming Online Court, and a range of different Ombudsmen models. A number of foreign financial sector Ombudsmen are expanding jurisdiction to cover SMEs in addition to the traditional coverage for consumers. Use of the Ombudsman model is clearly expanding, both in the UK and abroad. Also noted are new intermediaries that have been created to assist SMEs address disputes in various sectors: the Groceries Code Adjudicator, the Pubs Code Adjudicator and the Small Business Commissioner. Part B concludes with a comparative analysis of issues such as costs, funding, duration, the basis of decisions (law or fairness), binding effects, ability to refer points of law to court, and governance.

2. Part C notes contemporary thinking on how the future behaviour of business organisations can best be affected. There has been a revolution in such thinking recently, building on the findings of behavioural psychology. This thinking has been applied by various regulators and business

[1] Professor of Justice Systems at Oxford University; Supernumerary Fellow of Wolfson College; Head of the Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford; Fellow of the European Law Institute. Research funding is received from the UK Department for Business, Energy & Industrial Strategy, the Swiss Reinsurance Company Limited and the European Justice Forum.

compliance systems in some sectors. At bottom is a need to focus on organisational culture, rather than a traditional approach to accountability through deterrence, since there is extensive empirical evidence that the traditional approach is ineffective, whereas the new approaches are far more effective. There is little empirical evidence that settlements or decisions in individual legal cases (by courts, Tribunals or arbitrators) have much effect on the behaviour or culture of organisations and their staff.

3. Part D notes various techniques for achieving emotional closure, building on best practice in mediation, but also noting techniques developed from much more serious instances under the headings of 'restorative justice, 'transitional justice' and 'truth and reconciliation'. It is not suggested that those more serious situations apply here, but the consistency of the approaches is instructive.

Part E briefly draws some conclusions. This paper does not seek to choose what the right mechanisms might be (that is a task for Simon Walker CBE) but it indicates, first, that certain options can deliver better outcomes and functionality than others; second, that there are clear directions of travel in the general evolution of contemporary systems for dispute resolution and for regulation; and, third, that certain choices can be combined so as to form a coherent and efficient means of delivering more than one of the basic goals.

Thus, adversarial systems (courts, tribunals and arbitration) can resolve legal disputes, whether by determination of law by a third party or by settlement between the parties, especially if facilitated by mediation. But if criteria of cost, speed, width of criteria for decision (adding fairness to law), and the ability to aggregate and feed back data are taken into account, other systems such as an ombudsman model are now capable of delivering such outcomes as well.

The issue of changing behaviour and culture is one that has undergone extensive rethinking recently, with many regulators shifting from a traditional approach based on deterrent sanctions to one in which positive engagement is encouraged between businesses and multiple stakeholders to support compliance and an ethical culture. Intermediaries such as Resolver and leading consumer Ombudsmen are expanding involvement in such developments to change behaviour more quickly and effectively. Hence, an ombudsman model has various clear advantages for achieving both goals 1 and 2 in an effective and economic fashion. But new mechanisms could be envisaged that combine a number of elements that would help SMEs.

The third goal is of a somewhat different nature, and requires a different response. The resolution of deep psychological scars is not a matter for law or traditional legal processes, but there is considerable learning and experience on 'transitional justice' and effective mediation that can assist here.

A. SYSTEM DESIGN: FUNCTIONS, OUTPUTS AND CRITERIA FOR EVALUATION

This paper seek to outline the options for mechanisms for delivering three broad objectives: first, to design a mechanism by which disputes between SMEs and their financial services suppliers may be resolved speedily, effectively and fairly; second, to design a mechanism by which undesirable issues of behaviour by either side may be identified and addressed, to avoid ongoing or future repetition; and third, to assist those who have suffered serious emotional trauma to achieve closure. A series of possible mechanisms for those three objectives will be set out respectively in sections B, C and D, and conclusions are in section E.

This analysis of options for possible mechanisms, therefore, focuses on the functions and outputs desired. It will seek to analyse what mechanisms might be designed so as to provide the three objectives. In doing so, it will describe a number of existing models that may provide examples of the type of approach that is desirable for the objectives of the current project, and examine their broad advantages and disadvantages, but it will not assume that any of these existing mechanisms are the right answer for the objectives of this project. It is important to take an objective look at the problems rather than necessarily try to build on existing models—even if what may end up being proposed ends up having some features of existing models.

The starting point is to identify the essential elements of the three basic objectives, and the criteria against which options may be assessed. The first objective concerns dispute resolution. The criteria for the process will be: accessibility, low cost of access, low and proportionate transactional cost, speed of the process, delivery of fair and reliable outputs that resolve all aspects of individual disputes.

The second objective concerns market behaviour. It imagines a system in which undesirable behaviour is identified swiftly (by whatever means), the root causes of which are then examined and identified, so that effective and appropriate modifications can be put in place by all relevant actors, monitored and revised as necessary, so that future undesirable behaviour is prevented. This system is often equated with market surveillance, regulation and enforcement. However, modern ideas have transcended those concepts to address ways of affecting behaviour in a more fundamental and effective manner.

The third objective concerns a need for psychological healing, through profound recognition that for some people involved the consequences far exceed financial loss and that the experience of losing one's business has led in some cases to loss of livelihood, home, family or other consequences and hence deep emotional trauma. This is an area where the legal system has traditionally not sought to operate. But it is a subject for which effective new solutions need to be found.

The criteria identified here will, therefore, be used to evaluate options for the design of the system that might be recommended for this project. It is not the function of this analysis to provide specific recommendations on solutions: that is the task of Simon Walker CBE. The task of this paper is to outline technical options, although some clear comparative conclusions will be drawn.

B. SYSTEMS FOR RESOLVING DISPUTES

This section outlines a series of mechanisms for resolving disputes that have some relevance to the context of claims by UK SMEs against their lenders. Some important themes emerge:

In many areas of dispute resolution in the UK, there is a clear direction of travel away from adjudication by courts or Tribunals—and adversarial systems—to newer systems that deploy a number of different techniques. The reasons for this evolution lie in various needs: to achieve swifter resolutions, to reduce costs, to restore relationships between parties where this is relevant, and to deliver a larger number of functions than solely dispute resolution or declaration of the legal rights of parties involved (these points are expanded below).

The objective of this paper is to identify the best design for delivering particular functions—and a greater number of functions than dispute resolution alone. Important 'extra' functions are providing advice and assistance to parties (especially SMEs), and supporting effective behaviour by parties on both sides.

Courts

Issues of cost and complexity, and hence delay, are a constant theme in evaluating procedures for solving disputes. Such issues are widely familiar. For this reason, we need not undertake a detailed examination here of these issues in relation to court procedures. Valiant attempts to control 'the cost monster' have been undertaken. Professor John Peysner has demonstrated that Lord Woolf's approach of relying on case management and rationing of procedure has failed in delivering access to justice.'[2] Dr John Sorabji has highlighted the perennial tension between, on the one hand, ensuring that accurate and substantive justice is done in each individual case and, on the other hand, ensuring that the state's limited resources for delivering justice remain available to all at reasonable cost and without unreasonable delay, as a result of individual parties consuming disproportionate resource in individual cases.[3] The truth cannot be escaped that seeking a forensically accurate outcome in every individual case—especially cases with small value or inherent complexity—takes time and money. What follows here is an overview of attempts to adopt new procedures, techniques and models to provide a balance between fair outcomes, cost and delay.

Small Claims

One of the first attempts to alleviate the problems created by the formality, cost and length of court proceedings related to small-scale disputes, such as those of consumers against traders or of SMEs. The Small Claims Procedure introduced in 1973 was designed to be used by litigants in person, without the involvement of lawyers.[4] It was initially designed as an arbitration process, but had assimilated a strong element of mediation by the mid-1990s,[5] and Lord Woolf converted the process into a 'small claims track' alongside his fast and multi-track system for civil procedure. The Small Claims Track handles money claims up to £10,000 in England and Wales. The loser does not usually have to pay the winner's costs.

In 2005, local mediation schemes were replaced by a single national scheme, comprising a National Mediation Helpline (NMH) and a Small Claims Mediation Service (SCMS). The NMH was replaced

[2] J Peysner, 'England and Wales' in C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart, 2010), 291; J Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014), 24.
[3] J Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014).
[4] Report of the Review Body on Civil Justice 91988), Cm 394.
[5] Lord Woolf, *Interim Report* (Judiciary, 1999), 102.

by the Civil Mediation Online Directory in 2011, still providing referral to a private mediator, but on a self-referral basis only.[6] The website quotes fees to be paid by parties to the mediator on per hour, which rise for claims worth over £5,000 and £15,000.[7] In contrast, mediators available through SCMS (which started in 2007) are civil servants and available free to parties in defended claims. In 2012, the SCMS had 15,000 referrals, 73% of which settled.[8] Before 2014, mediation required the consent of both parties, but from 2014 claims are automatically referred to the SCMS.[9] Reforms introduced in 2013 automatically referred all small claims to a mediator,[10] but one that the parties had to pay, and unresolved cases were returned to the small claims court process.[11] By 2016, the SCMS, based at the Northampton County Court Business centre, had a small staff (usually working by telephone from home) that book cases for mediation with a team of 14 mediators.[12] The mediators (former court back office managers) achieve a success rate in settling 70% of the cases referred to them. However, Briggs LJ noted: 'Unfortunately, despite conducting up to five of these simple mediations a day, there are only enough mediators to service about 35 to 40% of the national demand. If the case has not been settled within 28 days of referral it is sent as a defended case to the local hearing centre in the usual way.' He commented that 'It is yet to become fully effective since it has insufficient mediators to meet even half of the relevant demand, and I am advised that there is no budgeted resource to expand it.'[13] The Online Court is intended to replace both the small claims track and small claims mediation.

Adjudication in Construction

In the construction sector, a specific form of dispute resolution has been devised, called Adjudication. A party to a construction contract may refer a dispute for a decision by an adjudicator, which must be made within 28 days.[14] The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute. The model is, therefore, similar to arbitration, with timely expert intervention, and enables the parties to move forward with their relationship on a reliable basis. The mechanism is widely used and very few adjudication decisions are challenged at the end of the contract.

Arbitration

[6] http://civilmediation.justice.gov.uk

[7] In 2017 the fees were:

Amount you are claiming	Fees per party	Length of session
£5,000 or less	£50 + VAT £100 + VAT	1 hour 2 hours
£5,000 to £15,000	£300 + VAT	3 hours
£15,000 to £50,000	£425 + VAT	4 hours

[8] *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System. A Consultation on Reforming Civil Justice in England and Wales. The Government Response* (Ministry of Justice, 2012), Cm 8274.

[9] Civil Procedure (Amendment) Rules 2014, CPR r.26.4A.

[10] *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales - The Government Response* (The Stationery Office, 2012), Cm. 8274.

[11] S Prince, 'ADR after the CPR' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009).

[12] This and the following is from Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016).

[13] ibid, para 2.90.

[14] Housing Grants (Construction and Regeneration) Act 1996, s 108.

Arbitration can be viewed as the most extensive form of alternative dispute resolution (ADR). The basic model contains strong similarities with an adversarial court process, although different forms of arbitration (large commercial, inter-State, construction sector, consumer-trader) have some differences. The basic model is adversarial, in that both sides set out their positions in writing, provide their evidence, and the neutral third party makes a determination, applying the relevant law. In larger cases, each party might nominate an arbitrator to sit on a panel of three arbitrators with an independently-appointed chair. Hearings may be lengthy and involve extensive oral argument by counsel. In small consumer cases, a single arbitrator may be appointed by the scheme administrator, and the parties may submit their statements and evidence only in writing. That latter model can be swift and efficient, although consumers are usually required to pay a fee to access the system, so as to ensure that the independent arbitrator's fees will be covered, even if some schemes may provide a losing trader to reimburse the consumer (as under the courts' loser pays rule).

A Business Arbitration Scheme is operated by the Chartered Institute of Arbitrators (CIArb) for disputes between £5,000 and £100,000.[15] It costs a fixed fee for each party of £1250 plus VAT. It offers a final and legally binding award in less than 90 days from the appointment of the arbitrator. Formal procedural steps are kept to a minimum (exchange of statements of case, documents and evidence) to enable the scheme to be simple enough to allow most businesses to present their own case without legal representation. Costs are awarded to the loser, but the amount of recoverable has been limited to £1,000 to dissuade parties from incurring high legal costs. The Award is enforceable in the same way as a court judgement. The scheme is described as underutilised.

ADR and Courts

In the context of court proceedings, ADR usually means mediation. Mediation is a technique in which an independent third party tries to assist those in dispute to reach an amicable resolution of their dispute. The model often adopted involves some combination of 'shuttle diplomacy' by the mediator, together with joint sessions. In some contexts (such as employment disputes involving the Arbitration Conciliation Advisory Service, ACAS) the term conciliation is used instead of mediation, although there is usually little difference in practice between the two terms.

Mediation was introduced into the court procedure of England & Wales under the 1999 Civil Procedure Rules, pursuant to the fundamentally reformed model devised by Lord Woolf. Woolf was influenced by the fact that perhaps 95% of court cases started ended up being resolved by agreement between the parties, rather than by decision by a judge, that the system should be re-focused to assist such outcomes as much as possible. Essentially, mediation is now expected to be tried by the parties before commencing every court claim, and possibly also during it. Pre-action Protocols that cover different types of disputes typically provide for parties to attempt ADR before proceeding with litigation. Failure to do so without a satisfactory excuse may lead to imposition of cost penalties.

Parties need to identify and appoint a mediator, and pay his or her fees. A Voluntary European Code of Conduct for Mediators was introduced in 2004, covering:

- Competence, appointment, fees of mediators.
- Independence and impartiality.
- Ensuring the understanding by the parties, fairness, informed consent over any http://www.ciarb.org/dispute-appointment-service/arbitration/schemes/business-arbitration-schemeagreement reached, parties' freedom to withdraw.
- Confidentiality.[16]

In 2017 the Civil Justice Council ADR Working Group called for wider use of ADR before and during court processes, suggesting that the court should actively promote mediation and that attendance at

[15] http://www.ciarb.org/dispute-appointment-service/arbitration/schemes/business-arbitration-scheme
[16] See http://europa.eu.int/comm.justice_home/ejn/adr_ec_code_conduct_en.pdf.

mediation ought to be compulsory for all cases.[17] The problem with court processes and mediation is, as Briggs LJ noted in 2016, that the two functions operate with different providers and the relationship between the two functions is 'semi-detached'.[18]

Tribunals

Various types of Tribunals exist, and models differ somewhat between those in the public sector and in employment contexts. The word tribunal can also be used generically to describe almost any court-like dispute resolution facility. The development of tribunals is an example of the general evolution from courts to less formal quasi-arbitration models in the past 70 years. We refer below to the different structures of Employment Tribunals and the general First and Second Tier Tribunals.

Claims for breach of employment rights may be brought, depending on certain rules, either in the courts or in Employment Tribunals, initially created as Industrial Tribunals. Since 2014 all claims must be notified to the Advisory, Conciliation and Arbitration Service (ACAS) before they can be started in court or an Employment Tribunal,[19] after which ACAS contacts the parties and offers its conciliation services. The origin of Employment Tribunals was linked with other Tribunals, and the design may appear at first sight to be a tripartite model like arbitration, since they involve a panel of three decision-makers, but the *modus operandi* of Employment Tribunals nowadays is essentially court-like, but with a strong sense of informality.[20] Cases are allocated to one of three tracks:

- Short: expected to be resolved in a hearing of 1 or 2 hours, such as unpaid wages, which ought to be amendable to an Online Court approach;
- Standard: expected to involve hearings of 1 or 2 days, such as unfair dismissal cases;
- Open: others, expected to last three days or more.

A claim before an ET is determined by a panel of three people: an independent legal chairman, and two others, who are taken from, respectively, lists of individuals who have employee or employer experience. The lists were compiled historically from people nominated by the TUC and CBI, but appointees nowadays are subject to an appointments screening process akin to that of the Judicial Appointments Committee. Appeals are heard by the Employment Appeal Tribunal, which has the same power as the High Court.[21]

Claims against the State have various possible pathways. First, almost every Ministry or local government body has its own complaints procedure. Second, decisions may be challenged in the courts on judicial review, basically if the law has been misapplied, or the process has been unfair, or they are extremely unreasonable. Third, cases may be subject to appeal in one of a number of Tribunals. Fourth, a complaint based on maladministration may be made to the Parliamentary and Health Service Ombudsman, or the Local Government Ombudsman. The overall picture is decidedly muddled, even though aspects of the system have been subjected to various reviews.[22]

---

[17] *ADR and Civil Justice. Interim Report* (Civil Justice Council, 2017).

[18] Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016), para 2.86.

[19] See Employment Tribunals Act 1996 ss 18, 18A and 18B.

[20] It does not appear from the Ministry of Labour's *Industrial Tribunal Reports* published in the 1960s and 1970s that the Industrial Tribunal Chairmen and members thought that they were conducting an arbitration in any sense. In the 1960s the process was largely legal and adversarial, albeit much more informal than a court.

[21] Employment Tribunals Act 1996, s 29(2).

[22] Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (Ministry of Justice, 2001); *Getting it right, putting it right – Improving decision-making and appeals in social security benefits* NAO (2003); *Citizen Redress: What citizens can do if things go wrong with public services* NAO (2005); House of Commons ; *Administrative Redress: Public Bodies and the Citizen*, Law Commission (2010); *Open Public Services*, Cabinet Office (2011); V Bondy and A Le Sueur, *Designing redress: a study about grievances against public bodies* (Public Law Project, 2012); *Putting it Right* (AJTC, 2012); *Complaints and Ombudsman*, (Public Administration Select Committee, 2012); *Complaints Handling Report* (Parliamentary Ombudsman, 2013); *More Complaints please* (Public Administration Select Committee, 12th Report, 2013).

Over 400,000 claims a year are started in the Tribunals system. It consists of two tiers (Upper and Lower). Tribunals represent a 'movement towards greater independence and judicialization of administrative appeals'.[23] They were reformed under the Tribunals, Courts and Enforcement Act 2007, to create a unified structure from what was 'a complex and disorderly landscape.'[24] Tribunals are currently undergoing further reform under the leadership of the Senior President of Tribunals,[25] especially in moving away from a litigation mindset to one of resolving problems.[26] However, functions of feeding back findings to drive changes in behaviour by public sector bodies are currently out of reach.

The Online Court

The advent of digital technology has opened up a number of interesting new techniques and models. Some have suggested that technology will replace lawyers.[27] One obvious idea is to process and resolve claims entirely online, by replacing paper documents with electronic files, and communicating through email and using skype or similar communications media. This idea has already been adopted to a significant extent in various existing models that cater for particular types of claims. Such tools have already been adopted by the consumer ombudsmen referred to below. Examples of digital portals are Money Claims Online[28] and for undefended personal injury claims.[29]

The objective of shifting many court claims online was made possible by a major injection of public funds, largely from agreement in 2015 to selling much of the court estate across the country.[30] The idea of an Online Court for all claims in England and Wales under £25,000 was announced by Lord Justice Briggs in 2016.[31] However, Briggs LJ identified enforcement of County Court judgments as a problem.[32] After a 2017 pilot, the new service was introduced in April 2018 for all claims in the County Court for amounts up to £10,000.

---

[23] P Birkinshaw, 'Grievances, Remedies and the State' in M Adler (ed), *Administrative Justice in Context* (Hart, 2010), 360.
[24] Department for Constitutional Affairs, *Transforming Public Services: Complaints Redress and tribunals* (Cm 6243, 2004). A Legatt Report, *Tribunals for Users* (2001).
[25] See *Senior President of Tribunals' Annual Report* (Senior President of Tribunals, 2016) and subsequent reports.
[26] Lord Justice Ryder, *'The Modernisation of Access to Justice in Times of Austerity'* 5th annual Ryder Lecture, University of Bolton, 3 March 2016.
[27] R Susskind, *Transforming the Law: Essays on Technology, Justice, and the Legal Marketplace* (Oxford University Press, 2003); R Susskind, *The End of Lawyers?: Rethinking the nature of legal services* (Oxford University Press, 2008).
[28] See description in Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016), paras 2.26-2.29.
[29] http://www.claimsportal.org.uk/en. This was introduced to support the Pre-Action Protocol for Low Value Personal Injury (PI) Claims in Road Traffic Accidents (RTAs), which became effective from 30 April 2010. The Portal is operated by Claims Portal Limited. It is not designed for, nor accessible to, individual claimants.
[30] *Spending Review and Autumn Statement 2015: key announcements* (HM Treasury, 2015); *Response to the proposal on the provision of court and tribunal estate in England and Wales* (Ministry of Justice and HM Courts & Tribunals Service, 2016). See later *Modernisation of justice through technology and innovation* (HM Courts and Tribunals Service, 2016).
[31] Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016).
[32] Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016), para 2.46. 'The main methods of individual enforcement of County Court judgments are Warrants of Possession (of land) and of Control (possession of goods), Charging Orders, Attachment of Earnings and Third Party Debt Orders. Methods of collective enforcement are mainly by Bankruptcy and Winding-up petitions, which give rise to separate proceedings of their own. There is also procedure for the obtaining of information from debtors about their assets, as a precursor to enforcement, by examination before a court officer. Default by judgment debtors in complying with the court's orders to attend or to provide relevant information in connection with enforcement is, in the last resort, punishable by committal to prison.'

The Online Court operates in three stages, all essentially online, similarly to—but with important differences from—how the leading consumer ombudsmen operate.[33] The first stage would be entirely online, with claimants supported by 'assisted digital' simple, commoditised online advice. The second stage would involve a Case Officer who would attempt to resolve a case through conciliation and also manage its collection of evidence and allocation to an appropriate track, such that those cases that reach the third stage could be decided by a judge.

Some scepticism has been voiced that the Online Court has arrived late in the day, given that various types of claims have or are moving away from courts. Thus, first, the model that is now used for consumer-trader disputes is that of consumer ADR, and especially consumer ombudsmen; second, there are some signs that personal injury claims may move away from courts to new administrative injury redress schemes; and third, debt claims by SMEs have largely ceased to be brought through Money Claims Online and have been shifted into new models such as the Small Business Commissioner.

Consumer ADR

The resolution of consumer-trader disputes has evolved its own architecture, with various different models. A simple model is that of 'consumer arbitration', where the case is submitted to a consumer ADR scheme and resolved by a single arbitrator (usually a barrister). CEDR has operated a number of such schemes for different sectors for some decades. Such ADR schemes are required under Codes that are approved under the Approved Consumer Code of Practice Scheme. That Scheme has developed since the 1980s, was widely known when operated by the Office of Fair Trading, and in recent years has been administered by the Chartered Trading Standards Institute (CTSI).[34] The CTSI issues criteria against which trade associations' Codes of Practice are assessed.[35] The key feature to note here is that a trade association has committed its members to agree to the process of arbitration in every dispute raised by a consumer. The number of complaints processed under these arbitration schemes is fairly small.[36] Various features may be off-putting for consumers, such as the need to pay an access fee (discussed further below) and the need to agree up front to be bound by the arbitrator's decision.

Another consumer ADR model might simply be mediation. That is not generally found in UK—since it does not include a mechanism for reaching a binding decision—but can be found in some countries.[37] However, some County Court judges have invited parties to consider settlement at hearings, and this has resulted in settlement a much higher proportion of small claims than normal.[38] As will be seen below, the most sophisticated model involves combining mediation with a decision stage.

---

[33] The FOS was a major source of inspiration for the Online Court model.

[34] eg the British Association of Removers, the British Healthcare Trades Association, the Consumer Code for New Homes, the Glass and Glazing Federation, the Institute of Professional Willwriters, RAC Approved Garages, The Carpet Foundation, the 'Trust My Garage' scheme of independent garages, the National Body Repair Association.

[35] See https://www.tradingstandards.uk/commercial-services/approval-and-accreditation/the-consumer-codes-approval-scheme. For the current list of members see https://www.tradingstandards.uk/commercial-services/code-sponsors.

[36] See figures for 2009 and 2010 in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 319.

[37] An example is the *conciliazione paritetica* model that is fairly successful in some market sectors in Italy.

[38] Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016), paras 2.19-2.28. He referred to 'a form of small claims conciliation (to use an umbrella term) carried out by District Judges in certain County Courts hearing centres in the Hampshire, Dorset and Wiltshire area, and also in Romford … [in which] the District Judge conducting the list …. Invites each pair of parties to consider settlement, and provides assistance in the form of informal early neutral evaluation. …. Those cases which do not settle there and then are given the benefit of case management directions designed to enable the parties to prepare for a final hearing much more effectively than is customary in the Small Claims Track.' 'Statistics … suggest that 25% of the entire small claims track list is disposed of due to non-attendance, 50% at the

Since 2015, every EU Member States has been required to have a national consumer ADR mechanism that is capable of processing any consumer-trader complaint.[39] This obligation arises under Directive 2013/11, which also specifies a regulatory system for such consumer ADR entities, and quality criteria that all such approved consumer ADR entities must satisfy (which will be referred to below).

Consumer ADR has developed at a different pace and taken different models across EU Member States,[40] and this diversity is of considerable assistance in illuminating the current SME issues. Particularly effective models of consumer ADR exist in the Nordic State, the Netherlands, the UK, Belgium and elsewhere, but they contain important differences. It is important to note the theme of evolution in a number of the leading systems.

Consumer Ombudsmen

A more advanced model of consumer ADR is that of an Ombudsman. The concept of an Ombudsman may be most familiar in the context of complaints of maladministration against public bodies (the Parliamentary and Health Service Ombudsman, and the Local Government Ombudsman). In the current context, however, greater assistance is to be gained from considering the different group of what might be described as 'consumer ombudsmen', who handle complaints by consumers against traders in a market context. Such consumer/market ombudsmen (who will refer to below merely as ombudsmen) have evolved in various sectors, and can be classified as a specific form of 'consumer ADR'.

Consumer Ombudsmen in UK

In UK, consumer ADR has evolved from an early model of arbitration of individual disputes, to add in mediation as a preliminary stage, and then to an ombudsman model in the most important market sectors, which provides a range of functions and outputs. Thus, in the financial services sector, various trade sectors created their own ADR schemes from the 1960s on. Many of these were merged by statute at the same time as a new regulatory system was created under the Financial Services and Markets Act 2000 to form the Financial Ombudsman Service (FOS).

For disputes about pensions, the Pensions Advisory Service (with the Pensions Mediation Service (provided by CEDR)) and the Pensions Ombudsman provide a sequence of advisory, and dispute resolution functions. The origins of the Pensions Advisory Service date back to 1983, when it was a charity before becoming a voluntary organisation in 1990. The Pensions Ombudsman was created under the Pension Schemes Act 1993.

Leading ombudsmen now exist in UK for energy, communications, lawyers, motor vehicles, furniture, university students. Although some leading Ombudsmen are created by statute and established as public bodies, this is not the only model. Ombudsman Services is a non-profit company limited by guarantee, and holds mandates as Energy Ombudsman (granted by OFGEM), Communications Ombudsman (granted by OFCOM) and various others. It also provides a complaints mechanism for members of UK Finance. This is clearly one option that could be expanded for complaints by SMEs against banks.

conciliation hearing, and a significant proportion of the remaining 25% settles before trial, due (anecdotally) to progress towards settlement achieved at the conciliation hearing.'

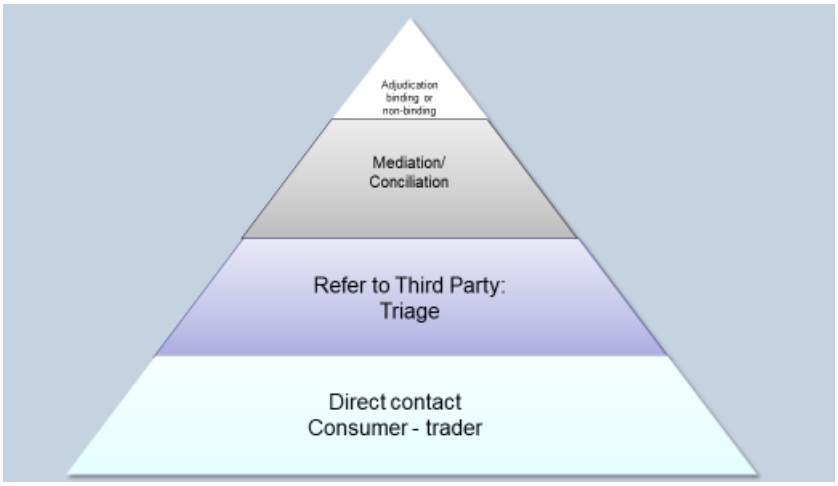
[39] Directive 2013/11 of 21 May 2013 on alternative dispute resolution for consumer disputes, OJ 2013, L 165.

[40] C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012); C. Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) 15(4) *ERA Forum* 593-608; C. Hodges, 'The Consumer as Regulator' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, 2016); C Hodges, 'Consumer Redress: Implementing the Vision' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press, 2017).

A number of consumer ADR schemes continue to operate on the model of arbitrating individual cases, but numbers of claims processed are now modest. It can now be said that the ombudsman model has come to dominate market disputes. Recent developments include appointment of a single Rail Ombudsman from November 2018, a Government proposal to combine various ADR bodies to form a single Property Ombudsman,[41] a proposal to create a Sports Ombudsman,[42] and a Government consultation on reforming the consumer disputes landscape.[43]

A strong advantage of the ombudsman system is that it is typically free to consumers. Unlike arbitration-based ADR schemes, consumers usually do not pay to access the system. All costs are paid by the trade sector and/or individual defendants. For example, the FOS sets an annual charge that is levied by statute through the Financial Conduct Authority (FCA), and also makes a case charge of £550 for every case that is handled annually over the first 25 cases. The amount of levy that each FCA-regulated business pays currently ranges from around £100 a year for a small firm of financial advisers to over £300,000 for a high-street bank or major insurance company.

The Ombudsman model is currently the most sophisticated consumer-trader dispute resolution model, since it combines various techniques within an integrated pathway, and also provides a wider range of output functions that just dispute resolution. The typical pathway is illustrated below.



The pathway provides a series of stage. In the first stage, consumers must contact traders direct allowing time for direct negotiation and an opportunity to resolve matters swiftly before formal escalation. Some schemes provide for a time limit for that stage. The second stage is 'Triage', where the consumer raises an issue with a case handler at the ombudsman, who is able to apply independence and expertise in an initial evaluation of the case. This may result in the ombudsman preventing time being wasted on cases that are not within its remit. Alternatively, it may result in a swift resolution of a case. This may be through an explanation of the relevant law (such as the relevant interpretation of the trader's terms and conditions) for the consumer, or, spilling over into the third stage of mediation or investigation bv the ombudsman of the position of both sides, the ombudsman being able to give a clear view to the trader that he should settle before the case goes further. As illustrated by the pyramid shape in the diagram, most cases resolve as the stages progress, and the number of cases that fall to be determined by a formal decision of an ombudsman is typically low.

[41] *Strengthening consumer redress in the housing market A Consultation* (Department for Housing, Communities and Local Government, 18 February 2018). Strongly supported in *Better redress for homebuyers. How a New Homes Ombudsman could help drive up standards in housebuilding and improve consumer rights* (House of Commons, All Party Parliamentary Group for Excellence in the Built Environment, 2018).
[42] Baroness Tanni Grey-Thompson, *Duty of Care in Sport. Independent Report to Government* (April 2017).
[43] *Modernising Consumer Markets. Consumer Green Paper* (Department for Business, Energy and Industrial Strategy, 2018)

The Financial Ombudsman Service

The FOS has significant resource and expertise. It is the largest Ombudsman for the private sector in the world. Its figures illustrate the pyramid structure of resolution of a large number of cases noted above. In 2017/18[44] the FOS received 1,448,396 inquiries, 339,967 new complaints, of which 55% concerned PPI, and resolved 400,658 complaints. Decisions by an Ombudsman were made in 32,780 cases. Claims Management Companies brought 85% of all PPI complaints. 83% of complaints were resolved within 3 months, excluding PPI, whilst 65% of all complaints were resolved within 3 months.

The FOS currently accepts claims from consumers and (since 2009) microbusinesses. The FOS is free to consumers and microbusinesses. The FOS can award up to £150,000. If an award might have been applicable above that sum, it can make Directions that can order a bank to pay a sum greater than the limit of its financial award. A significant number of decisions by an Ombudsman at the FOS do not quantify exact sums but set out a requirement to restructure a loan or a formula for recalculation. Hence, the implications can be that more than £150,000 should be paid. Banks vary on whether they pay up to £150,000 or more. The FOS does not actively monitor whether awards are implemented, but non-compliance is believed to be rare, and if a complainant complaints to the FOS that a bank has not paid then FOS will follow it up.

Further PPI claims are banned as from late 2019, with the consequence that the FOS should have considerable available resource. However, in 2017/18 the increase in complaints about home credit was 146% and the increase in new complaints about payday loans was 64% (to 17,256).

Proposal to Extend the FOS to cover SMEs

The FCA has consulted on a proposal[45] to extend the mandatory (and voluntary) jurisdictions of the FOS to claims by businesses that have:

1. Annual turnover of less than £6.5m.
2. Annual balance sheet total of less than £5m.
3. Fewer than 50 employees.

In addition, the FCA proposes to make a guarantor a new category of eligible complainant. This is estimated to involve around 35 to 50 people a year.[46]

The rationale for making new arrangements is:

- It is accepted that relatively few SMEs have the necessary bargaining power to negotiate contract terms.
- [It is assumed that, similarly, SMEs are vulnerable in pursuing their rights because they have an unbalanced position in dispute resolution, and probably no in-house legal expertise, or access to external expertise.]
- When things go wrong only a very small proportion of SMEs take their disputes with financial services firms to court.[47] The World Bank estimates that taking a dispute to court might cost an

[44] *Annual review 2017/2018* (Financial Ombudsman Service, 2018).

[45] *Consultation on SME access to the Financial Ombudsman Service and Feedback to DP15/17: SMEs as Users of Financial Services* (FCA, 2018), CP18/3.

[46] Consultation, Annex 2, para 71. Between around 790 to 2,400 complaints to financial services firms in relation to personal guarantees are likely to be within scope of DISP.

[47] Fewer than 0.5% of financial services disputes in the Legal Services Board's surveys and FCA's SME complaints survey resulted in a court hearing. In the limited Legal Services Board sample, SMEs used arbitration or conciliation services about as often as the courts in order to resolve financial services disputes. As of October 2015, only about 300 court cases involving IRHPs were active with the courts – about 1% of customers in scope of the IRHP redress scheme.

SME in the UK up to 44% of its claim.[48] Businesses gave the FCA examples where simply starting proceedings for a medium-sized commercial insurance claim might cost about 5% of the claim's value. The court fee alone for starting a claim of over £10k is 5% and fees are only capped (at £10k) once the value of the claim goes over £200k.[49]

- Fewer than 0.5% of financial services disputes in the LSB's surveys and the FCA's SME complaints survey resulted in a court hearing.
- The FOS receives an average of around 4,000 complaints a year from micro-enterprises.[50] The FCA estimates that another 2,000 complaints per year to the Ombudsman from self-employed individuals are business related. The Ombudsman found that 26% of insurance complaints and 52% of banking complaints by micro-enterprises are upheld.
- Hence, a new Ombudsman option would be helpful. The FCA only considered the FOS as an option here.

The rationale for the proposed limits are:

- There is a logic to using criteria on size of SMEs that are used for other purposes. 'A £6.5m turnover and 50 employee threshold is relevant to all banks that will be subject to the Ring-fencing Order and to all lenders who sign up to the Lending Standards Board's Standards of Business Lending Practice. Signatories to the Asset Based Finance Association's Standards Framework are already subject to an Alternative Dispute Resolution process (ADR), available to businesses with turnover of £6.5m. No other turnover threshold would overlap as much with the SME customer segmentations already used by firms.'[51]
- Legal Services Board (LSB) studies of the needs of small businesses show that the percentage of businesses with fewer than 50 employees that have a dispute involving financial services fell from 3.4% in 2013 to 2% in 2015.[52]
- Evidence from the LSB's Legal needs of small businesses survey and BDRC's SME Finance Monitor surveys' suggests that businesses are significantly more likely to spend money on financial and legal resources when their annual turnover reaches £5m-£10m. The FCA's own modelling suggests that a turnover threshold close to £6.5m means that the majority of newly-eligible complainants will not have regular access to significant legal resources, and so would particularly benefit from access to the Ombudsman.

Effect. The FCA considers that the proposals should result in 160,000 more SMEs being able to refer unresolved disputes. It estimates this could mean up to 1,500 more disputes involving SMEs being considered by the Ombudsman each year.[53] It expects redress recommendations by the Ombudsman of ca £0.28m to £0.54m per year.[54]

The upper limit of award would remain at £150,000. The FCA's analysis suggests that 1/5 of all SME disputes are above the current award limit, and these high value disputes account for c.90% of the total value of SME disputes. It estimates that around three quarters of these high value disputes are worth

[48] World Bank Group (2016) *Doing Business 2017 United Kingdom Country Profile*.
[49] The 5% fee is reduced to 4.5% for online claims of up to £100k. Fee data from HM Courts Service.
[50] Annex 2, Para 15: 'We use the average number of recorded complaints by micro-enterprises to the Ombudsman over the last 3 financial years (3,960 complaints) and include an additional 2, 000 complaints per year that are likely business complaints, but were not classified as such, to arrive at an estimated 5, 960 complaints. We then generate a number of between 370 and 1,255 complaints to the Ombudsman by newly-eligible SMEs.'
[51] Consultation, para 3.34.
[52] Respondents to the LSB surveys were asked whether they had experienced one or more of 85 potential 'problems' – defined as disputes ongoing in the last 12 months which required them to divert resources from the normal operation of their businesses. We treated a respondent as having had a financial services dispute if they reported a dispute regarding any of the following: mortgage arrears, mandatory insurance, mismanagement of business funds by a financial services provider, or refusal of credit due to incorrect information.
[53] Consultation, para 4.1.
[54] Consultation, Annex 2, para 75.

£250,000.[55] A significant proportion of the value of SME disputes with financial services firms relates to 'indirect' or 'consequential' loss.[56] Quadrupling the current limit to £600,000 would cover around 60% of the potential redress outside the current limit.[57]

Assuming that the award limit is maintained, the FCA suggests that between £1.11m and £7.54m in redress would be paid to newly eligible SMEs annually, with an average complaint value of £11,570, to between 95 and 650 complaints upheld by newly-eligible SMEs.[58]

The IFABL Scheme for SMEs

Since 2013, an independent Complaints Process has been available for complaints by small companies against financial services firms who are members of UK Finance Invoice Finance and Asset Based Finance Lending (IFABL).[59] The scheme was created by the Asset Based Finance Association, which was subsumed into UK Finance in 2017. Financing of small and larger businesses frequently involves the techniques of factoring invoices, discounting invoices and asset-based lending. At the end of 2017, these techniques involve advancing over £22 billion to support 40,000 UK businesses that had a combined turnover of over £287 billion. Around 80% of the businesses supported by IFABL members have turnover of less than £6.5 million.

The independent Professional Standards Council (PSC) oversees the Invoice Finance and Asset Based Lending Code and independent Complaints Process. The Code includes principles that 'Members shall act with integrity and deal fairly and responsibly with clients and guarantors'. It also requires members to operate their own appropriate complaints procedures, which the PSC may investigate.

The independent Complaints Process is provided by Ombudsman Services Limited. The costs of the Framework are met by UK Finance and IFABL members, so the independent Complaints Process is free to client businesses. The Process covers around 80% of the businesses currently supported by the industry. The maximum award is £28,000. The PSC considers issues that emerge from the complaints process.

ODR

Some dispute resolution systems are designed to operate entirely online. This is the case, for example, with complaint systems embedded into the internet platforms of traders such as eBay, Amazon and Alibaba. The complaint and response or negotiation can be entirely online. Further, an arbitrator (or mediator) can be available and function entirely online, or maybe with skype or perhaps by phone. In some cases, artificial intelligence (AIU) can be used in a number of ways, such as to assist negotiations by providing the parties with a possible settlement range so as to narrow the financial difference between them, or to provide a suggested solution based on information on how other similar cases have typically been resolved.

Consumers may typically access an Ombudsman either online, or by phone, or by dropping in (the FOS has a duty Ombudsman at its Docklands premises). Whatever the initial means of contacting an Ombudsman, case files are nowadays electronic rather than paper-based. Thus, details stated by a telephone caller to a case handler are recorded by the latter into an electronic case form.

[55] Consultation, para 4.15.
[56] Consultation, para 4.21.
[57] Consultation, para 4.23.
[58] Consultation, Annex 2, paras 21-23.
[59] For the details of this section see *The Standards Framework for Invoice Finance and Asset Based Lending* (UK Finance, 2017).

The EU consumer ADR architecture provides an ODR platform to handle cases between a consumer in one Member State and a trader in another (and the ADR entity may be in any Member State).[60] The system is extremely simple in design, but has suffered in practice from the fact that the dispute resolution process is voluntary, so few traders agree to it.

Despite the investment in online technology, it remains the case that many people—whether consumers or businesses—wish to talk to an adviser. Hence, demand for the EU's cross-border European Consumer Centres Network (EEC-NET) remains steady. The ECC-NET, which was initially created in 2001 and has an office in every Member State, provides an admirable expert people-based source of advice and assistance in resolving consumer-trader disputes involving cross-border elements within the EU.[61] Its workload has grown annually, and in 2016 it was contacted by some 110,000 consumers and handled about 45,000 consumer complaints.

A New Consumer-Trader Intermediary: Resolver

Since the 1950s, consumers have obtained independent advice from Citizens Advice Bureau, based in high streets around the country and their national website. Numerous internet-age online information sites are now available. One of them set out to provide a single national website for sending complaints to as many traders as possible. That model has proved to be successful and has provided a base for expanded functions to be offered to consumers, traders and regulators.

Resolver.co.uk is an online platform introduced in 2013 that allows consumers to send their complaints free of charge to over 25,000 retail businesses across 100 sectors.[62] Resolver offers consumers advice on their rights and on how to complain effectively. It can provide a pathway for the trader to respond, and for the parties to upload documents or comments. It can also pass the file electronically on to an ADR scheme—especially the leading Ombudsman schemes.

From mid-2018, Resolver's *Resolution Plus* service can assist businesses in predicting which cases will escalate to the Ombudsman (with 96% certainty), so that advice and guidance can be delivered to the business by the Ombudsman's organization on how to resolve issues before escalation of the case to the Ombudsman. Anonymized data can be made available from individual businesses, enabling businesses, consumers and regulators to see pictures of market trading conditions.

Ombudsman Services and Resolver have developed the *Helper* tool to help small businesses to manage and resolve customer issues. The tool will help small businesses understand both their rights and their consumer's rights, and will offer guidance (including templates and guidance) to direct the business through the process of responding to (and ultimately resolving) the consumer's issue. If the issue cannot be resolved, it can be escalated for independent, low-cost online issue resolution through integration with Ombudsman Services.

Having started only in 2014, by 2017, Resolver opened 1,217,443 case files and received 10,579,872 site visits.

Some Financial Ombudsmen in Other Countries, and extensions into services for SMEs

The Nordic model

[60] Regulation 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes OJ 2013, L 165.
[61] http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm
[62] Resolver is the brand of Resolving Limited. Resolver's ethics include: always free for the consumer, no adverts, no sale of data, no use of personal data, and no marketing to consumers.

ADR is extensively embedded in all the Nordic States. From the 1960s onwards they have all constructed systems that process as consumer-trader complaints and app personally cases through administrative no fault schemes. The result is that the courts handle a notably low number of claims. The consumer ADR bodies reflect the evolution of legal models at the time that they were created, and so resemble arbitration, with panels of three arbitrators. Some systems have since included elements of mediation. A particular feature of the Nordic consumer ADR schemes is that they are voluntary and their determinations are not legally binding. However, they will process any case on the basis of the evidence presented, so it is not in traders' interests to ignore them—and that is very rare in practice. It is also rare for traders no to observe the determinations of the ADR bodies. Compliance is supported by various mechanisms, including a 'name and shame' publication system that leverages the reputation of sectors and traders. In major sectors, such as financial services, compliance by banks is virtually universal.

Malta

The financial regulator operated an ADR scheme for some years, and in 2016 a Financial Ombudsman was created.[63] It is designed to be like the FOS and has many of the usual features. One element that is anticipated to give rise to problems, however, is the ability for parties to appeal to the court.

Ireland

Ireland has a statutory Financial Services Ombudsman (FSO) that is similar to the UK's FOS.[64] The FSO 'shall, as far as possible, try to resolve the complaint by mediation'.[65] The jurisdiction is somewhat wider than the UK FOS in a number of respects. Claims are received from more than just 'consumers', and open to larger institutions.[66] As a matter of practice, the FSO is trying to restrict the larger investors, using power to respond that another forum is more preferable.

However, one feature has proved to be more of a drawback than a safeguard. This is the right for parties to appeal an Ombudsman's decision to the High Court. Until recently, too many cases were appealed, especially by banks. In 2012, Donnelly stated that close to half of the appeals that have come before the High Court have resulted in a finding of a 'serious and significant' error.[67] She classified the cases into three types: flaws in procedure, legal error in the decision, and where the court disagreed with the substance of the FSO's conclusion and the way in which it was reached. The first type was by far the most common.

The appeal mechanism took up a great deal of resource, using 25% of the annual €6 million budget. Some appeals have been about very small amounts of money, but still had significant impact on the FSO's procedures. The courts' intrinsic starting point is to apply strict due process rules to the Ombudsman's procedure, as if it were a court hearing. The result was that the courts successively reformed the FSO's procedure so as to make it look more like a court, and in the process this

[63] Arbiter for Financial Services Act 2016.
[64] Central Bank and Financial Services Authority of Ireland Act 2004.
[65] Central Bank Act, s57CA(1).
[66] The definition of 'eligible consumer' is 'a natural person when not acting in the course of, or in connection with, carrying on a business' but also 'a person or a group of persons, of a class prescribed by Council regulations' (CBA s57BA), and the 2005 Regulations define a consumer as 'A person or group of persons, but not an incorporated body with an annual turnover in excess of €3 million. For the avoidance of doubt a group of persons includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate, and; Incorporated bodies having an annual turnover of €3 million or less in the financial year prior to the year in which the complaint is made to the Ombudsman (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said €3 million)': Reg 2.
[67] M Donnelly, 'The Financial Services Ombudsman: Asking the "Existential Question"' (2012) *Dublin University Law Journal,* 35 [16]

adversarialisation brought in greater cost and delay, moving the FSO further away from the original idea of an efficient, speedy and quick consumer dispute resolution process.

Italy

It is well known that the courts in Italy are incredibly slow. It is less well known that some alternative mechanisms have been created that get round that barrier to justice. The *Conciliazione Paritetica* system has been referred to above. Various regulatory authorities have created impressive ADR schemes. Two of these are that for financial services providers, Banca d'Italia's *Arbitro Bancario Finanziario* (ABF) system, and that for investors, the ACF created by CONSOB. The ABF and ACF are technically similar to arbitration by a panel but have many of the wider market control features of an ombudsman. The ABF has recently increased its maximum from €100,000 to €200,000 and adopted a longer time limit of 5 years. The ACF has a maximum of €500,000. Both schemes have impressive web portals and online claims procedures. They are, however, experiencing various problems by sticking to the historical model in which decisions are taken by panels on independent instead of case handlers.

France

The position in France is evolving. There is a number of sectoral *médiateurs* but in many sectors only in-house ones exist. The Loi Murcef 20 years ago required each bank to have its own *médiateur* to handle banking complaints but it no longer applies. The legacy is that almost all 330 banks have their own in-house *médiateur*, who is nominally independent. A fully independent *médiateur* exists for financial markets, *Le Médiateur de L'Autorité des Marchés Financiers* (AMF), which has many of the wider features of an Ombudsman, even if the model is technically based in arbitration. She sees her role as an ombudsman-regulator and states 3 missions:[68]

1. To propose resolution in cases.
2. To identify weaknesses in process and propose change.
3. To evaluate the law and make recommendations for change.

Some Foreign Financial Ombudsmen who cover SMEs

It is notable that some Ombudsmen for financial services in several countries are extending their coverage to claims by SMEs. Some major developments are described blow.

The Dutch model

The Netherlands has a well-developed consumer ADR system that has existed for over 40 years and, like the Nordic system, reflects the arbitration-like model with few instances of embedded mediation. There is a separate scheme that deals with financial services (KiFiD: incidentally created as a fused evolution of previous schemes), in which mediation plays an effective role in the process. Staff members phone up consumers and ask them what is at stake, enabling them to resolve 4 out of 10 cases through mediation. The President decides how many people sit on a panel, depending on the complexity and general importance of a case: it can be a single person in some cases, or at first instance three people. KiFiD has an appeal stage (in 2016, 60 out of 3,300 cases were appealed) in which case the President decides if the case is heard by an appeal panel of 3 or 5 people. After the appeal panel decision, it is not possible to go to court.

Determinations by ADR panels are not legally binding (the system is called 'binding advice' in Dutch) but compliance by major sectors and traders is good. A particularly attractive feature of the architecture

[68] *Annual Report and Accounts 2017/18* (Médiateur de L'Autorité des Marchés Financiers, 2018), 39.

that applies to most sectors (the financial services architecture is an exception to this) is that trade associations enter into contracts with the single national ADR coordinating body not only to cover its operating costs but also to guarantee payment of any award that panels make in favour of consumers, should one of their member businesses fail to pay.

A further feature is that there are regular discussions between consumer and trade bodies on market issues, leading to the agreement of standard terms and conditions for each sector. The result is that the standard of trading is constantly reviewed and increased, and then policed by the trade association and the ADR decisions.

In July 2018, KiFiD launched a new complaints office for SMEs against banks or alternative financing entities. It was initiated by the Dutch Banking Association (NVB), which in January 2018 issued a *Code of Conduct for lending to small businesses* that stated that banks and lenders that endorsed the Code would be bound by the dispute resolution regulations of KiFiD, and that KiFiD's rulings would be binding on banks and clients as provided under those regulations. The limitations are:

- SMEs eligibility is subject to an annual turnover cap of €5 million;
- Only for claims up to €1 million;
- Fees payable to KiFiD of €250; if the subsequent Appeal Board was involved a further €500;
- Binding outcome of an award up to €250,000. Above that sum, a non-binding outcome could be stated, and the parties could opt-in for a binding outcome.

Australia

A number of Australian Territories have established Small Business Commissioners in the past decade or so, which have operated with some success, all on slightly different models. In order to extend that approach at federal level, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) was launched on 11 March 2016. ASBFO has two key functions: to *assist* and to *advocate* for small businesses and family enterprises. In the assistance function, it transfers a request for assistance to a State Commissioner, an industry Ombudsmen, or the federal Financial Ombudsman Service,[69] but does not generally mediate or act in a dispute itself.

In November 2018 various ombudsmen for financial services, superannuation and credit will be merged to form a new ombudsman, the Australian Financial Complaints Authority (AFCA), as recommended in a Report of an Inquiry led by Professor Ian Ramsay.[70] AFCA will have more powers than the previous bodies. The caps are interesting. There is a jurisdictional definition of SMEs of less than 100 employees, but no metric on turnover. There is a cap on loans of A$5m, although there is some flexibility to take cases above that if AFCA wishes. There is to be a cap on awards of A$1m, which can be increased without primary legislation, and which is significantly increased from the previous cap of A$800k, which was widely regarded as being too low. (ASBFEO favoured adopting a definition of SMEs but no cap.)

Switzerland

The Swiss Banking Ombudsman was created by the Swiss Banking Association in 1993. The dispute resolution service accepts cases from individuals or businesses with no upper financial limit. The Ombudsman attempts to assist parties to resolve their issues between themselves, but can otherwise use a somewhat inquisitorial procedure, with power to inspect banks' files and require information to be provided. He also has a mass case procedure to deal with multiple similar cases so as to reach consistent

[69] Australian Small Business and Family Enterprise Ombudsman Act 2015, s 69.
[70] *Final Report: April 2017 Review of the financial system external dispute resolution and complaints framework* (Commonwealth of Australia, 2017).

decisions. Proposed solutions are not binding on parties. The Ombudsman provides feedback to banks and the regulatory authority at various levels.

In 2017, the Ombudsman closed 2027 cases, of which he intervened with banks in 264 cases. Banks declined to follow the Ombudsman's recommendation in 4% of cases.

Canada

The Ombudsman for Banking Services and Investments (OBSI) provides a free ADR service for complaints by consumers and small businesses. It makes non-binding recommendations up to a limit of $350,000: if a customer's claim is above that sum, the OBSI can accept it if the customer voluntarily reduces it. In 2017, OBSO received 370 banking-related complaints, compared to 290 cases in 2016, a 28% increase. Most of the complaints related to chargebacks.

The OmbudService for Life and Health Insurance (OLHI) covers complaints about life and health insurance, including disability. The General Insurance Ombudservice (GIO) covers car, property and business insurance.

New Intermediaries for SMEs in UK

Three new intermediaries have been created in the UK in the past five years to assist SMEs. This constitutes a prime example of designing the model and the intermediary to fit the problem. The starting point was the realisation of two facts:[71] first, that many SMEs were subject to commercial abuse by their (often larger) customers and, second, that the SMEs were reluctant to use any of the normal channels for complaining about this situation—such as Money Claims Online, the Small Claims track, mediation or other routes.

The Groceries Code Adjudicator

Specific examples arose in specific sectors, for which specific intermediaries have been designed. Since 2013, disputes between farmers and supermarkets over alleged imposition of unfairly low prices, where farmers feel individually and collectively unable to object for fear of attracting adverse action, may be referred to a special intermediary, the Groceries Code Adjudicator (GCA).[72] The GCA was established under the Groceries Code Adjudicator Act 2013,[73] with the role of enforcing the Groceries Code and encouraging compliance with it.[74] Broadly, the GCA exercises functions of arbitration, investigation and providing advice.[75] She has power, where she is satisfied that a designated retailer has breached the Code, to apply one or more of the following enforcement measures: making recommendations, requiring information to be published, and imposing financial penalties. The initial enforcement approach was based on transparency, although the GCA was later granted power to impose a financial penalty of up to 1% of annual turnover for breaches of the Code occurring after 6 April 2015.[76]

In 2016 the GCA identified poor business practice and cultural factors in Tesco's late payment of suppliers, notified breaches of the Code, made recommendations that were immediately accepted, and

[71] See R Blackburn, J Kitching and G Saridakis, *The legal needs of small businesses: An analysis of small businesses' experience of legal problems, capacity and attitudes* (Legal Services Board, October 2015).
[72] See *GCA compliance and monitoring policy* (Groceries Code Adjudicator, 2016).
[73] See The Groceries Code Adjudicator Act 2013 (Commencement) Order 2013, SI 20913 No 1236.
[74] *Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions* (Groceries Code Adjudicator, 2013).
[75] *GCA compliance and monitoring policy* (Groceries Code Adjudicator, 2016).
[76] The Groceries Code Adjudicator (Permitted Maximum Financial penalty) Order 2015.

referred specific issues to the Competition and Markets Authority for enforcement consideration.[77] In July 2016, the GCA reported that the top ten supermarkets had all acted on issues raised, and she rated the top three as complying 'consistently well' during the previous 12 months.[78] Surveys of direct suppliers found that the number that experienced issues had fallen.[79] One of her techniques is to encourage direct suppliers to undertake training, and she noted a rise in those undergoing training in 2016.[80] In July 2017 survey results reported a fall in the number of direct suppliers saying they had experienced one or more Code-related issues in the past year for the fourth year running.[81] The proportion stood at 56% in 2017, down from 62% in 2016 from the high of 79% in 2014. The percentage of unjustified charges for consumer complaints reported by suppliers, which at 37% was the second biggest issue for them in 2014, fell to 12% in 2017. Incorrect deductions from invoices with or without notice, which was at 14% in 2014, had fallen to 32% of suppliers reporting this as an issue in 2017, so remained a matter for attention.

From April 2017, large businesses were required to report the average time they take to pay their suppliers. The Chartered Institute of Credit Management (CICM) administers the voluntary Prompt Payment Code on behalf of the Department of Business, Energy and Industrial Strategy. The Code has over 2,000 signatories.

The statutory review of the GCA reported in July 2017 that she had made effective use of the statutory powers, was effectively enforcing the Code, and that her success was recognised internationally.[82] It was noted that the GCA had chosen to adopt a collaborative approach rather than a rapid escalation to formal measures, and this had been successful.[83] Two cases had been resolved by arbitration, and two arbitrations were ongoing, whilst responses from suppliers and large retailers were felt to have made resolution of problems easier and quicker without needing to rely on formal arbitration.[84] Whilst there were ongoing reports of fear by suppliers in raising issues, the GCA was considered to have reinforced the impetus for change in the industry.[85] The preference for a supportive approach as a first line technique—emphasising compliance and improved performance rather than enforcement—is now widely used amongst UK regulatory and enforcement authorities.[86] The whole approach of the GCA demonstrates a shift away from adversarialism towards achieving compliance.

There remains, however, evidence that late payment continues to affect many suppliers[87] and that smaller businesses 'are reluctant to launch legal challenges against larger firms. This can be for fear of damaging their business relationships, or concerns over a lack of resource or in-house expert knowledge.'[88] In February 2018, the Government announced its intention to widen the power of

[77] *Groceries Code Adjudicator Investigation into Tesco plc* (Groceries Code Adjudicator, 2016); *GCA investigation into Tesco plc – progress towards following GCA recommendations* (Groceries Code Adjudicator, 2016).
[78] *Groceries Code Adjudicator Annual Report and Accounts 2015-2016* (Groceries Code Adjudicator, 2016).
[79] Press release, GCA achieving significant progress for suppliers (Groceries Code Adjudicator, 2016): 62% in 2016, 70% in 2015, 79% in 2014.
[80] ibid: 29% in 2015, 35% in 2016.
[81] Press release, 'Tacon marks end of first term with survey showing significant progress for groceries suppliers', GCA, 26 June 2017.
[82] *Statutory Review of the Groceries Code Adjudicator: 2013-2016* (Department for Business, Energy & Industrial Strategy, 2017), paras 106 and 107.
[83] ibid, para 10.
[84] ibid, para 58 and 59.
[85] ibid, paras 60, 61, 76-78.
[86] See C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics* (Hart Publishing, 2015).
[87] Speech by Andrew Griffiths MP, Minister for Small Business, Consumers and Corporate Responsibility at the Groceries Code Adjudicator conference, 25 June 2018.
[88] *Late Payment and 'Grossly Unfair' Terms and Practices: Consultation. Summary of responses and government response* (Department for Business, Energy & Industrial Strategy, 2018), 3.

representative bodies to challenge certain contract terms and practices deemed 'grossly unfair'.[89] The reference to 'fairness' will be noted.

The Pubs Code Adjudicator

From July 2016 tenants of public houses are able to complain to a specialist Pubs Code Adjudicator (PCA)[90] where certain aspects of the contracts with their breweries that involve tied arrangements (such as restricting the supply of supplies to those of the brewery) are unnecessarily restrictive. Certain practices and procedures are to be followed by large pub-owning businesses (those owning 500 or more tied pubs[91]) in their dealings with their pied pub tenants.[92] The two central principles were of fair and lawful dealing, and that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie. The back-office function of the PCA is provided by the Regulatory Delivery directorate of the Department of Business, Energy and Industrial Strategy.

The background stretched back to complaints noted by Parliament from 2004. The industry introduced a voluntary Code but government concluded by 2013 that a statutory Pubs Code and specific new intermediary were needed.[93] As with the GCA above, in 2016 the PCA was given powers to impose financial penalties on pub-owning businesses following investigations into breaches of the Pubs Code.[94]

In his first year, the PCA (Paul Newby) reported that he had been building *relationships* with all sides in the industry, as well as providing information through an Enquiry Line and website factsheets.[95] By July 2017 he had received 156 cases for arbitration, of which 131 related to the Market Rent Only (MRO) option, the process by which tied tenants can request an option from their pub-owning business to go free of tie, and had made awards in 48 cases.[96] The PCA Enquiry Line had received more than 550 enquiries in the year. However, in August 2017, the PCA published a review of tenants' experiences in which tenants reported 'almost without exception that to varying degrees the pub-owning businesses [were] not acting within the spirit of the Code'. Having accumulated this evidence base, the PCA announced that he had asked the pub-owning businesses to provide him with further, detailed information about their particular processes and practices, and gave them an opportunity to set out their positions.

In December 2017, the PCA responded to concerns by publishing a *Handbook on Compliance* that set out his 'expectation of behaviours' that pub-owning businesses should adopt in order to comply with the Pubs Code.[97] This was followed in March 2018 by publication of statutory advice to provide clarity on the terms of Market Rent Only (MRO) tenancies, responding to a number of arbitration awards that had been made in previous months.[98] In order to assist in targeting his activities, the PCA undertook a

[89] The Late Payment of Commercial Debts (Amendment) Regulations 2018, SI 2018 No. 117.
[90] Established under the Small Business, Enterprise and Employment Act 2015, Part 4. The Pbs Code etc. Regulations 2016, SI 2016 No 790.
[91] Admiral Taverns Ltd, Ei Group Plc (formerly Enterprise Inns Plc), Greene King Plc, Marstons's Plc, Punch Taverns Plc, and Star Pubs and Bars (formerly Heineken UK).
[92] The Pubs Code etc. Regulations 2016/790, Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016/802.
[93] *Pub Companies and Tenants: A Government Consultation* (Department for Business, Innovation & Skills, 2013). See also *Pubs Code and Pubs Code Adjudicator: A Government Consultation - Part 2* (Department for Business, Innovation & Skills, December 2015).
[94] The Pubs Code (fees, Costs and Financial Penalties) Regulations 2016, SL 2016 No 802.
[95] *Annual Report and Accounts 2 May 2016 to 31 March 2017* (Pubs Code Adjudicator, 2017).
[96] Press release, 'Pubs Code Adjudicator marks the Pubs Code's major milestone by releasing first year data' 26 July 2017.
[97] *Regulatory Compliance Handbook: complying with the principles of the Pubs Code. Advice note* (Pubs Code Adjudicator, 2017).
[98] PCA Advice Note. Market Rent Only-compliant proposals (Pubs Code Adjudicator, 2018).

survey of tied tenants, which highlighted a number of issues and found that 72% of tied pub tenants knew about the Pubs Code but that detailed provisions on their rights were somewhat less known.[99]

The Small Business Commissioner

The third example arose from the finding that small and medium-sized enterprises (SMEs) and the self-employed are often paid late by their customers, causing serious cash-flow consequences that can threaten commercial viability.[100] Although both substantive requirements[101] and litigation procedures (such as small claims and an online money claim portal) exist, SMEs have been reluctant to use them for fear of damaging important business relationships.[102] In response to calls from the self-employed sector,[103] the government proposed[104] to create a new type of intermediary modelled on Australian success with a Small Business Commissioner (SBC) to assist SMEs with a large number of problems.[105] In the late payment situation, the SBC can offer a communication channel or ADR service, but it can also use powers to investigate a trader and inspect whether it is systematically breaking the law on late payment, and take steps to require compliance, without identifying any individual trader. The anonymity of suppliers can therefore be protected, whilst the outcome of debts being paid on time, and observance of the rules of a fair market place, are enhanced. The SBC for Victoria received 1,711 applications in 2013-14, settled 26.6% of cases through the actions of his staff prior to formal mediation, settled 82.7% of mediations, and attracted a 93.6% satisfaction rate by mediation participants.[106] The Australian SBCs also address other problems of SMEs, with targeted techniques, such as general commercial dealings in relation to leases and tenancy arrangements, franchising, supply chain, purchase of a business, non-retail leases, and distribution agreements.[107] Other issues that might arise include dealings with public bodies and intellectual property.

The UK Small Business Commissioner (SBC), which became operational in early 2018, is authorised under the Enterprise Act 2016, to provide general advice and information to small businesses, and to consider complaints from small businesses relating to payment matters in connection with the supply of goods and services to larger businesses, and to make recommendations.[108] A small business for these purposes has under 50 staff. The SBC is to establish and administer a complaints scheme, under which the SBC:[109]

(a) enquires into, considers and determines relevant complaints, and
(b) may make recommendations as to how issues raised by those complaints may be remedied, resolved, mitigated or how similar issues may be prevented from arising in future.

---

[99] *Tied Tenant Survey. Research Report* (Pubs Code Adjudicator, 2018).
[100] In 2008, late payment cost British business £19 billion, and was estimated in 2015 to exceed £40 billion, whilst the average amount owed to a small business exceeds £30,000: Press release 'Sajid Javid outlines ambitious Enterprise Bill' (Department for Business, Innovation and Skills, 19/05/2015), available at https://www.gov.uk/government/news/sajid-javid-outlines-ambitious-enterprise-bill
[101] Directive 2011/7/EU on Combating Late Payment in Commercial Transactions.
[102] *The ipse manifesto: Britain's Secret Weapon: Unleashing Independent Professionals and the Self-Employed in the New Economy* (Association of Independent Professionals and the Self-Employed (IPSE, 2014).
[103] 'Introducing a small business conciliation service to resolve such disputes will go a long way in helping freelancers get the payment they deserve without lengthy court action.' Statement attributed to S McVicker, Director of Policy and External Affairs at IPSE, Press release, IPSE, 6 December 2014.
[104] Enterprise Bill 2015. *See Enterprise Bill: A Small Business Commissioner* (Department for Business, Innovation and Skills, July 2015), *Response to the BIS Consultation Enterprise Bill - A Small Business Commissioner* (BIS, 2015).
[105] Small Business Commissioners now exist in most Australian states. See, for example, the Small Business Commissioner Act 2003, as amended, for Victoria.
[106] See *Annual Report 2013-14* (Victorian Small Business Commissioner, 2014). Most of the applications received by the Victorian Small Business Commissioner in 2013-14 related to retail leases.
[107] ibid.
[108] Enterprise Act 2016, s1.
[109] ibid, s4(1).

Some Comparative Evaluations

This section will compare some important aspects of accessing and the performance of different mechanisms.

Funding of the mechanism

There is one major structural difference between the various mechanisms outlined above in relation to who funds the system. The primary funding for courts and tribunals is the State, which may then recover some or all costs from users, especially claimants. The government's attempt from 29 July 2013 to recover the cost of accessing Employment Tribunals from claimant fees[110] was held by the Supreme Court to be unlawful in July 2017,[111] and the Ministry of Justice had to start to repay £32 million to users. The impact that access fees have on 'access to justice' was clearly illustrated here, with the number of Employment Tribunal cases collapsing from 2013 and then bouncing back from 2017.[112] It is interesting that damages-based agreements (DBAs) have been permitted for some time in Employment Tribunals,[113] but are not widely used because it is difficult for solicitors to undertake a reliable initial assessment of a case from initial interviews with potential clients in most employment cases.

Some systems (courts) apply a cost recovery stage after the outcome of a case is known, shifting a significant proportion of the (court fees and legal costs of the) the winning party to be refunded by the losing party. However, it means that the claimant has to fund such costs initially, and runs the risk of either trying to recover them afterwards if successful (subject to a shortfall) or of having to pay the winning defendant's costs as well. The cost shifting rule is not generally applied in Tribunals, but still means that the claimant has to fund the access and legal costs.

Arbitrators are funded by users. If they have significant standing administrative costs, these overheads have either to be provided from case fees or some other standing contractual commitment with businesses. Arbitrators' individual fees are generally covered by the case fee. Again, the 'loser pays' rule tends to apply.

The Ombudsmen, in contrast, are funded by industry. The core funding of the FOS is raised from banks in a levy that they pay annually to the FCA (which covers the FCA's costs and those of the FOS). The FOS also charges a bank a case fee of £550 from the 26th case in a year.[114]

Private sector Ombudsmen such as Ombudsman Services raise core funding through annual contracts with their individual (and usually large) corporate clients, and may impose case fees. There seems to be a developing trend away from Ombudsman imposing case fees: the administration cost can be disproportionately high and it is increasingly realised that the original justification for case fees, namely that it would act as an incentive or deterrent on traders to behave differently so as to reduce the incidence of cases going to an Ombudsman, has little effect in practice.

Overall, the State has the primary burden of providing funding for courts and Tribunals, whereas businesses fund arbitrators and Ombudsmen.

---

[110] The Employment Tribunal and Employment Appeals Tribunal Fees Order 2013, No 1893. See also The Employment Appeal Tribunal (Amendment) Rules 2013 No 1693, amending the Employment Appeal Tribunal Rules 1993 No 3864.

[111] *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.

[112] From 105,803 in 2013/14 to 61,308 in 2014/15, and 109,706 in 2017/18.

[113] The maximum percentage of damages that a representative may take as a fee has since 2010 been limited by regulations at 35% (including VAT): The Damages-Based Agreement Regulations 2010/1206.

[114] http://www.financial-ombudsman.org.uk/faq/businesses/answers/funding_a5.html

Cost and Access to Funding

The cost of dispute resolution is a complex subject and has the following elements:[115] (1) the overall cost to society (and the State) of a particular system; (2) the cost to parties of accessing a particular dispute resolution mechanism (i.e. pay-to-use fees); (3) the cost to parties of employing intermediaries (lawyers, experts); and (4) the extent to which a loser may have to reimburse some costs to the winner (cost-shifting risk).

The key question in comparing the various mechanisms is an empirical one: how much does each cost in practice? Regrettably, there are major gaps in available data to give a clear empirical answer to that question. Further, the answer will vary depending on the amount in dispute, the complexity of the factual and legal issues, the existence of features such as caps on costs or on cost-shifting, and the comparative financial resources of the parties.

Data is not available on some of the mechanisms, especially the cost of employing lawyers in relation to typical cases. Some major aspects are:

- The general consensus is that courts can be expensive in relation to (1), (2), (3) and (4).
- The same is true of Tribunals and arbitration. Although Tribunals apply limitations on (1) and (4), and parties can operate without legal representation, there can be a significant imbalance if one party (eg a bank) has legal representation. That can lead to the consequence that the cost of use will be high if both parties feel the need to engage lawyers, and if one party does not it may feel at a significant disadvantage.
- The small claims track limits cost on all aspects but jurisdiction is limited to £10,000 for non - personal injury cases.
- Ombudsmen typically operate for claimants without aspects (2), (3) or (4). This follows from the more inquisitorial nature of the process.

Cases that have good legal merits and involve a significant amount of money should attract funding from Litigation Funders. As at 2012, most Litigation Funders would only accept cases worth at least £100,000, and some had higher limits.[116] Smaller cases are generally unattractive to the industry as investments. The lenders typically carry out robust risk-assessment on the merits and evidence of cases before accepting them, and this acts as a strong filter resulting in a generally high success rate. However, given the inherent uncertainty of outcomes, cases with less than strong legal prospects would not be accepted for investment. Litigation Funders typically take 30-40% of the damages.

A somewhat different group of Claims Management Companies (CMCs) operate at a much lower level of sums in dispute but on a business model of processing multiple straightforward claims, such as for road traffic, payment protection insurance or holiday sickness claims. It is unlikely that CMCs would be attracted to individual business claims.

It may be possible to purchase bespoke after-the-event insurance cover for legal fees, but premiums may be high and strong risk-assessment would apply.

State funding through Legal Aid has disappeared and is unlikely to reappear, certainly for commercial claims. Individuals or companies that have Legal Expenses Insurance (LEI) policies may, of course, be able to fund claims, up to the indemnity limit and subject to policy conditions. Many householders and car drivers have LEI cover, but it is not known how many SMEs have this.

---

[115] C Hodges, S Vogenauer & M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Approach* (Hart Publishing, 2010).

[116] C Hodges, J Peysner and A Nurse, Report: *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln University, 2012), 73.

Legal cases can be settled tactically by defendants and claimants, for example by making an offer that is sufficiently acceptable so that a case is not decided on the basis that creates a legal precedent, or to save incurring further costs. Given that 95-99% of cases are settled, rather than decided by a judge or tribunal, data that could be useful to regulators and ministers is simply lost. That contrasts with the Ombudsman system, where data on every contact received by the Ombudsman (and not just cases started) is captured, as discussed in Part C below.

A legal case that is strong on its evidence and legal merits should be settled early by a commercial defendant, with favourable payment of costs incurred. (It is not proposed here to go into the complexities of the rules on cost-shifting or general settlement practice.) However, the accurate prediction of the outcome of any legal case simply cannot be done: the process involves inherent risk. Outcomes are, however, significantly improved by expanding the criteria for decision-making from applying legal rules to making decisions on what seems fair and reasonable to the decider (see below).

Access to Evidence

In a Court, Tribunal or arbitration, the traditional model in England and Wales is that the parties produce their own evidence (discovery), in accordance with the requirements of the Rules. Their lawyers are subject to a professional duty to the court to ensure that all relevant evidence is found and made available. The Court etc has power to order that certain classes of documents are produced, and if there is evidence that a particular document has not been produced it can be ordered (this is extremely rare). Written questions (interrogatories) and witnesses can be asked about historical facts and the existence of documents. Failure to produce particular evidence may lead to the decider making drawing an adverse inference against the party.

The primary duty of the FOS is to 'attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate, including mediation or investigation'.[117] The procedure is inherently more investigational:

> If the Ombudsman decides that an investigation is necessary, he will then:
>
> 1. ensure both parties have been given an opportunity of making representations;
> 2. send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and
> 3. if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination.[118]

The FOS may give directions as to:[119]

1. the issues on which evidence is required;
2. the extent to which evidence should be oral or written; and
3. the way in which evidence should be presented.

Compliance by a bank is backed by the ability to refer its conduct to the FCA, as well as to make an adverse inference.

In an adversarial system (Court, tribunal, arbitration), it is each party who has to call for classes of documents (or occasionally an individual document) thought to be in the possession of the other, and for the party who receives the request or order to produce the evidence. Lawyers for each side are relied as policemen in this respect, even though they are in fact partisan. The civil procedure system in England and Wales does not (unlike Scotland) have an inquisitorial system, in which an independent 'policeman' searches for evidence. The FOS also relies on each party's willingness to produce evidence voluntarily

[117] DISP 3.5.1. DISP 3.5.5 provides: If the Ombudsman considers that a complaint can fairly be determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by and means which the Ombudsman considers appropriate in the circumstances, including by telephone. …'

[118] DISP 3.5.4.

[119] DISP 3.5.8.

and can bring to bear expert knowledge of what evidence ought to exist. Both systems might draw adverse inferences if expected documents are not produced for good reason.

Process Fairness and Transparency

It is a fundamental requirement of justice that Court and similar processes should provide a level playing field so that the process by which the legal outcome is reached can be legally accurate and be seen by the parties and society to be fair. Much has been written about transparency, 'due process' and equality as between parties. However, in recent decades it has been accepted that justice comes at a price, and not only must that price be fair (and hence constrained) but also that resources need to be rationed. That was the whole point behind the fundamental recast of the Court procedures introduced in 1999 on Lord Woolf's model.[120] Dr John Sorabji has clearly identified the revolutionary nature of that change, in re-balancing the tension between, on the one hand, ensuring that accurate and substantive justice is done in each individual case and, on the other hand, ensuring that the state's limited resources for delivering justice remain available to all at reasonable cost and without unreasonable delay, as a result of individual parties consuming disproportionate resource in individual cases.[121]

The same rationale of the need to deliver swift, cheap and accessible justice for consumers against traders, and SMEs against their customers, has underlined the creation of new intermediaries such as Ombudsmen, the Small Business Commissioner and so on. In these processes, compromises are consciously made in moving away from the 'Rolls-Royce' due process of an adversarial model in order to deliver real justice to people that need it, when they need it, and at a cost that they and society can afford.

Accordingly, the question is to decide what balance is fair and supports trust in the context of particular types of disputes. Is it appropriate to have full transparency of elements like all the evidence, all the argumentation (written and maybe oral), and the decision? Should such transparency apply as between the parties themselves, and/or to the general public?

Some points are relevant to these decisions. A Court or Tribunal process typically involves disclosure in public of evidence (documentary, oral, expert) within the process of oral argument. It also involves publication of a reasoned, written judgment. An arbitration process is typically confidential, and sometimes decisions are published and sometimes not. In these three situations, if private settlements are reached, transparency may be curtailed (hence tactical use of settlements). Sometimes, settlement agreements may include confidentiality clauses.

In the typical UK consumer Ombudsman process, process and evidence would not be in public. Evidence would generally be available to both sides, although in some systems it might only be available to an Ombudsman. The FOS publishes all decisions it has made on its website.[122] These would typically include references to relevant evidence.

Basis of Decisions: Law and Fairness

[120] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).
[121] J Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014).
[122] http://www.ombudsman-decisions.org.uk/. See policy statement at https://www.financial-ombudsman.org.uk/publications/policy-statements/ombudsman-decisions.html

Courts, Tribunals and arbitrators apply the law. Some Ombudsmen make their decisions by applying the law (this is typically the case in Germany), but the consumer ombudsmen in Belgium, Ireland[123] and UK[124] are mandated to decide individual cases on the basis of what seems fair to the ombudsman in the circumstances of the case, taking the law into account. To some critics, that basis of making decisions is an attack on the rule of law, or more about settlement of cases than about legal precision. But to others, it is reaching decisions that reflect and support a fair society and market. It is increasingly the case that the relevant consumer protection and regulatory law that is being applied requires that banks (or other relevant traders) will treat customers fairly,[125] so the law in fact requires a fairness standard.

It is generally the case that the fairness standard assists consumers, rather than the converse: the same ought to be true for SMEs. It is relevant that the RBS scheme has been established on the basis of fairness rather than law. Indeed, the independent reviewer of the RBS-GRG compensation scheme reports that around 99% of cases involved conduct by the bank that was contractually legal, and the basic question relates to the bank's *treatment* of the SME. The FCA agrees that a legalistic approach is 'unlikely to be appropriate for lower value disputes'.[126]

> 'Many disputes between SMEs and financial services firms will relate to unregulated activities, such as corporate loans. … The fact the Ombudsman's standard is one of 'fair and reasonable' means it could uphold a complaint even where contracts and processes have been followed and they would need to explain why.'

It seems that there is an evolution in society and markets in which the mechanism for protection of commercial certainty (*caveat emptor*, free bargaining between parties) is slowly becoming subsumed to a higher principle of fairness in all dealings, that the law initially recognised in the protection of groups of individuals such as workers and consumers and is now spreading to other relationships. If that is so, then fairness is a relevant criterion to apply as between SMEs and banks. Fair dealing by banks towards customers is already, as noted below, a regulatory requirement.

It is highly significant that the APPG has called for changes to legislation and the rules[127] so that a proposed new SME Tribunal could base decisions on breaches of the FCA's regulatory rules that require fairness.[128] However, that route may only lead to complex legal arguments in a Tribunal over whether conduct was fair or in breach of the rules, and whether certain loss is compensable and proved. Such arguments may only add to delay and cost, and only benefit lawyers. In contrast, such a change is easier to effect for the FOS, since access depends only on the definition of 'eligible complainant' under its Rules, and it already makes decisions on outcomes that are 'fair and reasonable', which can include consequential loss.

Binding Effects

[123] Central Bank Act, s 57BK(4): the Financial Services Ombudsman must act 'in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.'
[124] DISP 3.6.1: 'The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.'
[125] *FCA Mission: Our Future Approach to Consumers* (Financial Conduct Authority, 2017); see initially Principle 6 of the Principles for Businesses 'to pay due regard to the interests of customers and treat them fairly', *Treating Customers Fairly After the Point of Sale*, DP7 (Financial Services Authority, 2001); Directive 2005/29/EC on unfair commercial practices.
[126] Consultation, para 4.32.
[127] K Hollinrake MP, *Fair Business Banking for All. How to improve access to justice for businesses in financial services disputes* (Centre for Policy Studies, 2018).
[128] One amendment would be to remove the restriction of the right to base a cause of action on breach of the Rules under FSMA s 138(D); see Shazia Khan Afghan, 'What is the purpose of section 138D of the FSMA 2000 (as amended)?' (2018) *Journal of International Banking Law and Regulation* …

A decision by a court, Tribunal or arbitrator is binding on the parties. If the loser does not implement the decision, the winner will usually have to take separate enforcement action.

Parties are not bound to reach any settlement, either through direct negotiations or where assisted by a mediator. However, where the court or similar body has power to award costs, it can apply that discretion to penalise a party that has acted unreasonably.

The model that applies to consumer Ombudsmen is a hybrid. This respects the protection of an individuals' human rights that a person must have the right of access to a court.[129] For example, a determination by the FOS is not binding on the consumer but if the consumer accepts the decision it is then binding on both parties.[130] The consumer is not bound by the 'decision' but can decline to accept it and start a case in court. The DISP rules provide that a respondent must comply promptly with any award or direction made by the Ombudsman and any settlement that it agrees at an earlier stage.[131]

Some sophisticated models are available. The ADR schemes in the Netherlands adopt a model of 'binding advice'. It occurs against the background of the involvement of trade associations in contracting with the national ADR bodies, leads to a high degree of compliance by traders who are members of the trade associations, and is supported by a guarantee for consumers that if a trader member does not pay for whatever reason then the trade association will honour the award.

Ability to refer points of law to a court

Some consumer ombudsmen are able to refer points of law to court for a decision on that point of law, after which the case is returned to the ombudsman for decision. This procedure mirrors the reference procedure between national courts and the European Court of Justice. It is a mechanism that could be developed. Such a procedure exists for the UK Pensions Ombudsman,[132] Financial Ombudsman Service[133] and Legal Ombudsman.[134] A major generic issue over the legality of bank overdraft changes was resolved by the Supreme Court.[135] The UK Pensions[136] and Financial Ombudsman Service can start a test case.[137] The Irish Financial Ombudsman may refer points of law to the High Court, on his own initiative or at the request of the complainant or the regulated financial service provider concerned.[138] This referral mechanism may be particularly useful where there are numerous similar cases that all involve a point of law; a referral procedure in the Netherlands applies where there exists a multiplicity of claims based on similar facts and/or questions of law.[139]

---

[129] European Convention on Human Rights, art 6; EU Charter of Fundamental Rights, art 47.
[130] DISP 3.6.6 (3).
[131] DISP 3.7.9.
[132] Pension Schemes Act 1993, s. 150(7).
[133] DISP 3.4: the Ombudsman may with the complainant's consent cease to consider the merits of a complaint so that it may be referred to a court to consider as a test case in specified circumstances, but the complainant has to initiate the court case.
[134] *Scheme Rules* (Legal Ombudsman, 2018), rule 5.8 (power for the Ombudsman to refer a legal question to court). DISP 3.4 provides that the Ombudsman may, with the complainant's consent, cease to consider the merits of a complaint so that it may be referred to a court to consider a test case, if, *inter alia,* the Ombudsman considers that the complaint (a) raises an important or novel point of law, which has important consequences, and (b) would more suitably be dealt with by a court as a test case.
[135] *Office of Fair Trading v Abbey National plc & Others* [2009].
[136] The Pensions Ombudsman has no award limit but parties have the right to appeal to the courts where there is a disagreement on a point of law. This reflects the requirement that the Pensions Ombudsman decides disputes in accordance with the law.
[137] see Legal Services Act 2007, s. 133(3)(b); C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012), 279 and 289 *et seq*.
[138] Central Bank Act 1942, s. 57CK.
[139] Code of Civil Procedure, Art. 392 par. 1(a), (b). See MW Knigge and EN Verhage, 'The impact of the ADR Directive on article 7:904 par. 1 DCC explored What is 'unacceptable according to standards of reasonableness

Extent of Compensation

A Court, Tribunal or arbitration based on applying the law will apply the established law on which heads of damage are compensable, after a cause of action and causation have been established. The approach of the FOS is somewhat different. As noted above, the FOS is empowered to 'determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.'[140] This means that the *outcome* should appear fair and reasonable in the circumstances of an individual case. The FOS explains the position thus on its website:

As well as looking at whether someone's lost out financially as a result of a business's mistake, it's important to recognise the emotional or practical impact.

need to know

- The types of impact to look for include the distress someone's experienced, any inconvenience they've had, any unnecessary pain and suffering, and damage to their reputation.
- Daily life - and dealings with other people, businesses and organisations - can be inconvenient at times. To award compensation, we'll need to see that a business's actions caused more than just a minor inconvenience or upset.
- On the face of it, some complaints might seem similar to others. But every customer and every complaint is different - and compensation needs to reflect the impact on the individual people involved. We don't add up awards money for each individual error. Instead, we look at everything that's happened - and then take a step back and decide what's fair compensation overall.

…. DISP 3.7.2 R of the regulator's handbook says we can award fair compensation that's a proportionate reflection of the impact a business's actions (or inaction) had on their customer.

That's why, in two separate cases where the business made the same mistake, we might award different amounts - because the mistake had a different impact on those individual customers.

Governance

Judicial independence is a major constitutional principle. The independence of lay members of Tribunals is also important, although a tri-partite membership (eg employee representative, employer representative and independent chair) is also a safeguard against bias. Regulatory authorities and Ombudsmen have governance structures including independent Boards and requirements of transparency. The EU criteria that apply to Consumer ADR entities are: expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality.[141]

Duration

In early 2018 the average time between issue and hearing in the small claims track was 33 weeks, and between issue and trial in the fast and multi tracks was 57 weeks, and these figures have been broadly stable for some years.[142] If a claim by a distressed SME were to be defended, eight months would appear to be too long.

Statistics on the duration of Tribunal cases are not published. HM Courts and Tribunals Service published the following charts for the first quarter of 2018:[143] caseloads and durations will differ between different types of Tribunals, but the 'caseload outstanding' figure is not entirely encouraging.

---

and fairness' after the implementation of the Directive?', (2016) *BW Krant Jaarboek* 85, https://openaccess.leidenuniv.nl/handle/1887/43410.

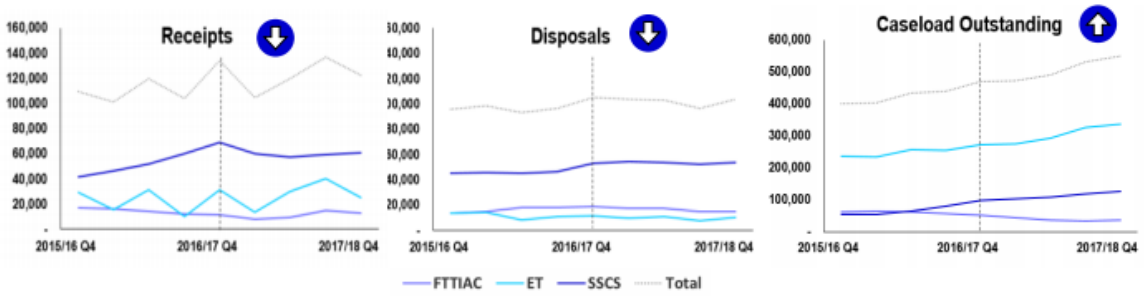
[140] DISP 3.6.1.

[141] Directive 2013/11/EU, arts 6-11.

[142] *Civil Justice Statistics Quarterly, England and Wales, January to March 2018 (provisional)* (Ministry of Justice, 2018), 7.

[143] *Tribunals and Gender Recognition Statistics Quarterly, January to March 2018 (Provisional)* (Ministry of Justice, 2018), 2.

Figure 1: Receipts, disposals and caseload outstanding[1] for all tribunals, Q4 2015/16 to Q4 2017/18 (Source: Tables S.2 - S.4)



In 2017/18 the average length of cases for a tribunal involving FCA regulation and civil matters was 52.4 months, and average cost to the FCA of £712,400.[144] Would those timings and cost assist a small business in distress?

In 2017/18 the FOS resolved 72% of all complaints excluding PPI complaints within three months.[145]

The above are all generalised average statistics. More important is to focus on how quickly the majority of cases are solved in practice. It can be the case that many cases are resolved as soon as, or very shortly after, they are raised. This is true today of the internal complaint and customer relations departments of many businesses across many sectors. For example, the Statistical Report by Professor Robert Blackburn and colleagues includes data that banks currently resolve many complaints within a day. The same is true of many complaints that are taken to an Ombudsman. All the leading Ombudsmen report that their ability to assist in facilitating communication between consumers and traders, plus the Ombudsman's expertise and independent authority, leads to swift resolution of many cases. This can be within an hour, depending on the type of problem. The same point applies to use of letters before action and then mediation before or alongside Court or Tribunal proceedings. However, the use of Resolver and Ombudsmen are typically quicker than mediations that need to be arranged, since mediation-like techniques are in effect automatically part of the pathway for Ombudsmen.

Conclusions

Considerable diversification has occurred away from the traditional dispute resolution forum of State courts. Some avenues retain a strong resemblance to courts, such as arbitration and Tribunals. In essence, arbitration is a private court, and Tribunals are provided by the State but with less formality. In both arbitration (or some arbitrations) and Tribunals, decisions are made by a panel of representative individuals rather than a single judge. Decisions apply the law, and all these avenues can still involve lawyers, which incurs expense.

Different avenues have developed based on different dispute resolution techniques in which mediation has replaced determination by a third party. Mediation facilitates the parties reaching their own agreements. Mediation has been enlisted before and alongside courts and other pathways.

Further avenues are more inquisitorial and less formal, trying to combine elements of mediation, expertise and ultimate decision-making in a process that is swift and cheap. Consumer Ombudsmen are typically free to consumers, paid for by trade sectors, and have a considerably expanded jurisdiction in reaching decisions not (just) on the basis of law but of what is fair and reasonable.

[144] *Enforcement annual performance report 2017/18* (Financial Conduct Authority, 2018).
[145] *Annual Review 2017/18* (Financial Ombudsman Service, 2018), 63.

UK has recently introduced three new intermediaries aimed specifically at assisting SMEs: the GCA, the PCA and the SBC. Their modes of operation are still somewhat limited, and they could be developed and merged to function more coherently and expansively in assisting SMEs.

Overall, there has been a broad move away from generic consumer ADR schemes or other forms of Tribunal towards an Ombudsman model. This direction of travel is driven three major factors: first, the need to reform procedural models so as to be more accessible, swift and cheap, involving some concentration of expertise in the Ombudsman rather than in a tripartite model of adversaries and a judge; second, the significant underlying expansion from applying legal rules to making decisions on grounds of fairness; and third, the need to deliver a wider range of functions that affect behaviour, which is discussed in Part C below.

Internationally, there is a recent but clear move towards extending dispute resolution facilities to be used by SMEs, and the mechanisms all seem to be built on an Ombudsman model.

There is considerable tension between devising a process in which, on the one hand, the participants are, and feel that they have been, treated equally and fairly, and, on the other hand, delivering just and fair outcomes within reasonable time and at reasonable cost. The traditional dispute resolution process emphasises 'due process', in which each party has equal opportunity to consider the case for and against them, and an equal opportunity to be heard. This equality before the law levels playing fields in the world in which there are imbalances of power, and is a hallmark of a civilised society. The problem is that processes that provide absolute guarantees of 'due and fair process' involve time and cost. That was precisely why small claims procedures, ADR, ombudsmen and other mechanisms were developed, so as to provide more accessible, swifter and cheaper justice. But some balancing trade offs have to be accepted.

In the current context, an important consideration is that it is unrealistic to expect small businesses, who will by definition have limited resources and may be distressed, to have the time, finances and expertise to access lawyers and dispute resolution processes that are too slow and costly. These considerations raise questions about the relevance of processes such as courts, arbitration and tribunals. They also raise difficult questions about the design of ombudsman-like options. Just which and how many corners can be cut in the balance between making procedures accessible, effective, cheap whilst ensuring that the system provides an adequate level of procedural fairness that can then command the trust of most people?

This is an issue that has arisen in relation to the voluntary ADR processes put in place by RBS and Lloyds/HBOS, for example in having internal reviews, non-disclosure of evidence, consumer advocates and appeals, as opposed to a full adversarial system.

Different sets of advantages would be available if disputes between SMEs and banks were to be channelled into various new mechanisms in UK. However, in my view the balance of overall advantage clearly lies with an Ombudsman mechanism, on grounds of cost of access, speed, and significantly widening the basis of decision-making from law to fairness, without losing too much of the formal advantages of more formal and coercive mechanisms, which all come at a cost in terms of money and time. Significant factors that I take into account here are that a distressed SME will by definition not have much available funds, access to sophisticated legal expertise or time.

I take fully into account the suggestion by Kevin Hollinrake MP in the APPG Report that a Tribunal model would be preferable.[146] I respectfully disagree. The APPG paper analysis draws on articles by Richard Samuel QC in which he argues that there is a 'middle gap' of SME disputes of claims involving

[146] K Hollinrake MP, *Fair Business Banking for All. How to improve access to justice for businesses in financial services disputes* (Centre for Policy Studies, 2018).

SMEs that either involve between £150,000 and 'several million pounds' by amount in dispute.[147] That argument in fact implicitly recognises the real problem, which is one of cost. There is an available option for disputes involving larger sums, the courts. But the cost of lawyers and court fees is too expensive for small and distressed businesses, and litigation cost insurance is not available for cases under say £1 million or more, or would be unaffordable. Exactly the same cost barriers in lawyers' fees and insurance would be faced with a Tribunal solution. Mr Samuel merely proposes that the cost of accessing a Tribunal could be linked to the amount in dispute. But the proposals by Mr Samuel, and the APPG paper, completely fail to take into account the real cost of Tribunals (i.e. in providing jobs for lawyers that each party would have to pay for or be disadvantaged) or the wider functions of Ombudsmen and others in relation to affecting behaviour, discussed in Part C below. If litigation insurance is unavailable for court cases up to a certain cap, the same should be true for Tribunal cases, especially since the lack of a reliable 'loser pays' rule in Tribunals makes external funding less attractive for funders.

Creating a new Tribunal would require primary legislation. Creating a new Tribunal system as a new pathway between an ombudsman system and the courts might confuse users on both sides, but also perpetuates an adversarial system and one that would apparently preserve use of lawyers and hence add to transnational costs. The financial criteria at the top and bottom of the Tribunal pathway would inevitably be arbitrary. This all seems to me to be complicating justice, not promoting it. Both a court and Tribunal system do not offer the advantages of the consumer ombudsman system in feeding back frequent empirical information on the real problems that exist in behaviour and the market, in ways that can address the root causes of such behaviour. It is a myth that by making a determination of rights between two parties to an individual dispute, and hence declaring the law in that particular situation, even if the law is clarified in a way that theoretically applies to many trading situations, the result is that the behaviour of potentially many market actors is necessarily changed. As discussed in greater detail in Part C below, the evidence that criticism arising from the publication of embarrassing evidence or an adverse decisions affects real behavioural or cultural change in a defendant organisation is very limited. That is a separate point from observing that defendants may try to avoid bad publicity, such as by settling individual cases. In contrast, the consumer ombudsmen have developed ways of engaging with traders to assist them in changing behaviour, if necessary supported by regulators.

It may be helpful to summarise the main pros and cons of Tribunal versus Ombudsman:

- Cost: concrete and irrecoverable if Tribunal as will need lawyers, versus no direct cost if Ombudsman;
- Basis: law versus law and fairness
- Access to evidence: order of a Tribunal versus expertise of Ombudsman, request mechanism, and ability to draw an adverse inference (banks could undertake to accept in advance, assisted by the mechanism of referring points of law of major significance to the court);
- Enforceable outcome: judgment versus recommendation that is (as for consumers) binding on a bank if the SME accepts it, and also overseen by Ombudsman/FCA (again banks could give an undertaking; or there is the Dutch solution of the trade association giving a guarantee if a bank does not pay);
- Transparency: Tribunal cases will provide openness for the evidence in such cases as reach a hearing at the end of the process, versus publication by an Ombudsman of all Ombudsman decisions and aggregated data on every case and complaint received by the Ombudsman;
- Collection of data, feedback, and ability to influence behaviour and culture of banks: Tribunals have minimal influence compared with an Ombudsman plus regulator, who are already in this space and developing it further.

[147] R Samuel, 'Tools for changing banking culture: FCA are you listening?' (2016) 11(2) *Capital Markets Law Journal* 129; R Samuel, 'Tools for Culture Change: FCA, now you are listening! Time to build an independent, low cost forum for conduct dispute resolution' (2016) 12(3) *Capital Markets Law Journal* 227; R Samuel, 'The FCA has now listened: Banks, it is your interests to listen too' (2018) 13(1) *Capital Markets Law Journal* 3.

Views may be influenced by current dissatisfaction with the FOS. I stress that my conclusion is that an Ombudsman model is clearly the right way forward. I note that there are various options on how to implement that model that might or might not involve the FOS, but it is clear that a new system would have to be based on a significantly new design and approach in order to cater to the needs of SMEs.

If an Ombudsman model is the preferred option, the possible hosts would be:

1. To establish a new Ombudsman for SMEs.
2. To extent the FOS, but involving a significantly redesigned procedure and possibly governance.
3. To extend the existing IFABL financial services ADR scheme operated by Ombudsman Services.

A number of possible developments could be suggested in the current model, arguably more relevant for SMEs than consumers:

- clarity over whether banks should pay loss or consequential loss if it exceeds £150,000, or whatever limit is applied;
- a mechanism for confirming that banks have given effect to a settlement or Ombudsman award (as occurs in Switzerland: an electronic case system might include a simple way of achieving this).

Issues with the Proposal to Extend the FOS to SMEs

The FCA's Consultation focuses on *jurisdictional criteria for size* of SMEs that would be eligible. The upper limit would cut out one in five of all SME claims, and 90% of the total value of all SME disputes. This raises some concerns.

Some international comparisons are relevant. The recommended award limit for the new Australian body is no less than AUD500,000 (£295,000) for most disputes and AUD1m (£589,000) specifically for small business lending disputes. The Swiss Banking Ombudsman has no financial limit, but only a comparative small number of cases. The new Dutch KiFiD scheme is open to SMEs with an annual turnover cap of €5 million and claims up to €1 million.

If the objective is to design a system that does not exclude claims unnecessarily or arbitrarily, then the aperture should be as wide as possible. Further, if the objective is to design a system that provides a large database, that can identify issues and poor practice (on whichever side) early (the argument for this is discussed in Part C below), then the aperture should be as wide as possible. Hence, liberal limitations on firm size (turnover etc) and amount in dispute. The FOS is able to exclude claims that appear to it not to be suitable, and that reduces unnecessary cost.

The underlying policy should be to provide assistance to those SMEs who do not have the resources to defend or assert themselves because of lack of financial or personnel resource or expertise. Metrics such as caps on size of company (turnover or number of staff) or amount that can be awarded are all attempts to provide a simple substitute for that lack of resource. But they also limit the advantages of an Ombudsman system (accessibility of fairness, lack of access and process costs) to some businesses. Equally, they therefore limit the cost to its funders of providing such advantages through the Ombudsman. Any such metrics will be to some extent arbitrary. Decisions should be based on reliable empirical evidence, and take into account that such evidence may change over time. The real point is about market bargains and relationships that are distorted by inequalities is the comparative power of the counterparties involved.

Although answering these issues may prove difficult, the more fundamental questions seem to be:

1. In which circumstances has there been an *imbalance of power* that has led to injustice, which therefore deserves to be righted?
2. Which SMEs have *no expertise or resources* to address injustice?

3. Rather than look at criteria for who can bring individual claims, should the system not also seek to *identify systemic behaviour* that needs to be addressed? If the criteria for individual claims are set too narrowly, it will be more difficult, or take longer, to identify systemic issues. This is a 'regulatory rationale' for designing a system that contains certain features that go beyond dispute resolution, and to which I now turn.

One further important issue also arises, which is to strike a sensible balance between designing a process that is a 'Rolls-Royce' (i.e. provides full guarantees of due process rights and is as forensically accurate as possible) whilst not making the process to costly as to be inaccessible to SMEs, especially those who are financially distressed, and which takes too long so that the chance of commercial recovery is lost. Striking that balance will inevitably involve compromise, such as on process and upper limits on accessibility (size of SME that is eligible) and size of award.

C. AFFECTING FUTURE BEHAVIOUR

An important question once poor market behaviour has been identified is: How can this be prevented from happening again? This Part focuses on how future behaviour can be affected. The traditional answer to that question has been a different question (How to increase deterrence?) on the assumption that deterrence is the only relevant mechanism and that imposition of sanctions and decisions that uphold the law have an effect on future behaviour that is (wholly or significantly) deterrent of future wrongdoing. Such theorising has crumbled in the light of the application of modern behavioural science on how people act and make decisions. Explanations are now available of the *mechanism(s)* involved by which change is caused and effected.

As a result, little short of a revolution is underway in public regulatory enforcement. The new approaches explain why particular dispute resolution systems contribute far more to the new approaches of affecting behaviour than others. In particular, combinations such as Resolver + Ombudsman + Regulator are the current state of the art in delivering *both* dispute resolution and affecting behaviour. A great deal of the effectiveness of the system relies on the ability to collect data from multiple instances and subsequently engage in detailed ongoing conversations with organisations about exactly what changes are to be made. An example is outlined about how that is being done in relation to protecting consumers in various sectors. A similar model now needs to be designed and assembled that assists both SMEs and banks to learn from identification of problems and to implement effective changes.

The Traditional Approach of the Legal System to Affecting Behaviour

The legal system is based around citizens of a State having rights that the State guarantees will be enforced, either through providing private or public means of enforcement that will uphold those rights. In private enforcement, individuals must initiate and pursue their actions in the State's civil courts or tribunals, first in the stage of seeking vindication of the party's rights and second in obtaining a means of enforcement of a judgment─in either case unless the defendant agrees to comply or the parties agree a settlement. In public enforcement, a State authority initiates enforcement, and either has powers to act itself or to take action in a criminal or civil court.

The key question is *how* either of these mechanisms affect the future behavior of an individual defendant or of everyone else. Understanding on this point has expanded markedly in recent years, as a result of research on behavioural psychology on how humans make decisions and act, and on how organisations promote or hinder internal compliance of individuals who work there.

There are 5.7 million businesses in the UK, over 99% of which employ 0-249 people (SMEs)[148] and 5.36 million people employed in the public sector.[149] Theories on how the behaviour of all those people is actually affected needs to be supported by convincing evidence.

Various claims have been traditionally made as to how private enforcement mechanisms promote compliance with law. It is said, for example, that the fact that a defendant loses an action (i.e. is found to have infringed others' rights) or that a judgment is given and may be published will have a wide-ranging effect on future behaviour. The empirical evidence for such propositions is simply lacking, even if the lawyers who work in such systems may wish to believe this.[150] The theory behind this approach is that of deterrence. However, extensive research has shown that the empirical evidence that deterrent sanctions have much effect on future human behavior in most situations is lacking, and that many other

[148] C Rhodes, *Briefing Paper: Business statistics* (House of Commons Library, 2017).
[149] *Statistical bulletin: Public sector employment, UK: March 2018* (Office for National Statistics, 2018).
[150] A well-recognised phenomenon of behavioural science is WYSIATI (what you see is all there is): see D Kahneman, *Thinking, Fast and Slow* (Allen Lane, 2011).

factors in fact affect behaviour. Research in criminal,[151] regulatory[152] and tort[153] law contexts has found virtually no empirical evidence that future acts are generally affected by deterrent sanctions. Criminologist and regulatory enforcement experts have known these facts for some time and the new thinking has been widely applied in those sectors. Many regulatory authorities now adopt policies in which deterrence plays a minor role.[154] Similarly, there is little empirical evidence that a decision in an individual court/tribunal/ombudsman case affects changes in the behaviour of an organisation against which an award is given. Having strong trust between people is far more effective than trying to affect choices by the threat of punishment.[155]

Individual decisions by courts or other tribunals on points of law in individual cases have little impact on changing corporate culture. They might lead to changes in, for example, the terms and conditions of particular defendants, and sometimes across sectors, but they have very limited effect on culture. It does not take much thought to understand why that is so. It is necessary to explain the causative mechanism between resolution of an individual case (whether settled by agreement or by imposition of a third party's decision) and *actual* changes or the content of future decisions made by those who work in the many public and private organisations across the country. Somewhat more sophisticated understanding of how to affect behaviour has developed amongst many public regulatory enforcement authorities and business compliance departments, which engage on a daily basis with organisations and their staff in seeking compliance.

Effecting Changes in Behaviour

There has recently been a quiet revolution in the understanding of how changes are achieved in the behaviour of individuals acting alone or in organisations. Behavioural psychology supports a focused approach to 'enforcement'. The UK is an international leader in this new philosophy.[156]

Many regulatory authorities new carry out root cause analysis of the reasons for mistakes or errors and then agree or require specific changes to be undertaken by a business, such as training, alarms, or other responses to reduce future risk or change systemic behaviour. The first response to responsible businesses is then to *support* specific agreed changes. Use of strong sanctions is still available, but generally reserved for intentionally criminal behaviour. Further attention is now being given to the fact that an organisation's culture is critical to its systemic behaviour. Building on that realisation, the Ethical Business Practice & Regulation model,[157] now being piloted in some sectors, requires a constant stream of evidence of behaviour. Enlightened regulators and Ombudsmen can provide this, but it does not flow from individual decisions on disputes and has to be addressed in other and more profound ways.

[151] See A Bottoms and A von Hirsch, 'The Crime-Preventive Impact of Penal Sanctions' in P Cane and HM Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).
[152] See C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics* (Hart Publishing, 2015).
[153] P Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997).
[154] For example, compare *The FCA's approach to advancing its objectives* (FCA, July 2013) in which an enforcement policy of 'credible deterrence' was stated, with *Our Approach to Supervision* (FCA, 2018) and *Our Approach to Enforcement* (FCA, 2018), in which deterrence is hardly mentioned.
[155] D Awrey and D Kershaw, 'Toward a More Ethical Culture in Finance: Regulatory and Governance Strategies' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford University Press, 2014).
[156] C Hodges, *Ethical Business Regulation: Understanding the Evidence* (Department for Business Innovation & Skills, Better Regulation Delivery Office, 2016).
[157] C Hodges and R Steinholtz, *Ethical Business Practice and Regulation. A Behavioural and Values Based Approach to Compliance and Enforcement* (Hart, forthcoming 2017).

The importance of *culture* in banking has been widely recognised as a—if not the—cause of the global financial crash in 2008, and of a series of major scandals since then.[158] Despite the imposition of huge fines on financial institutions (on a theory of deterrence) and the introduction of a huge quantity of regulatory rules, including on senior managers as well as institutions, leading central banks have recently accepted that banks' culture is more important than rules and enforcement in reducing risk and promoting compliance.[159] A number of central banks are currently focusing strongly on culture in financial services organisations.[160] The FCA has recently strongly emphasised this issue.[161]

The UK Corporate Governance Code was amended in July 2018 to include a strong emphasis on the requirement for a company's Board to ensure that its purpose, values, strategy and culture are aligned.[162]

It follows that if a system is to be designed to effect changes in behaviour—by borrowers or lenders—it needs to be designed to use particular means that are proved to be effective in achieving such aims. It is no longer effective to rely on decisions in individual disputes as a means of effecting change. It has been recognised that the means of intervention has to be far more direct and appropriate so as to affect behaviour of individuals within organisations, and the culture that affects such behaviour.

The contrast can be seen by asking *how* change in behaviour or in corporate culture is produced by comparing the following two models:

A. Litigation of individual or collective cases leading to settlement or an imposed decision, typically involving payment of money and not often directly requiring specific changes in how things are done.
B. Collection of data from individual queries, complaints, disputes and decisions; aggregation of that data and its analysis to identify patterns of poor practice and trends; direct intervention with an organisation or trade association to agree specific changes in practice or culture.

In simple terms, approach A is the private enforcement mode, and used to be that of public enforcement. Approach B has developed from supervision and enforcement by public authorities, and in many sectors now involves new intermediaries such as Ombudsmen, Resolver and the Small Business Commissioner. In terms of affecting behaviour, there has been a revolution in techniques and technologies, that transcends the older approaches. The point is developed below to indicate somewhat more about how the leading Ombudsmen now work. The system works particularly well where various intermediaries (such as Resolver, FOS and FCA) act *together* so as to intervene with businesses in a consistent manner, with each reinforcing the messages by means of a different conversation with management. Once this point about how real intervention works, it will be seen that the ability of the dispute resolution system

---

[158] *Toward Effective Governance of Financial Institutions* (Group of 30, 2012); *A New Paradigm. Financial Institution Boards and Supervisors* (Group of 30, 2013); *The FCA's approach to advancing its objectives* (FCA, 2013); *The Salz Review of Barclays' Business Practices report to the Board of Barclays PLC* (2013); *Report of the Collective Engagement Working Group* (Collective Engagement Working Group, 2013); *A report on the culture of British retail banking* (New City Agenda and Cass Business School, 2014); *G20/OECD Principles of Corporate Governance. OECD Report to G20 Finance Ministers and Central Bank Governors* (OECD, 2015);

[159] *Stocktake of efforts to strengthen governance frameworks to mitigate misconduct risks* (Financial Stability Board, 2017): 'Main themes identified in the stocktakes: …. The importance of culture was evident throughout the responses'.

[160] *Supervision of Behaviour and Culture: Foundations, practice & future developments* (DeNederlandscheBank, 2015); *Behaviour and Culture of the Irish Retail Banks* (Central Bank of Ireland, 2018); Jay Clayton, Chair of the SEC, speech 'Observations on Culture at Financial Institutions and the SEC', at https://www.sec.gov/news/speech/speech-clayton-061818 ('Culture is not an option').

[161] *Transforming Culture in Financial Services* (FCA, March 2018), DP18/2. Speech by Andrew Bailey, Chief Executive of the FCA, at the HKMA Annual Conference for Independent Non-Executive Directors, 16 March 2018. 'We also know that firms' culture shapes the conduct outcomes for consumers and market. So we aim to assess and address the drivers of culture including firms' leadership, purpose, governance and approach to managing and rewarding its employees.': *FCA Mission: Our Approach to Supervision* (FCA, 2018).

[162] *The UK Corporate Governance Code* (Financial Reporting Council, 2018); *Guidance on Board Effectiveness* (Financial Reporting Council, 2018).

to have much impact on organisations' behaviour and culture could only be minimal. It should also not be thought that the situation is static: fresh developments and innovations should be anticipated, but by those acting in approach B rather than approach A.

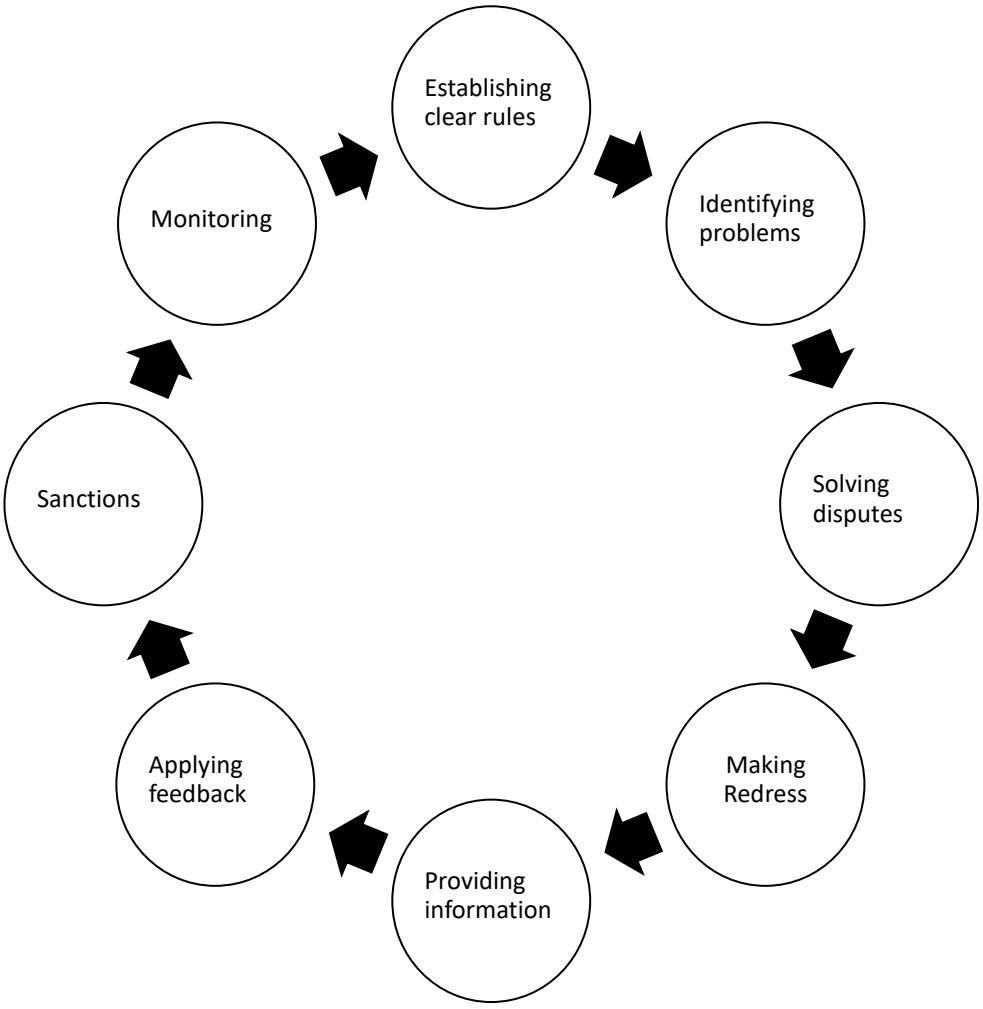
Delivery of an Increased Number of Consumer Market Functions

An important reason for the shift towards Consumer Ombudsmen and Resolver is that they deliver more functions than arbitration-style ADR and courts mechanisms. This can be seen by considering the regulatory delivery functions that need to be fulfilled in ensuring that a modern market operates well. These functions are:[163]

1. Consumer information and advice;
2. Dispute resolution;
3. Aggregation of data on market complaints, disputes, and issues;
4. Feeding back the aggregated data to traders/sectors, consumers, competitions, regulators and investors, to drive relevant responsive actions, such as improvements in behaviour and innovation;
5. Improving market behaviour. This may be achieved by publication, but it may also lead to regulatory action, or direct action by ADR body.

A representation of the functions that should be applied, roughly in sequence, in responding to regulation of market trading and behavior is shown below.

[163] C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) 15(4) *ERA Forum* 593-608.



The Wider Functions of Ombudsmen

On the list above, dispute resolution (providing redress) is only one of the functions. However, Ombudsmen (especially if assisted by a system like resolver) are able to build databases of considerable size from which market behaviour, trends, and the problems raised by individual businesses, products or services can be identified. That aggregated information is fed back to businesses, regulators, consumers and others, enabling corrective action to be taken.

The major Ombudsmen are now going beyond just providing the statistics and they engage regularly with businesses to discuss exactly what action the business is going to take to respond to the source of the problems that the data has identified. This engagement has, therefore, moved in to the territory traditionally occupied by regulators. It means that the engagement by Ombudsmen is typically swifter than by regulators. It does not, of course, oust the jurisdiction of regulators, who will be kept informed of relevant issues. Indeed, the EU regime requires ADR entities and consumer regulatory and enforcement authorities to communicate, and ensure 'mutual exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints'.[164]

Thus, Ombudsmen, to a far greater extent that courts, tribunals or arbitration-model ADRs, are able to use the data that they assemble from individual user *complaints* and formal claims. The number of complaints and requests for assistance or clarification is typically several times larger than the number

[164] Directive 2013/11, art 17.

of claims actually lodged. It is that ability to compile larger databases that has proved particularly valuable in monitoring market behaviour.

The data gives the ability to identify behaviour and trends that are of general relevance, and hence the ability to intervene to raise issues. The latest development is increasingly to assist in addressing change so as to effect changes in behaviour and to reduce the risk of the undesirable behaviour recurring.

Ombudsmen make the data and issues available in a number of ways, including periodic meetings with businesses, annual or themed reports with recommendations, and bilateral links with relevant regulatory authorities. These techniques appear to have produced real change in various sectors, although more could still be done. Examples outside financial services are engagement by Ombudsmen in energy and communications sectors by Ombudsman Services in UK and equivalent Ombudsmen in Belgium. A related mechanism is that involving the Consumer Ombudsmen in all the Nordic states (although those bodies are enforcement authorities and work together with separate dispute resolution bodies).

The New SME Intermediaries

It has been noted in Part B above that the GCA, PCA and SBC have all been designed to respond to particular issues. The issues are not just late payment or commercial abuse, but the need to maintain the anonymity of the SME traders from their larger counterparts. Hence, the new intermediaries were designed to maintain that anonymity, and given not just the ability to provide mediation services but also the ability to investigate spontaneously themselves. In other words, the critical function is to be able to carry out an investigation, rather than find facts through an adversarial process. The United Nations recently endorsed non-judicial mechanisms as a major means of supporting human rights, and included their delivery of continuous learning as one of the functional objectives.[165]

The Regulatory Background in Financial Services and its Challenges

Developments have also taken place in regulatory systems. Most lending to SMEs falls outside, or at the periphery of, the existing coverage of the current regulatory system.[166] This situation presents some challenges to regulators, principally the Financial Conduct Authority (FCA). Whilst the FCA has powers to order redress to be paid by regulated entities (such as through the mechanism of ordering a redress scheme to be implemented), it has no power to order a compensation scheme in relation to non-regulated lending, such as to SMEs. However, ideas on best practice have evolved in recent years, and the FCA has exerted moral suasion in various situations, resulting in institutions 'voluntarily' creating redress schemes. An example is the creation by RBS of a scheme overseen by Sir William Blackburne in relation to customers of RBS' GRG activities, and that for Lloyds/HBOS overseen by Professor Russel Griggs OBE.

Currently, instances of complaints by SMEs about banks' behaviour relate back some years. Since then, the FCA has been given a new regulatory tool that enables it to focus on a 'whole firm' activities, namely under the Senior Manager and Certification Regime (SM&CR). The SM&CR is, however, not retrospective. The FCA has recently issued policy on taking into account voluntary Codes of Conduct or industry standards in relation to how the SM&CR (Rule 5: you must observe proper standards of market conduct) is applied to unregulated financial markets.[167] Some commentators argue that the SM&CR is still new and should be given a chance to prove itself in relation to effects on conduct issues. However, the SM&CR does not address the issue of compensation or redress schemes.

---

[165] *Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms. Report of the United Nations High Commissioner for Human Rights* (2018).
[166] The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001 No 544.
[167] *Consultation Paper on Industry Codes of Conduct and Discussion Paper on FCA Principle 5. Consultation Paper* (FCA, 2017), CP17/37**

Conclusions

We now know a great deal about how organisations work, and the circumstances in which compliance with law will be promoted. Behaviour is affected by approaches and changes implemented in individual organisations. This is a task for management and staff, and can be supported by the active and engaged intervention of external experts, such as regulators and ombudsmen. Behaviour is significantly affected by organisational culture.

Dispute resolution mechanisms by themselves have very little effect on the future behaviour and culture of organisations. Their essential function is retrospective (to resolve a past dispute) rather than prospective. But some dispute resolution systems can be designed to produce data that can have a major impact when used in effective future-focused behavioural systems. Indeed, some new intermediaries (Resolver and some Ombudsmen) have recently made a major evolution in joining enlightened regulators in adding the function of detailed engagement with businesses to affect future behaviour.

It can be argued that people should be given a choice of dispute resolution pathways, so a multi-track including court, tribunal, arbitration, Online Court, ombudsmen, and anything else is attractive and democratic. A great deal can be said for that view. It also allows for 'competition' and innovation. However, there are two other points. The first is that 'we're paying for all this, and we ought to put our money in things that work, and not waste them on tracks that we know deliver poor returns'.[168] Second, it is difficult to collect aggregated data from multiple sources. That has important implications in relation to the 'affecting behaviour' goal. If it is important to create large data pools, so as to be able to identify behaviour and trends swiftly, the design of the system has to be simple, so that everyone can remember it, and limit the number of databases. Thus, if it is wished to be able to build a reliable database that can identify what financial services firms are doing in the marketplace, there is a very strong argument for having a single point of entry for SMEs to seek information and complain.

It is for that second reason that the consumer-trader-market area is moving towards a unified architecture in which consumers feed complaints to players like Resolver and a limited number of Ombudsmen. The same thinking applies to SMEs. Small businesses may be confused by having too many options in dispute resolution and in seeking information, with the result that the regulatory system fails to work adequately or swiftly by not having enough data.

These issues have immense significance for the design of a future system that identifies problems between SMEs and banks. It should be possible to use complaint and dispute resolution data to identify problems. The problems might be with the policies or practices of either banks (systemically or locally) or SMEs. Intervention systems should be designed to assist in achieving change. Such intervention systems can draw upon, firstly, the existing ability of some dispute resolution systems (Resolver, Ombudsmen and the SBC, but not courts, tribunals or arbitration systems) to collect and aggregate data and, secondly, to assist in engaging with both banks and SMEs in achieving effective change in future behaviour.

[168] That point has been made in reviews in Australia and Scotland: *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Australian Government, 2009); *Ensuring effective access to appropriate and affordable dispute resolution. The final report of the Civil Justice Advisory Group* (Consumer Focus Scotland, 2011).

D. EMOTIONAL CLOSURE

The third objective of this inquiry concerns what mechanism(s) might effectively address the emotional damage that has been caused to some owners of SMEs who have received rough treatment by banks. That statement of the issue puts the point mildly. Human beings can normally withstand the normal ups and downs that life throws at us, and have resources of resilience to adverse knocks. However, some people experience more than normal hurt and can find it difficult to bounce back. The law does provide for monetary compensation of psychological harm caused by unlawful actions, but awarding or having money does not necessarily provide the healing or closure that people need, and the process of obtaining it can itself add to the problem.

This issue goes beyond the issue of the resolution of disputes over financial lending and arrangements discussed in Part A. It recognises the fact that some─but not all─of the people involved have been through the available legal and ADR mechanisms, accepting what may be wholly or partially adverse outcomes, even if fatalistically, so in effect do not seek money but other outcomes around the need to be heard that they have suffered life-changing loss and for that to be fully acknowledged.

For some of the customers of banks involved in this case, the consequences far exceed financial loss and loss of one's business has led to loss of livelihood, home, family or other consequences. The whole extended experience has led to deep emotional trauma. The language changes from 'claimants' operating within the legal system to 'victims' who have profoundly different needs for closure and healing. It needs to be recognised that the resolutions that flow from a legal process involving rights, adversarialism and money fail to address, and may even exacerbate, the psychological harm that has been suffered. What is needed is a different form of response to a different form of damage.

The Nature and Effects of Deep Psychological Harm

The type of damage felt by families, and the difficulty of resolving it, was recognised recently by the Independent Panel investigating the early death of many patients at Gosport War Memorial Hospital.[169] In his Foreword, the Chair of that Inquiry, Bishop James Jones KBE, described the nature of the harm felt:

> Some of the family members are the first to acknowledge that their quest for truth and accountability has had an adverse effect on their own lives. They know that the frustration and anger that they feel has sometimes consumed them. This in turn has no doubt made those in authority less inclined to build a bridge towards them and to investigate their concerns thoroughly. But what has to be recognised by those who head up our public institutions is how difficult it is for ordinary people to challenge the closing of ranks of those who hold power.
>
> ….
>
> The anger is also fuelled by a sense of betrayal. Handing over a loved one to a hospital, to doctors and nurses, is an act of trust and you take for granted that they will always do that which is best for the one you love. It represents a major crisis when you begin to doubt that the treatment they are being given is in their best interests. It further shatters your confidence when you summon up the courage to complain and then sense that you are being treated as some sort of 'troublemaker'.

There is clear evidence that some involved in SMEs that are the subject of this inquiry have suffered profound psychological hurt. The records of hearings involving the All Party Parliamentary Group on Fair Business Banking provide extensive evidence of this. I quote here just from a recent letter by the Chair of that APPG, Kevin Hollinrake MP to Andrew Bailey, CEO of the FCA, dated 9 August 2018, (emphasising particular wording):

---

[169] *Gosport War Memorial Hospital: The Report of the Gosport Independent Panel* Ordered by the House of Commons to be printed on 20 June 2018, HC 1084. Similar comments are frequently made in reports into major disasters involving other NHS units, such as Morecambe Bay and Mid-Staffordshire Trusts.

> Our economic model depends on fairness, transparency, accountability and justice not only being done, but being seen to be done. As things stand, this is not the case. …
> The [Promontory] report determined that the abuse caused "material financial *distress*" …
> For years we have been hearing about mis-selling and misconduct, yet the consequences of these actions, which are described in the mild language as mere misdemeanours, have had *a catastrophic effect not only on individual lives, families and livelihoods*, but on confidence in our entire system. …
> … we remain frustrated that it is wholly within the 'gift' of institutions to determine the level of compensation for *people who have had their life's work taken from them*.
> [The criteria for Public Inquiries includes] *Catharsis or therapeutic* exposure─providing an opportunity for *reconciliation and resolution*, by bringing protagonists face to face with each other's perspectives and problems'

The themes that emerge here are that some people experience a deep level of damage that has not only a lasting but traumatic effect on them. Calls are made not just for explanations, apologies and payment of compensation but for holding those responsible to account and─critically─for catharsis.

Mediation

It has been recognised for some time that a process of drawing parties together in resolving their disputes can achieve more than is possible through the determination of legal rights by an independent third party and a remedy such as an order to pay money. The mediation process can offer significant advantages over the adversarial process, and the resolution of disputes other than by a declaration of legal rights (and 'who is right'). Mediation may produce an *outcome* in which some but not all damage is compensated by an agreement to transfer money (although this is an outcome that can be criticised as not upholding the law or providing full compensation). The mediation *process* can also deliver 'resolution' by agreement through a process that gives parties opportunities for 'voice', the ability to express their emotional feeling and the impact of the harm, as well as for apology and agreement on redress, hence promoting reconciliation and perhaps forgiveness.[170]

A recent academic review has summarised the learning on mediation and apologies that an analytic approach could consider the following components of an apology:[171]

- a specific statement of what was done
- recognition of responsibility and accountability
- acknowledgement of pain, distress, other feelings and emotions
- a judgement about the offence
- a statement of regret
- future intentions
- an explanation of why they acted the way they did.

Would mediation and an apology be enough to bring healing and closure in the current SME-bank situation, especially in the current historical context of the events some years ago? Both RBS and Lloyds/HBOS have issued apologies in the press or individual letters. The point, however, is that their sincerity has not been established in the minds of some former customers. It is useful to examine the question in a wider context, since wider techniques have been developed in other─and generally more serious─situations. This Part therefore proceeds to summarise the learning from Restorative Justice techniques used between offenders and victims in criminal law, and from Transitional Justice and Truth & Reconciliation techniques used between groups after traumatic changes in societies. The thread running through these examples is to try to enable people and groups to be able to deal with the past in order to be able to move on.

Restorative Justice and Transitional Justice

[170] P Randolph, *The Psychology of Conflict, Mediating in a Diverse World* (Bloomsbury Continuum, 2016).
[171] R Carroll, A Allan and M Halsmith, 'Apologies, Mediation and the Law: Resolution of Civil Disputes' (2017) 7(3) *Oñati Socio-legal Series* 569.

Restorative Justice

Restorative justice is an approach that has ancient origins in customary societies, notably North American and Australasian indigenous peoples.[172] It has been applied in recent years in attempting to achieve better outcomes in offending by, for example, youths or recidivist criminals than traditional penal sanctions,[173] and impressive results have been reported.[174] Restorative justice brings the offender and victim together with the following aims:[175]

> Firstly, it aims to affect the offender's future behaviour by confronting him with the effects of his crime. The approach moves them away from sole reliance on traditional deterrence-based approaches. Secondly, it aims to restore the victim's sense of injury by giving an opportunity to express her feelings. Where this technique is successful, it achieves a social and behavioural rebalancing. It can also lead to reparative actions by the offender, not least saying sorry. Thirdly, the legal mechanisms by which reparative compensation may be paid to victims of crime have been developed. Several mechanisms exist, and from 2012 criminal courts are required to consider making a compensation order after every conviction.

UK Government policy as at 2012 was to use processes that

> bring those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.[176]

Certain aspects of restorative justice are worth contemplating in the SME-bank situation. One of the techniques is to identify one or more individuals who can exert influence over the offender, and create opportunities for them to do so. In the case of an anti-social youth, the effective influencer might be a grandmother or certain peers. In the context of organisations, this idea has echoes of the social culture and influence of peers within and without the group.

Transitional Justice

The related concept of Transitional Justice describes ways on which different societies have dealt with past human rights abuses as they transition to different political and social regimes. Examples included the responses to address past human rights violations in dictatorships and armed conflict by regimes or civil war in Eastern Europe and Central America in the 1980s and 1990s. Principal goals have been 'to ensure accountability, serve justice and achieve reconciliation',[177] although all elements are not always included.

---

[172] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, 1992); J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, 2002).

[173] See D Sullivan and L Tifft (eds), *Handbook of Restorative Justice* (Abingdon and New York: Routledge, 2006); D Miers and J Willemsens (eds), *Mapping Restorative Justice: Developments in 25 European Countries (*European Forum for Victim-Offender Mediation and Restorative Justice, Leuven, 2004); I Aertsen, R Mackay, C Pelikan, M Wright and J Willemsens, *Rebuilding Community Connections - Mediation and Restorative Justice (*Council of Europe, Strasbourg, 2004). In the United Kingdom, restorative justice was first extensively used in relation to juvenile crime: see Home Office, *Restorative Justice: the Government's Strategy* (Home Office, 2003).

[174] *Facing Up To Offending: Use of restorative justice in the criminal justice system* (Criminal Justice Joint Inspection, 2012). Policy on expansion: *Restorative Justice Action Plan for the Criminal Justice System* (Ministry of Justice, 2012). J Shapland, G Robinson and A Sorsby, *Restorative justice in practice* (London, Routledge, 2011).

[175] C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics* (Hart Publishing, 2015), 213.

[176] *Facing Up To Offending: Use of restorative justice in the criminal justice system* (Criminal Justice Joint Inspection, 2012). *Restorative Justice Action Plan for the Criminal Justice System* (Ministry of Justice, 2012).

[177] *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* UN Doc. S/2004/616 (3 August 2004), para 8.

One of the features of transitional justice is its flexibility and contextual responsiveness.[178] New approaches often arise because of political pressure and the inability of the legal system to deliver outcomes that are sought. Professor Christine Bell, an expert in Transitional Justice who has particularly studied 'The Troubles' in Northern Ireland, commented:[179]

'These campaigns have been successful in forcing a modified or quasi-legal mechanism drawn from the repertoire of transitional justice mechanisms when two criteria have been satisfied: political pressure requires that the wrong be addressed, and the legal system has had no capacity to respond to the wrong because it had no individual perpetrator, because the wrong done was historic and because the wrong was legal (both under international and domestic law) when perpetrated.'

Professor Bell and others have also noted the fact that in some situations the political goals of transition shape the justice that applies, rather than vice versa in more stable societies. In other words, there can be a tension between whether the rule of law is applied (such as the certainty provided by agreements concluded under law of contract) and between bending to political forces (possibly those who shout loudest) in determining what 'justice' means and what outcomes are delivered.

Truth and Reconciliation

In countries where there has been widespread harm in society, such as disappearance, torture and death, a 'Truth and Reconciliation' processes has been found to be both effective and necessary. This process has been used in South Africa to try to bind the nation together after apartheid.[180] The website description says:

> 'The South African Truth and Reconciliation Commission (TRC) was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses.
> *"... a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."*
> *Mr Dullah Omar, former Minister of Justice.*

The TRC established three committees: the Amnesty Committee, Reparation and Rehabilitation (R&R) Committee and Human Rights Violations (HRV) Committee.

Needs and Responses

What is the right and effective response to this type of harm? The key is that it involves individuals and responding to their emotions: public statements to the stock market or press releases do not respond. Let us go through a sequence of what might be called stages of emotional resolution: explanation, voice, being heard, apology, and emotional closure.

A related strand comprises explanation, accountability and assurance that the same thing will not recur and happen to others: that strand is largely addresses in the earlier Part of changing behaviour. However, it is just noted here that people can frequently accept terrible events where they receive assurance that lessons have been learned and the same thing will not happen to others. Thus, providing credible assurance that a regulatory feedback mechanism exists and operates can assist in gaining closure.

---

[178] As Professor Carrie Menkel-Meadow has said, the '"forum must fit the fuss", and there are many different kinds of "fusses" that arise' to be dealt with: C Menkel-Meadow, 'Process Pluralism in Transitional/Restorative Justice - Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)' (2015) 3(1) *International Journal of Conflict Engagement and Resolution* XXX

[179] C Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3(1) *International Journal of Transitional Justice* 5.

[180] http://www.justice.gov.za/trc/

It is important to start with the realisation that achieving an outcome of being told that one's rights were broken and that some money will be paid might address physical loss but does not address emotional damage. That point is closely associated with the expansion of the Ombudsman jurisdiction outside breaches of law to cover providing outcomes that are fair.

Explanation and Accountability

Responses to medical mishaps demonstrate a need for 'information in' as opposed to 'voice out'. Patients and families always call for a full and clear explanation of what happened and why. It is often not recognised that those recipients may need such explanations to be provided in simple language, to be repeated, to involve independent friends or experts, and to be available to be repeated more than once as it may not be taken in at first explanation.

The need for explanation is linked to the call for voice and accountability. The call for accountability is frequently driven by the assumption that one or more *individuals* are *to blame* for wrongdoing and must be held to *account*. Whilst such situations of course exist, and are evidenced where some individuals are convicted, such an approach fails to address a systemic situation, such as where the culture of an organisation or business sector are involved. More sophisticated approaches to accountability exist in some sectors and organisations, the paradigm being the open safety culture discussed above in aviation safety, where strong and effective accountability is interpersonal.

The way in which an explanation is given can significantly affect whether an issue gains closure. People feel even more hurt and affronted if they think that they have been lied to, or not told the truth, or positively lied to, or treated dismissively with a lack of respect, or not taken seriously. People who experience these feelings can 'dig in and not give up', even if that is irrational, when they might previously have been prepared to compromise or give up.[181]

Voice and Being Heard

Vindication of legal rights is an important issue but does not necessarily address deep damage to the ego of a person harmed. Vindication in psychological terms requires people to be heard and believed, and for that to be demonstrated.

It is often said that people want their 'day in court'. The implication might be that people should be given an opportunity to sound off before the judge imposes a more rational solution, and the process of expressing their views will be sufficiently cathartic even if they lose. However, various problems arise with this view. First, research establishes a clear link between outcome and satisfaction with even a process in which procedural fairness has been observed.[182] Second, a seriously damaged loss of self-esteem will not be healed by such a process.

It is important to people that they are not just given 'voice' but are also 'heard'. The need to demonstrate that people have been heard through 'reflecting back' was clearly recognised by a striking statement at the start of the Report of the Gosport Memorial Hospital Inquiry:[183]

> *Introduction and key conclusions*

[181] 'emotions are the driving force that appear to overwhelm reason in dispute situations': Archbishop Desmond Tutu, Foreword' in P Randolph, *The Psychology of Conflict, Mediating in a Diverse World* (Bloomsbury Continuum, 2016), xix.
[182] N Creutzfeldt, *Ombudsmen and ADR: a comparative study of informal justice in Europe* (Palgrave, 2018).
[183] *Gosport War Memorial Hospital: The Report of the Gosport Independent Panel* Ordered by the House of Commons to be printed on 20 June 2018, HC 1084.

> 12.4 Having looked at documents covering the whole period since 1987, the Panel can say: "Yes, we have listened and yes, you, the families, were right. Your concerns are shown to be valid." Indeed, as this Report shows, the practice of anticipatory prescribing and administering opioids in high doses affected many patients and families – not only those who have led the way in pressing for the truth, but also very many other families.

Apology

There is plenty of evidence that receiving an apology can resolve a dispute.[184] An apology carries a deep implication of appreciation of the fact that the other person has suffered hurt, and their ego has been damaged. It is regarded as morally essential as constituting the moral repayment of a moral debate (atonement).[185]

However, *how* an apology is given can significantly affect the result. There has been strong recent empirical evidence that perpetrators of harm provide less comprehensive apologies than victims desire, and their apologies thereby evoke lower forgiveness in victims.[186]

> 'These differences were explained by their differing perception of torts, such that perpetrators regard their transgressions as less severe and intentional, and themselves as less blameworthy than victims do, and consequently offer less comprehensive apologies than victims desire. Therefore, subjectiveness in victims' and perpetrators' perception of torts may undermine the remedial effectiveness of legal apology.'

The lessons appear to be that those who cause harm should think more deeply about both the causes and effects of what they have done and should pay attention to how sincere their actions and statements actually appear to those who have been harmed.

The Need for Closure

Where some people who have been damaged suffer the kind of deep psychological harm described here an effective response needs to be found. This is so even if such people may be a minority of those who have suffered financial loss. Unless the issue is addressed, there can be no closure. Repeated concentration on traumatic past events can induce a level of obsession from which it can be difficult to move on.[187] The distinguished mediator Paul Randolph has written that the vital objective of a mediator is to secure an attitude shift on the part of one or more of the parties in the conflict, and he quotes an ancient Tao observation, according to Wayne W. Dyer (an American psychologist): 'if we change the way we look at things, the things we look at change.'[188] A central tenet of the classic book on mediation by Roger Fisher and William Ury was that if you want the other side to appreciate your interests, begin by demonstrating that you appreciate theirs.[189]

---

[184] E Latif, 'Apologetic justice: Evaluating apologies tailored towards legal solutions' (2001) 81 *Boston University Law Review* 289–320; P Vines, 'Apologies and civil liability in the UK: a view from elsewhere' (2008) 12 *Edinburgh Law Review* 200-230; BT White, 'Say you're sorry: court-ordered apologies as a civil rights remedy' (2005) 91 *Cornell Law Review* 1261-1269; LW Sherman, H Strang, C Angel, D Woods, GC Barnes, S Bennett and N Inkpen, 'Effects of face-to-face restorative justice on victims of crime in four randomized controlled trials' (2005) 1 *Journal of Experimental Criminology* 367–395.

[185] L Radzik, *Making Amends* (Oxford University Press, 2009).

[186] C Reinders Folmer, P Mascini and J Leunissen, 'Rethinking Apology in Tort Litigation Deficiencies in Comprehensiveness Undermine Remedial Effectiveness'. Available at: https://ssrn.com/abstract=3113196

[187] P Randolph, *The Psychology of Conflict, Mediating in a Diverse World* (Bloomsbury Continuum, 2016).

[188] Ibid, 28.

[189] R Fisher and W Ury, *Getting to Yes: Negotiating an Agreement without giving in* (Penguin Books, 1981).

This country has seen a number of examples of the continued pursuit of issues by those who feel deeply hurt despite the conclusion of legal processes such as police investigations, inquests or court cases. Current examples are stories of the families involved in the Hillsborough Stadium,

The ultimate demand by those involved is often for a Public Inquiry, as this appears to be the only option that people can identify as a means to achieve closure through 'getting at the truth', holding and people to account. Issues of financial compensation often fade into the background in such situations. The broad functions of a Public Inquiry are:[190]

— **Establishing the facts**—providing a full and fair account of what happened, especially in circumstances where the facts are disputed, or the course and causation of events is not clear;
— **Learning from events**—and so helping to prevent their recurrence by synthesising or distilling lessons which can be used to change practice; — Catharsis or therapeutic exposure—providing an opportunity for reconciliation and resolution, by bringing protagonists face to face with each other's perspectives and problems;
— **Reassurance**—rebuilding public confidence after a major failure by showing that the government is making sure it is fully investigated and dealt with;
— **Accountability, blame, and retribution**—holding people and organisations to account, and sometimes indirectly contributing to the assignation of blame and to mechanisms for retribution;
— **Political considerations**—serving a wider political agenda for government either in demonstrating that "something is being done" or in providing leverage for change.

However, Public Inquiries suffer from some serious disadvantages, not least lengthy delay and massive cost. They remain based on an adversarial model, even if able to introduce some more personal elements. They may provide voice but not necessarily being heard, nor effective accountability by leading to change in future behaviour or culture.

Conclusions

Responding effectively to deep or extensive past hurt is an area where the legal system has not traditionally sought to address, in terms now understood by modern psychology. Access to Justice takes on a different meaning in this context: justice is inter-personal and social, rather than remote and a declaration of rights. It is an area for which effective new solutions need to be found, however infrequent the incidence might be for individuals. The legal system based on vindication of rights, and a process based on adversarial combat, are wholly inappropriate for resolving such problems. However, various bodies of knowledge and experience, and techniques, can be called upon.

These considerations point to the need to adopt at least an approach based on 'fairness' rather than 'law' as a means of recognising the inter-personal nature of the relationships that need to be restored. Resolving issues over how certain banks treated some customers some years ago needs a mechanism in which the nature of the harm suffered by *some* of those harmed leads to personal restorative approaches.

One view is that various processes have already addressed the major goals of a public inquiry noted above (establishing the facts, accountability and blaming) and providing 'voice', such as through criminal trials, the Promontory Report, the involvement of the Public Accounts Committee, the APPG and its hearings, the FCA, multiple court and ADR cases, and extensive press and website reporting.

[190] Geoffrey Howe, 'The management of public inquiries' (1999) 70 *Political Quarterly* 294–304, summarised in Kieran Walshe and Joan Higgins, 'The use and impact of inquiries in the NHS' *British Medical Journal*, Vol 325, (19 October 2002), 896–7; reproduced in *Government by Inquiry. First Report of Session 2004-2005* House of Commons Public Administration Select Committee, HC 51-I (2005) and in *Public Inquiries: non-statutory commissions of inquiry* (House of Commons Library, 2016). See also *Inquiries Guidance* (Cabinet Office); Briefing Paper: *Statutory commissions of inquiry: the Inquiries Act 2005* (House of Commons Library, 2018).

An important issue is that effecting real improvements in creating a better dispute resolution process and a learning/regulatory process should come out of this Inquiry.

It may be that the adequate telling of victims' stories has been achieved through various means, not least in Parliament through hearings of the APPG. It may also be that regulatory steps have been taken to avoid repetition, although debate continues on that aspect, and the issues of affecting the *culture* of financial institutions remains current. But responses are needed by senior officials of the banks to demonstrate that individuals have been *heard* and, that responsible people are genuinely sorry.

The effectiveness of an apology depends significantly on *how* it is done. Victims who feel that an apology is insincere or formalised will not accept it, and it may deepen their motivation to continue to fight.

E. CONCLUSIONS

The objectives of the current Inquiry go beyond identifying a good mechanism for how to resolve future disputes between SMEs and banks. A separate issue is how to avoid things going so wrong again as they did some years ago. The issue of what is at first sight a regulatory issue, but at bottom a complex issue of embedding ethical business culture and practice, has implications for design of a dispute resolution system. Thirdly, the current situation raises an issue of how to resolve the deep hurt that is felt by owners of SMEs who have lost their businesses and more, represented by the APPG. There is a risk that if that issue is not resolved, the APPG group will not have trust in any system that might be put in place, and that the issue will continue politically unresolved for potentially some decades.

Accordingly, the design parameters of a new system need to include the following functions:

1. A pathway for SMEs to obtain assistance and advice on how to avoid getting into difficulty and how to react to problems.
2. The pathway should be easily identifiable, hence a single national mechanism, accessible through a single website and call line.
3. The resolution of individual disputes that is swift, involves no cost to SMEs, and is delivered in a manner that supports fair dealing and relationships between banks and their customers. This includes resolving groups of similar cases consistently.
4. Hence, the essential criteria applied need to be fairness and legality.
5. The system should identify wider or systemic issues and poor practice so that improvements can be made. A unified database is needed for this, ideally combining data from various sources, such as Resolver, the Ombudsman, regulators and also banks.
6. The ability to feed back data and analyses of issues, and to undertake root cause analysis on underlying issues so as to define the appropriate response.
7. The ability to implement changes in rules, and also in the behaviour and culture of banks, SMEs, regulators and Ombudsman. This requires effective coordination on an Ethical Practice model. It may be an SME is in need of assistance in making prudent business decisions, including borrowing decisions.
8. The ability to achieve closure for those individuals who have suffered serious emotional trauma as a result of their experiences.
9. The ability to monitor solutions applied and refine them as required.

In summary, what is needed is an integrated system that delivers more functions than just the resolution of particular disputes. Elements of all the above can be found already in existence, largely in an Ombudsman model. The challenge is to design a new integrated system to deliver the required functions and outputs. In doing this, it is helpful to ensure that an open mind is applied, free from conflicts of interest in existing models.

Suggested elements of the new system should include:

A. **SME focus.** The body should be focused on and have the confidence of SMEs, whilst maintaining independence. It should have (a) expertise in SME businesses, finance, and the markets, (b) links with the Treasury, BEIS, the FCA, the SBC and other relevant bodies.

B. **Governance.** The Board should include a majority of SME representatives (not consumer representatives).

C. **Funding.** The body should be fully funded by banks, either directly or through the FCA. This would allow the dispute resolution function to be provided free to SMEs.

D. **Operational parameters of the dispute resolution function.** Direct honest and swift communications between banks and customers should be encouraged as a first stage. The default process of the independent body should be independent, swift, effective, proportionate cost, use latest technology (i.e. online and ICT).

E. **Basis of decisions.** The dispute resolution function should make decisions on the basis of what seems fair and reasonable to the body, taking the law into account. Decisions on what constitutes fair business practice, complex issues of fact, or large sums of money, could be taken by a representative Panel, consisting of business and banking experts chaired by an

independent, along the lines of a Tribunal and the Dutch/Nordic ADR system. If that feature and the ability to refer points of law to a court are included, there should be no case for an appeal stage.

F. **Design features of the dispute resolution function.** The body should operate generally on current Ombudsman lines, involving the stages of triage, mediation, and decision. Legal representation would not be permitted, save in exceptional circumstances and at a party's own cost in circumstances where the body considers that no imbalance of power is created. Lenders should undertake to produce all evidence required by the intermediary. Hearings could be called but would not be the norm, as they would usually unnecessarily delay resolution. Outcomes should be binding on the bank if the SME agrees a proposal. The trade association should guarantee payment of an award if the lender fails to pay. The triage stage should identify cases where serious emotional damage has been caused, and a separate track should be invoked, involving various kinds of support.

G. **Ability to refer a point of law to court.** That mechanism may prove difficult without legislation. As an interim position, a point of law could be referred to a Tribunal-like panel, consisting of one or three members, chaired by a judge or senior lawyer. Cases involving fair business practice could be covered. It should be discussed how to fund a case involving a point of law of general relevance if it is referred to court, since that would involve greater expenses on lawyers. There is a clear argument that an SME whose case throws up a general point of law that needs to be resolved should not have to bear the cost of such resolution.

H. **Ability to affect behaviour and culture.** There needs to be the ability to feed back aggregated data and engage with both banks and SMEs about what changes need to be achieved and how this will be done. One option is for the body to convene a group to engage with systemic behaviour. If SMEs are to be assisted in practice, there is an opportunity to merge or link closely with the SBC, to provide an integrated service.

Section 3: The Evidence Base

Professor Robert Blackburn, SBRC, Kingston University

Contents

		Page
Executive Summary		2
3.1	Background	3
3.2	Data sources	4
3.2.1	Bank complaints data	4
3.2.1.1	Descriptive results of Bank Complaints Data	5
3.2.1.2	Multivariate Analysis of Bank Complaints Data	7
3.2.2	Interviews with stakeholders and owner-managers of SMEs	9
3.2.3	BDRC Survey data	15
3.2.3	Charterhouse Research data	16
3.3	Synthesis of key points from the evidence	21
Appendices		25
Appendix 3.1	Frequency Counts of Bank Complaints	
Appendix 3.2	Cross-tabulations of Bank Complaints	
Appendix 3.3	Multivariate Analysis of Bank Complaints	
Appendix 3.4	Interview Topic Guide	
Appendix 3.5	BDRC Results	
Appendix 3.6	Charterhouse Research Results	

Section 3: The Evidence Base

Executive Summary

- The main evidence for this review comprises a range of data from UK Finance, BDRC, Charterhouse Research, as well as interviews with SME owner-managers. This has generated the most comprehensive evidence base on SME-bank complaints to date, to allow for an independent and robust analysis.
- The evidence shows that the overwhelming bulk of SME bank complaints are relatively minor, including administration and customer service issues, and are dealt with quickly by the banks and to the satisfaction of business owners. Two-thirds of SME complaints to the banks are settled and upheld by the banks.
- A small percentage of SME complaints take longer to resolve, sometimes over six months. These are more complex and relate to 'unsuitable advice' and 'unclear guidance'.
- Over time (2015-18) there has been a fall in complaints linked to 'unsuitable advice' and 'disputes over bank charges'. Conversely, complaints related to 'errors' or 'not following instructions' have increased.
- The data allows for a detailed breakdown of types of complaints by firm age, legal form, size, sector and region. These show some differences and where significant are reported in this section of the report.
- SME owners are very conscious of the perceived time and risks to pursue a complaint. The opportunity costs this course of action entails; a perception that this will be difficult to win; and knowing where to find advice and trust, also affects their decision to pursue their case. Indeed the data shows that a substantial minority of firms wanted to complain but did not do so.
- Just over one percent of SME bank complainants used the FOS. In addition to a lack of awareness of the services of the FOS, some SMEs were not eligible because of their size. This may be interpreted as evidence of an unmet latent demand for an alternative disputes resolution system for SMEs and a need to improve their access to justice.
- Collectively, the data sets and interviews found no recent evidence (2015-18) of SME-banks disputes resulting from practises pursued by some of the banks following the GFC. We identified some historical cases that are on-going and remained prominent in the minds of business owners. Numerous calls via SME intermediaries and representative bodies, for recent serious SME-banks disputes, however, found no major disputes that resembled those of 10 years or so ago.

3.1 Background

In order to lay the empirical foundations for this Review, it is important to develop a robust body of evidence upon which a serious and impactful assessment of alternatives to litigation in disputes between banks and SMEs can be considered.

Bank-SME complaints have received high-profile attention in the media, mainly in the form of headline figures and specific case studies, as discussed earlier in this report. However, detailed research on the relationship between SMEs complaints and their banks, utilising data sets – both specially commissioned studies and bank complaints records - has, hitherto, been largely absent.[1]

We sought to develop an evidence base that was methodologically robust, diverse and relevant to the terms of reference set out for the Review. This involved carefully ascertaining data that was unbiased and appropriate for analyses in terms of breadth (e.g. the types of complaints) and depth (e.g. the demographics of the firms; the impacts of complaints). In order to do so, a range of data suppliers have been involved in the Review. All the analyses have been undertaken independently by staff in the Small Business Research Centre (SBRC), Kingston University, based on guidance and discussions with Simon Walker and the Review team, without undue influence by any major stakeholder in the research. [2]

[1] There has been a number of studies examining SMEs and bank complaints (such as the FSB, 2016) and a series of government reviews. The advantage of this Review is the breadth and scale of data sources upon which a rational argument for reform of the system can be drawn.

[2] The SBRC team involved in this analysis led by Professor Robert Blackburn, included Professor John Kitching, Dr Hang Do and Dr Chris Hand. Additional support was provided by Dr Eva Kasperova. http://kingston.ac.uk/sbrc

Hence, the evidence base derives from four main sources, including primary (direct interviews with people) and secondary data (that already exists but is developed for this Review). We also held discussions with key stakeholders to help shape the questions and reach the SME business community. These datasets and information are unique to this study and are summarised in Figure 3.1.

Figure 3.1 Data Sources

Collectively, these data sources provided evidence from a variety of perspectives to form a basis upon which inferences on how the current ADR system for bank-SME disputes can be developed. The following sections will outline the methodological approach, contribution and descriptive analysis.

3.2 Data sources

3.2.1 Bank complaints data

The Review drew upon a specially created data set by the high-street banks under the direction of the Review team and UK Finance. This dataset comprised

business that had a complaint with their bank between 2015 and 2018 and was designed to map-out the scale and type of complaints. The data comprised a range of variables, including enterprise characteristics (size, sector, age, location); category of complaint/ dispute (simple, complex); and outcomes (resolved/ closed/ unresolved). As a result, the research team had full access to an anonymised data set of 415,854 businesses and their complaints. Basic frequency counts of the data set are shown in Appendix 3.1 and the cross-tabulations (by size, sector, location etc.) in Appendix 3.2. The advantage of this dataset was that we could undertake various analyses to investigate specific questions that arose as the Review developed.

3.2.1.1 Descriptive results of Bank Complaints Data

The basic characteristics of the bank complaints' dataset are shown in Appendix 3.1 (Descriptive Frequencies of Banks' Complaints data Banks' Complaints Data) and Appendix 3.2 (Cross-tabulations of Business Banks Complaints). Essentially, the business complainants that comprise the banks' database have the following characteristics:

- The bulk of firms with a complaint have a turnover of less than £250k. This is not surprising, given the skewed business population towards micro and small firms.[3]
- The majority of firms are private limited companies; followed by sole traders and then partnerships. This is a fair reflection of the number of business with business bank accounts and higher registration of bank accounts by limited companies.

[3] See for example, BEIS , Business Population Estimates for the UK and Regions 2017. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663235/bpe_2017_statistical_release.pdf

- A large share of the firms are older than 10 years; but around a third are less than five years old. Again this spread is to be expected given the distribution of firms in the UK by age.
- The overwhelming bulk of firms are in Services; less than 10% in Manufacturing; and a very small proportion in Primary sectors. This tends to reflect the shares of the UK business population as a whole.
- The most frequently raised complaint by firms of all turnover sizes relates to 'Other general admin and customer service' issues, followed by 'Errors/ not following instructions' and then 'Delays / timescales'
- Numerically, most of the complaints derived from firms in London, reflecting the distribution of the population of firms. One in 10 complainant enterprises have multiple locations.
- More than 60 per cent of complaints by firms are settled and upheld by banks.
- Firms with turnover of £250k or less are *twice as likely* to be paid redress by their bank for financial loss compared with firms having a turnover of £6.5m or over.
- 1.1% of firms took their case to the Financial Ombudsman Service (FOS) (this figure is also confirmed in other data sources we analysed).
- Firms with turnover of up to £250k are *more likely* to take their complaint to the FOS than any other group of firms by turnover size. This reflects the FOS eligibility threshold for business customers but may also be a result of other factors: smaller firms may have limited resources to use alternative, more costly, forms of dispute resolution.
- Just over a third of complaints taken to the FOS by firms are upheld by the FOS. On average, where the complaint is upheld by the FOS, redress is paid to more than half of firms across turnover size bands. For the smallest firms, however, redress is paid in almost 70 per cent of cases.

- Only a very small fraction of businesses involved business in a bank 'turnaround unit' or in financial distress (less than one percent).

3.2.1.2 Multivariate Analysis of Bank Complaints Data

We undertook a multivariate analysis of bank-business complaints, (See Appendix 3.3 for details and technical explanation). This method of analysis has the advantage of isolating the specific effect of variable (eg. turnover) by controlling the influence of all other variables (eg. legal form; sector; region; firm age). The analysis focuses on the duration of complaints, the nature of complaints and the outcome of complaints in relation to SME characteristics. The results are as follows.

Nature of complaint (see Appendix 3.3 Table 3.3.1)

Larger SMEs are *more likely* to complain about 'timescales and general administrative issues', and less likely to complain about 'unsuitable advice'. Private limited companies and "Other" legal forms are *less likely* to raise a dispute over unsuitable advice than Sole-traders, (approximately 5% less likely), and disputes over sums/ charges (approximately 4% less likely)

Companies and "other" legal forms are more likely to complain about delays/ timescales and other general admin/ customer service than sole traders.

Agriculture sector SMEs are *slightly more likely* to complain about unsuitable advice than those in other sectors.

Younger SMEs are *more likely* to complain about unsuitable advice.

SMEs in Scotland and those operating across multiple regions are *more likely* to complain about ‘general administration’ or ‘customer service’ (by 16% and 25% respectively).

Complaints about ‘errors’ or ‘not following instructions’ have *grown in significance* recently (a 12% increase between 2015 and 2018).

Duration of complaint (See Appendix 3.3 Table 3.3.2)

There is a strong relationship between the nature of the complaint and its duration, some being settled within one day whilst others taking much longer:

Complaints about ‘unsuitable advice’ are 40% *less likely* to be resolved in one day than ‘administrative / customer service’ complaints. Conversely, ‘unsuitable advice’ was 17% more likely than ‘administrative / customer service’ complaints to take 31-60 days to be closed.

However, it has to be borne in mind that only 1.8% of all complaints are classified as ‘unsuitable advice’, compared with 35% as ‘administrative / customer service complaints’. This suggests that although some complaints may be limited in number – including unsuitable advice - these complaints may have a lasting and deep effect on SMEs.

Younger firms (less than 5 years old), sole traders and firms in the agricultural sector are *more likely* to have their complaints resolved in one day.

Real estate and Transport sector SMEs are *less likely* to have their complaint resolved in one day.

Outcome of complaint (See Appendix 3.3 Table 3.3.3)

There is a positive relationship between turnover size and the likelihood of a bank complaint being upheld. Larger SMEs (<£6.5 million and <£25 million) have a higher chance (by 6%) that a complaint is upheld compared with the smallest turnover category (<£250k).

SMEs in Scotland and those operating across multiple regions are 14% *more likely* to have their complaint upheld compared with those in London (this also holds after turnover is controlled).[4]

SMEs with a legal form partnership, company and other are *more likely* to have their complaint upheld than sole traders (by 10%).

3.2.2 Interviews with stakeholders and owner-managers of SMEs

Whilst the large-scale data-sets provides important statistical evidence, we also sought to talk with business owners in order to understand the nature of their complaint; explore the pathways that they have pursued in trying to resolve their complaint; tease out their experiences of using the complaint's system and particular points within it; and if relevant, appreciate and assess why the dispute has not been resolved.

Our methods for recruiting interviewees involved working with SME intermediaries, representative and membership bodies to reach a diverse population of SMEs having experience of a complaint with their bank. The organisations involved in the fieldwork comprised:

[4] It may be that larger enterprises are also interacting with enterprises that are operating in multiple regions.

British Chambers of Commerce
The Chartered Institute of Arbitrators
The Confederation of British Industry
The Federation of Small Businesses
The Institute of Directors
The Engineering Employers Federation

Through their regular newsletters and targeted emails, these organisations informed their members of the Review and asked those with experience of a complaint with their bank in the past three years if they would provide an interview. The contact details of the SME's volunteering for interview were then passed onto the SBRC research team who contacted the business, checked that they met the criteria for interview and explained the interview protocol. In parallel, those responding to the BDRC online survey (see below) were also offered the opportunity for an interview. We also asked for potential complainants through contacts in the All Party Parliamentary Group on Fair Business Banking (APPG) and interviewed the Chartered Institute of Arbitrators to help develop an understanding of alternative forms of dispute resolution.

The numbers of SMEs coming forward for interview were less than the research team envisaged. There may have been a number of reasons for this including the timing of the data collection (June – September 2018) and the reluctance of firms to come forward with their stories because the time it may entail or the belief that it may not help overcome their particular problem. It may also be a reflection that the scale of serious, or on-going complaints, between SMEs and their banks may have diminished since the scandals of a decade or so ago.

Seventeen interviews were conducted by members of the research team following a topic guide (see Appendix 3.4). All the interviews were audio recorded, with the interviewee's permission. The interviews revealed numerous key themes, helped inform some of the patterns in the datasets and provide some pointers for what SMEs are looking for when accessing justice.

SME owner-manager interviews

SME owners were asked questions about the nature of their complaint(s), their experience of the bank's handling of the complaint, the impact of disputes on their business, any further action taken, or considered, following a perceived failure by the bank to resolve the complaint satisfactorily, and the outcome (if any) of the dispute. Respondents operated (or had operated) businesses in manufacturing and service industries; and were spread around the UK. Respondents' businesses varied in size from a single-person freelancer up to 300 staff.[5] Their contribution to this evidence base is that of providing depth to the range of complaints identified in the statistical analysis and demonstrating the real-life experiences of complainants. Citations to interviews that underpin the themes derived in the analysis are shown in brackets.

Interviewees reported a range of bank complaints. These were primarily considered to be 'day-to-day banking issues' rather than 'business-threatening' issues. A minority of disputes, however, dated back to the serious financial difficulties arising out of the Global Financial Crisis (GFC) and the accompanying recession of a decade ago, as well as experience of GRG and its impacts.

[5] All respondents gave permission for the audio recording of the interview and researchers follow an ethical code of conduct when treating such information.

Although more recent complaints related to day-to-day issues this does not mean that these were unimportant or mundane in terms of cause or effect. Disputes varied in terms of type and level of impact on the business, but often entailed serious time and emotional costs for business owners. In one case, the dispute was perceived as a major cause of company liquidation (Interview 1) and in another there was still an ongoing dispute and litigation (Interview 17). All business owners reported their complaint to be indicative of poor treatment by the banks, either through incompetence or, in a few cases, the effects of deliberate bank practice.

Complaints typically related to the *quality of the service* provided by banks. Examples include account set up and related facilities (interview 4, 13); using online/mobile banking services (Interview 8, 14, 15); delays in service provision and ensuing bank charges (Interviews 2, 7, 11); changes to borrowing rates and charges without informing customers (Interview 9, 10, 11, 17); staff rudeness (Interview 9, 13); lost documentation or failure to acknowledge receipt of documents requested (Interviews 4, 13, 17); and administrative errors, such as failure to update contact details, sending statements to the wrong address, sending duplicate statements in error, failure to cancel direct debits (Interviews 5, 7). Other issues include taking out a mortgage product (Interview 7) and seeking bank consent to extend a property lease (Interview 2).

Business owners reported bank offers of refund/compensation to resolve their dispute (Interviews 7, 8). However, this was not always perceived as satisfactory because estimates of management time costs in pursuing the complaint were not always fully recognised (Interviews 2, 10).

Some respondents were aware that if they did enter a dispute with their bank they faced challenging an organisation that had a far greater resource base and

legal expertise than their own business. This may mean that some respondents were not pursuing their case beyond the banks own internal procedures.

Two respondents pursued their case beyond the bank's internal procedures. Respondent 2 took a case to FOS in relation to costs arising from delays in handling a request to extend the lease on two properties and the inadequate financial compensation offered for delay (case continuing at the time of interview). The respondent reported these delays may have cost their business up to £28,000 in lawyers' fees and lost opportunities to build new flats because planning permission had expired. Furthermore, he perceived the FOS as slow to act and that there was a 'vacuum' in terms of appropriate mechanisms for dispute resolution in small firms. A further respondent (17) was still in dispute with their former bank following interest rate swaps that had not been agreed and led to debts that ran into millions of pounds. This business was not eligible to use the FOS because of their lack of eligibility on the grounds of size and where, therefore, pursuing litigation in the courts.

Overall, however, contemporary customer problems are likely to have been influenced by *broader changes introduced into the banking sector* since the GFC, most notably, branch closures and the decline of relationship banking. Respondents referred explicitly to the lack of access to a local branch (Interview 14) and to the lack of service continuity previously provided by a named account manager with substantial knowledge of the business (Interview 8, 9, 13, 17). Business owners reported having to explain the problems they were facing each time they contacted the bank because they dealt with different bank staff, or the bank was poor at keeping the documentation or a record of their previous conversations. This was also echoed in much more serious cases which led respondents to believe that the bank was just not interested in their business and

the processing of their complaint was being deliberately slowed down by the bank in the dispute resolution process (Interview 17).

The interviews show that business owner complaints vary in type and level of impact on the business. However, the bulk of contemporary complaints appear less serious or damaging than those 10 years ago. This should not leave room for complacency as the SME-bank relationship and their complaints system was criticised, but for different reasons than those in the past. Banks might, therefore, reduce the number of complaints they receive – and, by extension, reduce the demand for non-bank dispute resolution mechanism - through the provision of *better and more responsive and timely services*.

Better banking practices would reduce the need for SMEs to pursue complaints through the banks' internal systems and beyond to the FOS (or any new arrangement) or to the courts. It seems likely that recent changes in banking practices – closures of branches and streamlining of personal relationship managers, for example - have contributed to business owners' experiences of poor treatment. These results chime with some of the statistical analysis below, particularly in relation to levels of satisfaction of banks dealing with complaints (see Charterhouse Research data).

Overall, these interviews show that considerations of equity in the complaints process, speed and costs have to be integral to any improved dispute resolution system for SMEs. The complainants that we interviewed were very conscious of the time it had taken to pursue their case, both within the banks own procedures and especially beyond; some with little confidence that they may secure compensation for their claims because of the power of the banking organisation in terms of resource capacity and expertise.

Given that those interviewed are the owner-managers who had the desire to voice their complaint there will be many others would simply be put off by the perceived time and costs they face. It may be inferred from this that there is a latent demand for SME bank complaints systems. Improvements in both the banks internal complaints processes as well as alternative disputes resolution systems, will lead to an improvement in the access to justice for SMEs.

3.2.3 BDRC Survey data

In order to supplement the business bank data, an online research survey was conducted to put into perspective the incidence of complaints to their banks amongst SMEs as a whole, and the way in which these were resolved. Hence, this was not solely of business bank complainants but of businesses as a whole. This survey also added some data triangulation to the Review by allowing some cross verification of results from the bank complaints data discuss above and the Charterhouse data discussed in the next section of this Chapter.

The BDRC survey involved 750 businesses interviewed online, using a number of online business panels. Larger businesses were over-sampled and this was corrected by weighting the data by number of employees. Interviews were conducted across sectors and regions and all respondents had some responsibility for banking. A detailed report of the BDRC can be seen in Appendix 3.5.

The key results from the BDRC survey shows:

- 17% of firms had complained to their bank; and a few wanted to but did not (4%).
- Most complaints were resolved to the customer's satisfaction, and their working relationship and trust in the bank were unaffected.

Most complaints were resolved to the customer's satisfaction and very few were referred on.

- 1% of businesses had had a complaint referred on – either to FOS, to mediation, or to court.
- Half of the complaints satisfactorily resolved and a third of the complaints resolved unsatisfactorily were to do with day to day banking issues.
- Few businesses sought legal advice but were more likely to do so if the complaint was referred on.
- Six in 10 of those who went to the FOS were not happy with the compensation received.
- 16% of businesses said that they had a good idea of the services FOS offers, but almost four in 10 said they were not aware that some businesses could use FOS.
- Those whose complaint remained in dispute were more likely to say that they had a low level of trust (both 42% compared to 10% of all businesses)
- Trust in the banking industry more generally is lower (21% have a high level of trust and 28% a low level of trust).

3.2.3 Charterhouse Research data

A third dataset was derived from the Charterhouse UK Business Banking Survey. This data provides details about the types of complaints, changes over time and levels of satisfaction. This data is based on 9,756 respondents. Of these, 2,261 said they had complained. When weighted to reflect the distribution of SMEs by region and size, the total is 4,096, 362 businesses including over 800,000 that had complained.

Complaints to the bank over the past six months

In order to help assess the scale of complaints amongst the UK SME population, the Charterhouse UK Business Banking Survey provides evidence on those who have complained. Table 3.1 shows that 20% of respondents complained to their bank whereas 69% neither complained nor felt like complaining.

However, the data also shows that 17% of firms felt like complaining but had not actually done so. Although the data cannot tell us why they have not done so, this may imply a small level of latent demand for complaints procedures.

Table 3.1 SME Banks Complaints Past 6 Months (to March 2018)

	All	**£0-£2m**	**£2.1-£5m**	**£5.1-£6.5**	**£6.6-£25m**
Unweighted base	*9,756*	*6,720*	*958*	*260*	*409*
Complained	*20%*	19%	28%	25%	29%
Felt like complaining but not actually done so	*17%*	18%	14%	13%	14%
Neither complained nor felt like complaining	*69%*	69%	65%	68%	63%

Note: Weighted base, total number of complaints (year 2018= 822187; Year 2011=887556. SME's turnover up to £25m. See Appendix 3.6 for more details.

Table 3.1 also shows that there is some variation in the levels of complaint by turnover size. Larger SMEs are more likely to complain whilst smaller firms are more likely to have felt like complaining but not actually done so. These results may be a reflection of the resource constraints in smaller firms: their willingness and ability to complain being tempered by their capacity and expertise to do so.

Types of complaints over time

The Charterhouse UK Business Banking Survey, 2011-2018, classifies SME bank complaints into 15 main types (see Table 3.2). The most frequently occurring types of complaint over the period 2011-2018 are *errors/ mistakes* and *customer service*, each accounting for about 20% of total complaints. The least frequent types of complaints are *merchant services/ own cards* (average 2%) and followed by complaints about *international service* (3%), *lack of interest in my business* (3%) and *fraud* (3%).[6]

Table 3.2 Changes in types of complaints during 2011-2018 (weighted)

Type of complaint	2011	2018	Change 2011-18
Customer Service	14%	21%	+7%
Errors /mistakes	25%	20%	-5%
Poor service	7%	21%	+14%
Online banking	7%	10%	+3%
Branch related	7%	11%	+4%
Charges	16%	7%	-9%
Poor communication	7%	7%	0%
Relationship manager	7%	3%	-4%
Money transmission	8%	5%	-3%
International service	2%	4%	+2%
Fraud	-	4%	-
Lending	5%	4%	-1%
Lack of interest in my business	4%	2%	-2%
Merchant services/own cards	2%	1%	-1%
Other	9%	9%	0%
Weighted base	887,556	822,187	
Unweighted base	*3,200*	*2,261*	

Note: SME's turnover up to £25m. See Appendix 3.6 for more details.

[6] See Appendix 3.6 for more information.

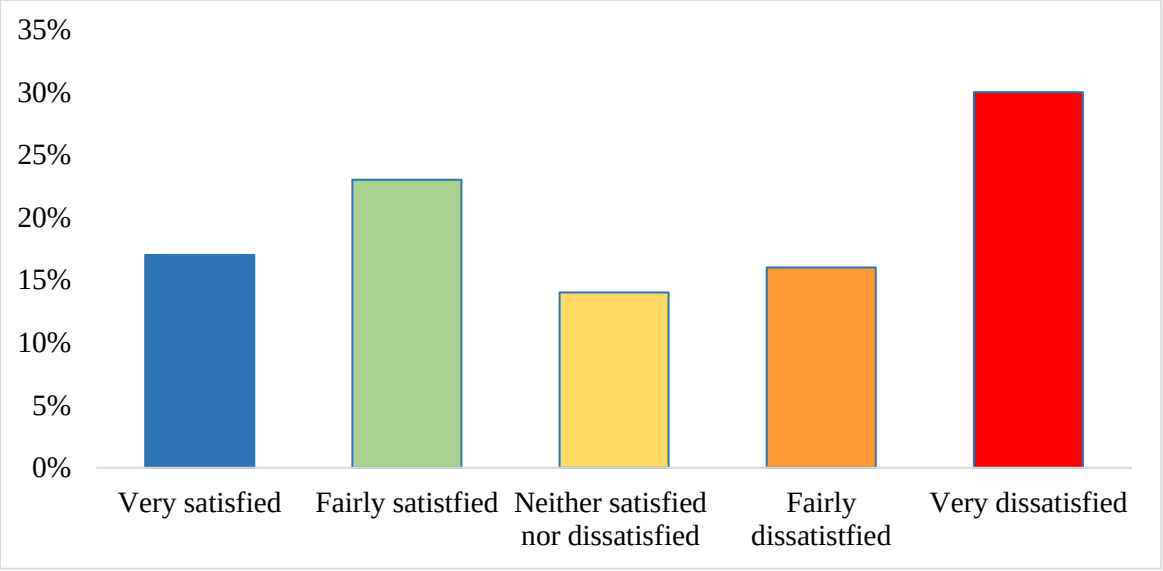
There has been a change in the types of complaint over the past seven years. Complaints about *customer service*, *poor service*, and *branches* all show a significant increase over the period 2011-2018.

The biggest increase is found in complaints about *poor operational service*, which triples from 7% to 21% over the same period. On the other hand, complaints regarding *charges* decrease substantially by more than half (from 16% to 7%). Other types of complaints show only a few fluctuations.

Levels of satisfaction of banks' handling of complaints

A substantial proportion of SME complainants (46%) are dissatisfied with the handing of their complaint (Figure 3.2). Specifically, 30% of the complainants are very dissatisfied with the handling of the complaint – much more than in any other response category and almost double the percentage of the complaints of those who are very satisfied (see Figure 2).

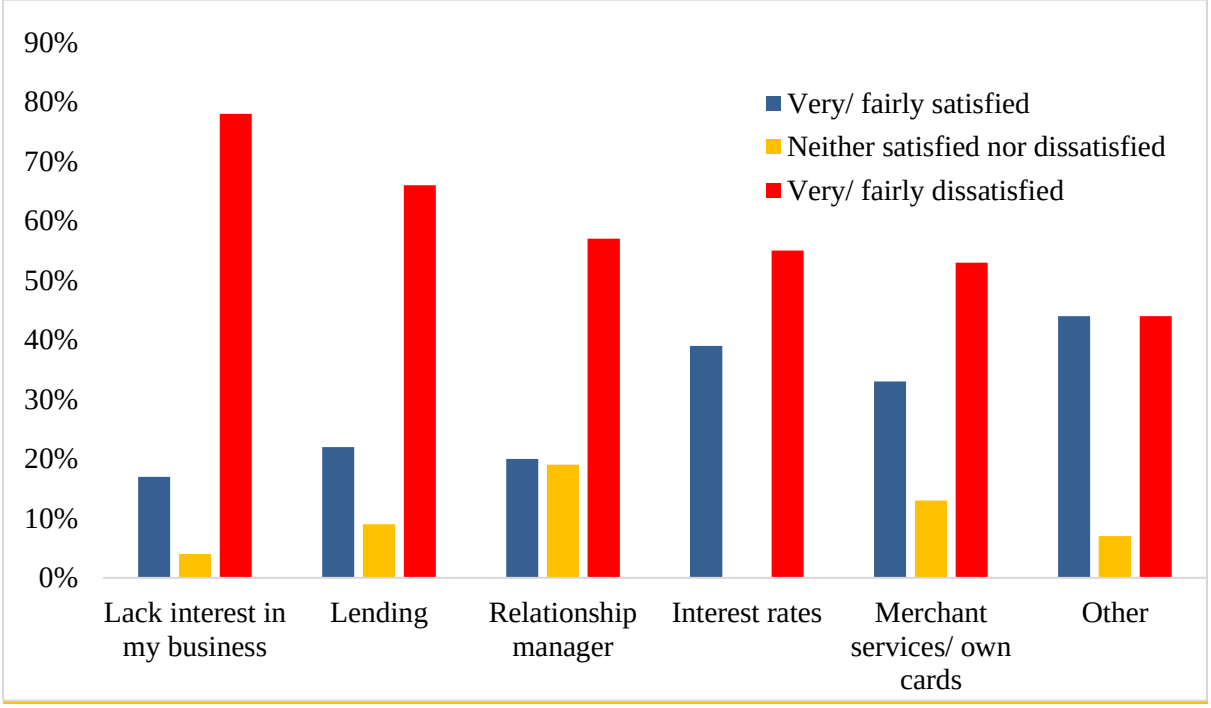
Figure 3.2
Levels of satisfaction with the handling of complaints, 2018



Source: Survey period 3rd July 2017- 22nd June 2018, Charterhouse research. Note: Weighted base, total number of complaints= 822187. Unweighted base 2,261.

Overall, almost a half of SMEs were dissatisfied with the handling of their complaint. In particular, amongst those complaining about a *lack of interest in my business*, 78% are dissatisfied with the handling of their complaint; of those complaining about *lending* 66% are dissatisfied with the handling of their complaint. Levels of satisfaction of the handling of their complaint amongst those respondents complaining about *interest rates*, *merchant services/ own cards*, and *other* is approximately double that of complaints about *lending*, *lack of interest in my business* and *relationship manager*.

Figure 3.3
Levels of satisfaction with the handling of complaints by type (N=822187)



Source: Survey period 3rd July 2007- 22nd June 2018, Charterhouse research
Note: Weighted base, total number of complaints= 822187. Unweighted base 2,261.

The level of satisfaction also varies by region, sector, and firm size. Wales/ South West (50%) have the highest levels of dissatisfaction of the handling of complaints, followed by North/ North West/ Yorkshire (48%) and London (47%). The South East (46% satisfied compared with 35% dissatisfied) show

the highest level of satisfaction. Complaints of handling of complaints from businesses in Agriculture, Forestry and Hunting sector show the highest level of dissatisfaction (58%), whereas complaints of those in Business services including finance sector, and Wholesale and retail/ repair of motor vehicles sector show the highest levels of satisfaction, accounting for 40% and 39% of the complaints respectively reporting being satisfied.

Firms with a turnover from £100k to £250k show the highest levels of dissatisfaction. In contrast, firms with turnover ranging from £6.6 million to £10 million have highest level of satisfaction.

3.3 Synthesis of key points from the evidence

The four main sources of data presented in this report provide an important evidence base on the nature of complaints and disputes that SMEs have with their banks. From the above evidence, 11 main points can be drawn.

1. Overall, although the data is from different sources and are complementary, they tend to point to a similar composition of the SME – bank relationship. Of course, the data is collected using different methods, by different organisations and asks different questions. Yet, *there is little dissonance between the results from the different data sources* on the subject of this Review: rather there is much in common to help build an understanding of SME-bank relations and the complaints procedures.

2. We have to keep the SME-bank relationship, their complaints and processes for disputes resolution into perspective. Most businesses conduct their day-to-day business with the minimum of contact with the

bank. Around eight in 10 SMEs have not complained at all, or have felt that their issue was not worth complaining about.

3. The data show that *the overwhelming majority of SME-bank complaints are dealt with by the banks own internal complaints procedures*. The bulk of these complaints centre around administrative issues, delays, errors and not following instructions. Others include problems with communications and the internet, bank closures and staff attitudes. These types of complaints tend to be dealt with relatively quickly, or are simply a result of the changing nature of service delivery by the banks that SMEs simply have to face.

4. However, the qualitative evidence suggested that collectively such 'routine' complaints lead SME owner managers to build up a *poor image of banks* and that they are not particularly interested in their needs or concerns. This is backed up by the quantitative evidence on SMEs' levels of satisfaction of dealing with complaints and levels of trust.

5. More *complex complaints can take more time to resolve* and include 'unsuitable advice'. These complaints are less voluminous but suggest that they are much more problematic for all parties concerned.

6. Such findings imply that although the bulk of complaints are dealt with quickly by the banks, *there is a minority of complaints that are much more burdensome*. It is these types of complaints that are more likely to lead SMEs to incur costs, take time to resolve and create opportunity costs for SME owner-managers in terms of management time. It is also this minority of complaints that are more likely to be taken beyond the banks own complaints process to litigation or, if eligible, the FOS.

7. Our evidence also showed *changes in the types of complaints in the four years examined*. There has been a substantial fall in complaints related to bank charges but a rise in those related to customer service. We found little evidence of the malpractices displayed after the GFC, such as interest rate swaps.

8. The data reveals a *size-effect within the SME population*: many smaller SMEs appear to be less satisfied with the complaints procedures and outcomes. This may be linked to them having a higher probability of complaining about 'unsuitable advice'.

9. Collectively, *the evidence suggests a possible latent demand for an improved disputes resolution procedure*: i.e. some had a complaint but did not pursue it for some reason(s), particularly beyond the bank itself. This was supported by the BDRC and Charterhouse data. This is especially the case amongst smaller firms who reported that they were deterred by the costs and time of pursuing their case beyond the banks own processes, as well as the risks of losing the case especially when challenging a much more powerful organisation. Thus, an improvement in access to justice for SMEs is likely to increase the number of banking related complaints.

10. The data from two sources (Banks complaints data and the BDRC survey) report that *around one per cent of SME complaints are taken to the FOS*. This may seem like a small percentage of all complaints, given the volume of complaints as a whole but these are the complaints that are potentially more impactful on SMEs.

11. Issues of *low awareness of the role of the FOS*, what it provides for SMEs, as well as not being eligible for using the FOS system, were raised by some firms. Undoubtedly, for micro firms pursuing a complaint with their bank may seem daunting: taking a complaint beyond the banks own internal system may be considered too expensive, time consuming and risky even if the complainant believed they had not been treated fairly. On the other hand, larger SMEs were not eligible for the FOS.

Robert Blackburn
25-10-18

Appendices

Appendix 3.1	Frequency Counts of Bank Complaints
Appendix 3.2	Cross-tabulations of Bank Complaints
Appendix 3.3	Multivariate Analysis of Bank Complaints
Appendix 3.4	Interview Topic Guide
Appendix 3.5	BDRC Results
Appendix 3.6	Charterhouse Research Results

APPENDIX 3.1

Descriptive Frequencies of Banks' Complaints data 2015-1st Quarter 2018

This data is provided by UK banks (Barclays, HSBC, Lloyds, RBS, Santander), complied by UK Finance

We have a total of **415,854 valid cases** of complaining firms 2015-2018

Year of complaint

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	2015	110178	27.4	27.4	27.4
	2016	131847	32.8	32.8	60.1
	2017	126915	31.5	31.5	91.7
	2018	33530	8.3	8.3	100.0
	Total	402470	100.0	100.0	

- The number of business complaints to their banks is around 13,000 pa.
- NB the data for 2018 is partial.

Turnover

		Frequency	Valid Percent
Valid	<£250k	234799	56.5
	>£250k and <£500k	50178	12.1
	>£500k and <£2m	71251	17.1
	>£2m and <£6.5m	32267	7.8
	>£6.5m and <£25m	18079	4.4
	unknown	8895	2.1
	Total	415469	100.0
Missing	System	385	
Total		415854	

- The bulk of firms have a turnover of less than £250k.
- 93.5% have a turnover of less than £6.5m – the cut-off point for eligibility for FOS.

Legal form

		Frequency	Valid Percent
Valid	Company	282539	67.9
	Sole trader	83659	20.1
	Partnership	35928	8.6
	Other	13727	3.3
	Total	415853	100.0
Missing	System	1	
Total		415854	

- The majority of firms are private limited companies; followed by Sole Traders & then Partnerships. This reflects the use of the banks by limited companies; they are more likely to hold a bank account and use the banks' services.

Firm Age

		Frequency	Valid Percent
Valid	<1 year	28632	6.9
	>=1 and <5 years	98324	23.6
	>=5 and <10 years	81810	19.7
	>=10 years	170996	41.1
	N/A	36090	8.7
	Total	415852	100.0
Missing	System	2	
Total		415854	

- A large share of the firms are older than 10 years; but around a third are less than five years old.

Sector

		Frequency	Valid Percent
Valid	Agriculture, hunting & forestry AND Fishing	9025	2.4
	Mining & quarrying AND Electricity, gas & water supply	1550	.4
	Manufacturing	31683	8.4
	Construction	32143	8.5
	Wholesale and retail	72663	19.2
	Accommodation & food service AND Recreational, personal & community service activities	49119	13.0
	Transport, storage & communication	32066	8.5
	Real estate, professional services & support activities	124048	32.8
	Public administration & defence AND Education AND Human health & social care	26036	6.9
	Total	378333	100.0
Missing	System	37521	
Total		415854	

- The overwhelming bulk of firms are in Services; less than 10% in Manufacturing; and a very small proportion in Primary sectors.

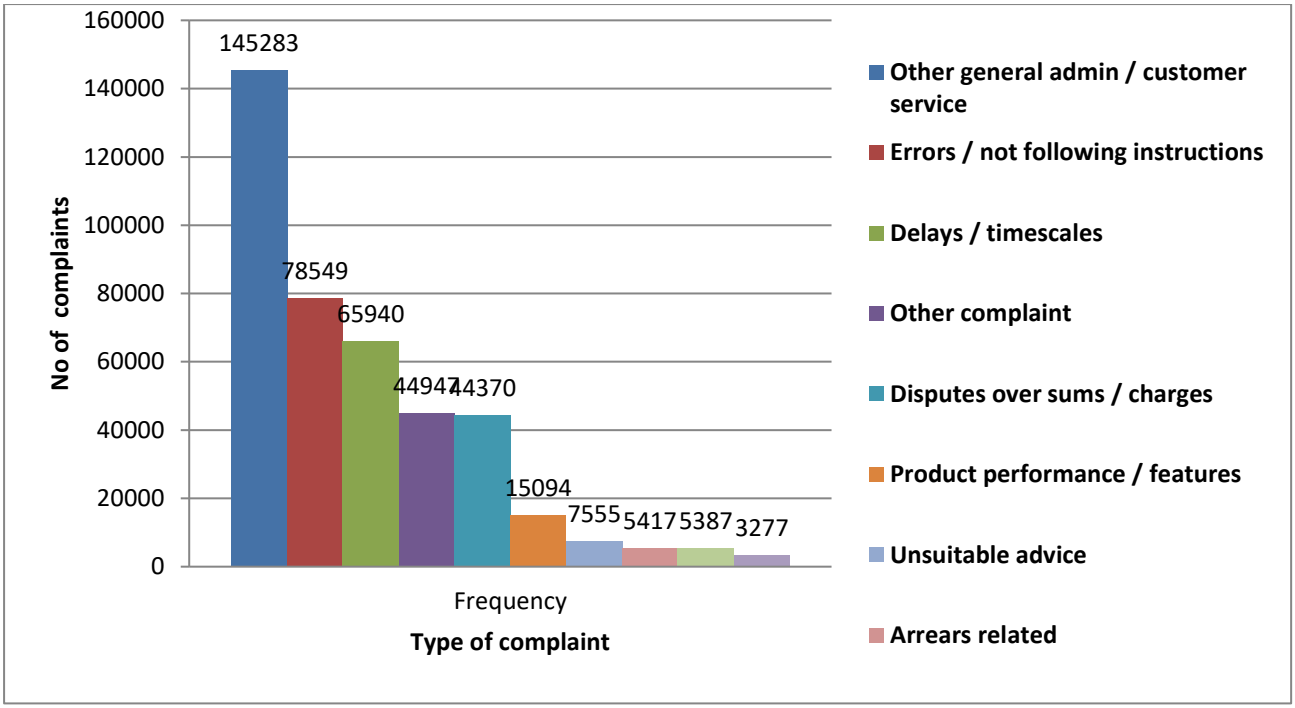
Geographical region

		Frequency	Valid Percent
Valid	Agriculture, hunting & forestry AND Fishing	9025	2.4
	Mining & quarrying AND Electricity, gas & water supply	1550	0.4
	Manufacturing	31683	8.4
	Construction	32143	8.5
	Wholesale and retail	72663	19.2
	Accommodation & food service AND Recreational, personal & community service activities	49119	13.0
	Transport, storage & communication	32066	8.5
	Real estate, professional services & support activities	124048	32.8
	Public administration & defence AND Education AND Human health & social care	26036	6.9
	Total	378333	100.0
Missing	System	37521	
Total		415854	

- A good spread geographically
- Most of the complaints derived from firms in London, reflecting the distribution of the population of firms
- One in 10 complainant enterprises have multiple locations

Nature of complaint	Frequency	Valid Percent
Other general admin / customer service	145283	34.9
Errors / not following instructions	78549	18.9
Delays / timescales	65940	15.9
Other complaint	44947	10.8
Disputes over sums / charges	44370	10.7
Product performance / features	15094	3.6
Unsuitable advice	7555	1.8
Arrears related	5417	1.3
Product disclosure / information	5387	1.3
Unclear guidance / arrangement	3277	0.8
Total	415819	100
Missing System	35	
Total	415854	

- The largest category of complaints comprised ‘other general admin / customer service’ issues,.
- This is followed by ‘errors / not following instructions’
- Then ‘delays / timescales’



NB: These follow the banks categories

Outcome of complaint within banks' internal procedures

		Frequency	Valid Percent
Valid	complaint settled and upheld by bank	263601	63.5
	complaint not upheld by bank	142893	34.4
	complaint ongoing in banks own procedures	1659	0.4
	other	6819	1.6
	Total	414972	100.0
Missing	System	882	
Total		415854	

- In most cases, firms' complaints were settled and upheld by the banks
- Around a third of complaints were not upheld.

Redress paid by bank

		Frequency	Valid Percent
Valid	none	161306	48.9
	yes financial loss	91693	27.8
	yes unspecified	43600	13.2
	yes distress and goodwill	33218	10.1
	yes financial loss and distress-goodwill	71	.0
	Total	329888	100.0
Missing	System	85966	
Total		415854	

- Just over half of firms have had redress paid by their bank.
- Nearly a third received redress for financial loss.

Case taken to FOS

		Frequency	Valid Percent
Valid	yes	4650	1.1
	no	406754	98.9
	Total	411404	100.0
Missing	System	4450	
Total		415854	

- About 1 per cent (or **4,650**) of firms in dispute with their bank took their case to FOS.

Case upheld by FOS

		Frequency	Valid Percent
Valid	yes	1138	29.2
	no	2419	62.0
	3	323	8.3
	4	21	0.5
	Total	3901	100.0
Missing	System	411953	
Total		415854	

- Out of the cases taken to FOS, almost a third were upheld by FOS.
- Note: 3 and 4 were not valid answers – we need to check with the banks what these refer to.

Redress paid by FOS

		Frequency	Valid Percent
Valid	**yes**	461	57.5
	no	341	42.5
	Total	802	100.0
Missing	**System**	336	
Total		1138	

- Out of the cases upheld by FOS, more than half (or **461**) received redress paid by FOS.

Case involving customer managed by a turnaround unit

		Frequency	Valid Percent
Valid	**yes**	814	0.3
	no	254847	99.7
	Total	255661	100.0
Missing	**System**	160193	
Total		415854	

- Only a fraction of complaint cases (**814**) involved customers managed by a turnaround unit.

Case involving customer in financial difficulty

		Frequency	Valid Percent
Valid	yes	795	0.4
	no	195971	97.4
	don't know	4443	2.2
	Total	201209	100.0
Missing	System	214645	
Total		415854	

- Less than 1 per cent (or **795**) of complaints involved customers in financial difficulty.

Redress amount

		Frequency	Valid Percent
Valid	>£0 and <£100	136148	33.8
	>=£100 and <£1000	71255	17.7
	>=£1,000 and <£10,000	5947	1.5
	>=£10,000 and <£150,000	406	0.1
	>=£150,000 and <£500,000	12	.0
	>=£500,000	4	.0
	None	188613	46.9
	Total	402385	100.0
Missing	System	13469	
Total		415854	

- More than half of firms received some financial redress.
- A third of firms received redress of less than £100
- About a quarter of firms received between £100 and £1000.

Days it took from the date complaint was opened and closed with the bank

		Frequency	Valid Percent
Valid	Less than 1 day	257204	62.7
	1 day	21519	5.2
	2 - 5 days	22947	5.6
	6 - 10 days	10288	2.5
	11 - 30 days	34716	8.5
	31 - 60 days	43593	10.6
	61 - 90 days	12216	3.0
	91 - 180 days	5771	1.4
	181 - 365 days	1716	0.4
	366 and more days	431	0.1
	Total	410401	100.0
Missing	System	5453	
Total		415854	

- The majority of complaints that small business owners had with their bank took less than 1 day to resolve within the banks' internal procedures.
- However, just over 20 per cent of complaints took between 1 day and a month to resolve
- 15% took between 1 month and 6 months to close.
- A small fraction of complaints (or **2,149**) took more than 6 months to resolve.

Year of complaint

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	2015	110178	27.4	27.4	27.4
	2016	131847	32.8	32.8	60.1
	2017	126915	31.5	31.5	91.7
	2018	33530	8.3	8.3	100.0
	Total	402470	100.0	100.0	

- The number of business complaints to their banks is around 13,000 pa.
- NM the data for 2018 is partial.

APPENDIX 3.2
Cross-tabulation analysis of bank complaints data

NB. ***All Tables are statistically significant.***

The colours denote:

Yellow: negative relationship left to right (eg. by turnover size)

Green: positive relationship left to right

Amber: specific differences within the tables

List of Tables

Nature of complaint by turnover

Outcome of complaint within banks internal procedures by turnover

Redress paid by bank by turnover

Case involving customer managed by a turnaround unit by turnover

Case taken to Financial Ombudsman Service by turnover

Case upheld by FOS by turnover

Redress paid by FOS by turnover

Nature of complaint by legal form

Nature of complaint by firm age

Outcome of complaint within banks' internal procedures by legal form

Outcome of complaint within banks' internal procedures by firm age

Redress paid by bank by firm age

Case taken to FOS by legal form

Case taken to FOS by firm age

Case upheld by FOS by legal form

Case upheld by FOS by firm age

Redress paid by FOS by legal form

Redress paid by FOS by firm age

Nature of complaint by year of complaint

Outcome of complaint within banks' internal procedures by year of complaint

Redress paid by banks by year of complaint

Nature of complaint by turnover

		Turnover					
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	Total
Nature of complaint	Unsuitable advice	4915	830	940	296	128	7109
		2.1%	1.7%	1.3%	0.9%	0.7%	1.8%
	Unclear guidance / arrangement	1861	363	453	201	95	2973
		0.8%	0.7%	0.6%	0.6%	0.5%	0.7%
	Disputes over sums / charges	28279	5244	6459	2510	1104	43596
		12.2%	10.5%	9.1%	7.8%	6.1%	10.8%
	Product performance / features	8654	1724	2615	1218	655	14866
		3.7%	3.4%	3.7%	3.8%	3.6%	3.7%
	Product disclosure / information	3600	545	680	280	143	5248
		1.6%	1.1%	1.0%	0.9%	0.8%	1.3%
	Errors / not following instructions	44412	9754	13118	5472	3003	75759
		19.2%	19.5%	18.5%	17.0%	16.7%	18.8%
	Delays / timescales	34135	7360	11517	5523	3566	62101
		14.8%	14.7%	16.2%	17.2%	19.8%	15.4%
	Other general admin / customer service	77760	17269	26238	12767	6867	140901
		33.6%	34.6%	36.9%	39.7%	38.1%	35.0%
	Arrears related	3899	618	467	128	42	5154
		1.7%	1.2%	0.7%	0.4%	0.2%	1.3%
	Other complaint	23715	6271	8527	3788	2428	44729
		10.3%	12.5%	12.0%	11.8%	13.5%	11.1%
Total		231230	49978	71014	32183	18031	402436
		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

- The most frequently raised complaint by firms of *all* turnover sizes relates to ‘other general admin and customer service’ issues.
- Larger SMEs are more likely to complain about ‘other general admin and customer service’.
- Larger SMEs with turnover of £6.5m and over are more likely to complain about ‘delays and timescales’ than other groups.
- Smaller firms are more likely to complain about ‘Errors and not following instructions’.
- Firms with turnover of £250k or less are most likely to have ‘disputes over sums and charges’. The likelihood decreases with firm size growth.
- Firms with turnover of £6.6m or more are most likely to have ‘other complaints’

Outcome of complaint within banks' internal procedures by turnover

		Turnover					
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	Total
Outcome of complaint within banks internal procedures	**Complaint settled and upheld by bank**	144658	30949	45639	21461	12576	255283
		62.7%	62.1%	64.4%	66.8%	69.8%	63.6%
	Complaint not upheld by bank	82102	17867	23507	9824	5002	138302
		35.6%	35.8%	33.2%	30.6%	27.8%	34.4%
	Complaint ongoing in banks own procedures	854	238	353	120	40	1605
		0.4%	0.5%	0.5%	0.4%	0.2%	0.4%
	Other	3125	805	1338	738	392	6398
		1.4%	1.6%	1.9%	2.3%	2.2%	1.6%
Total		230739	49859	70837	32143	18010	401588
		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

- More than 60 per cent of complaints by firms of *all* turnover sizes are settled and upheld by banks.
- There is a positive relationship with size of firm and having their complaint settled and upheld by bank
- Smaller firms are *less likely* to have their complaint upheld by the bank.

Redress paid by bank by turnover

		Turnover					
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	Total
Redress paid by bank	**Yes, financial loss**	56401	10107	13685	5144	2116	87453
		31.0%	25.5%	24.9%	20.3%	14.4%	27.6%
	Yes, distress and goodwill	18461	3398	5431	2673	1526	31489
		10.1%	8.6%	9.9%	10.6%	10.4%	9.9%
	Yes, unspecified	25332	6483	7269	2739	1690	43513
		13.9%	16.4%	13.2%	10.8%	11.5%	13.7%
	None	81693	19610	28632	14725	9409	154069
		44.9%	49.5%	52.0%	58.2%	63.8%	48.7%
Total		181889	39598	55017	25281	14741	316526
		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

- Firms with turnover of £250k or less are *twice as likely to be paid redress by their bank for financial loss* compared with firms with turnover of over £6.5m.
- Larger firms were more likely to have no redress paid by the bank.

Case involving customer managed by a turnaround unit by turnover

		Turnover					Total
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	
Case involving customer managed by a turnaround unit	Yes	126	57	152	153	115	603
		0.1%	0.2%	0.4%	1.0%	1.3%	0.3%
	No	122428	26043	34367	15159	8428	206425
		99.9%	99.8%	99.6%	99.0%	98.7%	99.7%
Total		122554	26100	34519	15312	8543	207028
		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

- Larger firms (£2m +) managed by a turnaround unit were more likely to have a complaint than small firms managed by a turnaround unit.

Case taken to Financial Ombudsman Service (FOS) by turnover

		Turnover					
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	Total
Case taken to FOS	**Yes**	3072	544	691	137	20	4464
		1.3%	1.1%	1.0%	0.4%	0.1%	1.1%
	No	228176	49435	70330	32054	18011	398006
		98.7%	98.9%	99.0%	99.6%	99.9%	98.9%
Total		231248	49979	71021	32191	18031	402470
		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

- Firms with turnover of £250k or less are *more likely to take their complaint to FOS* than any other group of firms by turnover size.
- This reflects the FOS eligibility threshold for business customers as well as other factors - smaller firms may have limited resources to use alternative, more costly, forms of dispute resolution.

Case upheld by FOS by turnover

		Turnover					Total
		<£250k	**>£250k and <£500k**	**>£500k and <£2m**	**>£2m and <£6.5m**	**>£6.5m and <£25m**	
Case upheld by FOS	**Yes**	690 34.3%	126 33.5%	161 35.1%	26 28.6%	6 50.0%	1009 34.2%
	No	1321 65.7%	250 66.5%	298 64.9%	65 71.4%	6 50.0%	1940 65.8%
Total		2011 100.0%	376 100.0%	459 100.0%	91 100.0%	12 100.0%	2949 100.0%

- Just over a third of complaints taken to FOS by firms of *all* turnover sizes are upheld by FOS.
- There is no clear size relationship in terms of cases being upheld.
- Some businesses are outside the size eligible for the FOS, but may have grown after their complaint was processed.

Redress paid by FOS by turnover

		Turnover					
		<£250k	>£250k and <£500k	>£500k and <£2m	>£2m and <£6.5m	>£6.5m and <£25m	Total
Redress paid by FOS	**Yes**	263 68.1%	39 58.2%	52 54.2%	10 58.8%	3 60.0%	367 64.3%
	No	123 31.9%	28 41.8%	44 45.8%	7 41.2%	2 40.0%	204 35.7%
Total		386 100.0%	67 100.0%	96 100.0%	17 100.0%	5 100.0%	571 100.0%

- Where the complaint is upheld by FOS, redress is paid to more than half of firms in each turnover size band.
- For the smallest firms (less than £250k), redress is paid in nearly 70 per cent of cases.

Nature of complaint by legal form

		Legal form				
		Sole trader	Partnership	Company	Other	Total
Nature of complaint	Unsuitable advice	2854	1046	3109	100	7109
		3.5%	3.0%	1.1%	0.8%	1.8%
	Unclear guidance / arrangement	563	302	2001	107	2973
		0.7%	0.9%	0.7%	0.8%	0.7%
	Disputes over sums / charges	11796	4032	26669	1098	43595
		14.6%	11.6%	9.7%	8.6%	10.8%
	Product performance / features	3078	1413	10120	255	14866
		3.8%	4.1%	3.7%	2.0%	3.7%
	Product disclosure / information	1132	441	3601	74	5248
		1.4%	1.3%	1.3%	0.6%	1.3%
	Errors / not following instructions	14780	6247	52702	2030	75759
		18.2%	18.0%	19.3%	15.9%	18.8%
	Delays / timescales	10542	5434	43958	2167	62101
		13.0%	15.6%	16.1%	16.9%	15.4%
	Other general admin / customer service	25928	12010	97783	5180	140901
		32.0%	34.5%	35.7%	40.5%	35.0%
	Arrears related	1769	531	2826	28	5154
		2.2%	1.5%	1.0%	0.2%	1.3%
	Other complaint	8622	3345	31000	1762	44729
		10.6%	9.6%	11.3%	13.8%	11.1%
Total		81064	34801	273769	12801	402435
		100.0%	100.0%	100.0%	100.0%	100.0%

- Sole Traders are more likely to complain about ‘unsuitable advice’ and ‘Disputes over sums and charges’ than any other group of firms.
- Companies are more likely to complain about ‘Delays and timescales’; and ‘Other general admin/customer service’.
- Other legal forms of organisation are more likely to complain about: ‘Delays and timescales’; ‘Other general admin/customer service’; and ‘Other complaint’.

Nature of complaint by firm age

		Firm Age				
		<1 year	>=1 and <5 years	>=5 and <10 years	>=10 years	Total
Nature of complaint	Unsuitable advice	147	944	961	4197	6249
		0.6%	1.0%	1.3%	2.6%	1.7%
	Unclear guidance / arrangement	444	822	554	1098	2918
		1.7%	0.9%	0.7%	0.7%	0.8%
	Disputes over sums / charges	2557	11930	8935	16844	40266
		10.0%	12.8%	11.7%	10.2%	11.2%
	Product performance / features	543	2970	2419	6118	12050
		2.1%	3.2%	3.2%	3.7%	3.4%
	Product disclosure / information	308	1799	912	1712	4731
		1.2%	1.9%	1.2%	1.0%	1.3%
	Errors / not following instructions	5461	20858	15310	29510	71139
		21.4%	22.4%	20.0%	17.9%	19.8%
	Delays / timescales	4861	10734	8906	23431	47932
		19.1%	11.5%	11.7%	14.2%	13.3%
	Other general admin / customer service	8337	31440	25901	60387	126065
		32.7%	33.7%	33.9%	36.7%	35.1%
	Arrears related	156	1250	1277	2094	4777
		0.6%	1.3%	1.7%	1.3%	1.3%
	Other complaint	2686	10422	11244	19188	43540
		10.5%	11.2%	14.7%	11.7%	12.1%
Total		25500	93169	76419	164579	359667
		100.0%	100.0%	100.0%	100.0%	100.0%

- ‘Customer service and general admin-related issues’ are the largest category of complaint type across the board.
- Older firms are more likely to complain about ‘Customer service and general admin-related issues’ than younger firms.
- Older firms are also more likely to complain about ‘unsuitable advice’.

Outcome of complaint within banks' internal procedures by legal form

		Legal form				
		Sole trader	Partnership	Company	Other	Total
Outcome of complaint within banks internal procedures	Complaint settled and upheld by bank	38713	17632	144388	7330	208063
		61.7%	66.8%	66.4%	75.5%	65.8%
	Complaint not upheld by bank	23773	8635	72233	2339	106980
		37.9%	32.7%	33.2%	24.1%	33.8%
	Complaint ongoing in banks own procedures	211	121	713	38	1083
		0.3%	0.5%	0.3%	0.4%	0.3%
Total		62697	26388	217334	9707	316126
		100.0%	100.0%	100.0%	100.0%	100.0%

- 60 per cent of complaints are settled and upheld by banks for firms of *all* legal forms
- Sole Traders are less likely to have their complaint settled and upheld by their bank.

Outcome of complaint within banks' internal procedures by firm age

		Firm Age				
		<1 year	>=1 and <5 years	>=5 and <10 years	>=10 years	Total
Outcome of complaint within banks internal procedures	**Complaint settled and upheld by bank**	15673	52778	41184	98428	208063
		68.7%	63.8%	63.2%	67.7%	65.8%
	Complaint not upheld by bank	7090	29785	23776	46330	106981
		31.1%	36.0%	36.5%	31.9%	33.8%
	Complaint ongoing in banks own procedures	51	184	215	633	1083
		0.2%	0.2%	0.3%	0.4%	0.3%
Total		22814	82747	65175	145391	316127
		100.0%	100.0%	100.0%	100.0%	100.0%

- Almost two-thirds of complaints are settled and upheld by the banks.
- Both the youngest and the oldest of firms appear *most likely* to have their complaint settled and upheld within banks' internal procedures.

Redress paid by bank by firm age

		Firm Age				
		<1 year	**>=1 and <5 years**	**>=5 and <10 years**	**>=10 years**	**Total**
Redress paid by bank	**Yes, financial loss**	5045	19840	13075	31084	69044
		28.0%	30.8%	26.2%	28.3%	28.5%
	Yes, distress and goodwill	1021	4778	3853	12070	21722
		5.7%	7.4%	7.7%	11.0%	9.0%
	Yes, unspecified	3144	9730	8509	13776	35159
		17.4%	15.1%	17.1%	12.5%	14.5%
	None	8810	30129	24375	52870	116184
		48.9%	46.7%	48.9%	48.2%	48.0%
Total		18020	64477	49812	109800	242109
		100.0%	100.0%	100.0%	100.0%	100.0%

- Over a half of all firms received some form of financial redress from the banks.
- Firms aged 1 to 5 years are most likely to have redress paid by their bank for ‘financial loss’ only, whereas firms aged 10 years and older are most likely to be compensated for ‘distress and goodwill’ only.
- Note: For a large proportion of the sample, the nature of redress has not been specified.

Case taken to FOS by legal form

		Legal form				
		Sole trader	Partnership	Company	Other	Total
Case taken to FOS	Yes	1076	579	2709	100	4464
		1.3%	1.7%	1.0%	0.8%	1.1%
	No	79991	34231	271081	12702	398005
		98.7%	98.3%	99.0%	99.2%	98.9%
Total		81067	34810	273790	12802	402469
		100.0%	100.0%	100.0%	100.0%	100.0%

- One per cent of the firms took a legal case to the FOS
- Partnerships are most likely to take their case to FOS, followed by Sole Traders and Companies.
- Do we need to take out those firms not eligible for FOS in this analysis?

Case taken to FOS by firm age

		Firm Age				
		<1 year	>=1 and <5 years	>=5 and <10 years	>=10 years	Total
Case taken to FOS	Yes	201 0.9%	747 0.9%	734 1.1%	1611 1.1%	3293 1.0%
	No	22613 99.1%	82000 99.1%	64441 98.9%	143780 98.9%	312834 99.0%
Total		22814 100.0%	82747 100.0%	65175 100.0%	145391 100.0%	316127 100.0%

- Firms aged 5 years or older are somewhat more likely to take their case to FOS than younger firms.

Case upheld by FOS by legal form

		Legal form				
		Sole trader	Partnership	Company	Other	Total
Case upheld by FOS	Yes	204	99	529	26	858
		33.0%	31.7%	34.0%	48.1%	33.8%
	No	414	213	1029	28	1684
		67.0%	68.3%	66.0%	51.9%	66.2%
Total		618	312	1558	54	2542
		100.0%	100.0%	100.0%	100.0%	100.0%

- A third of SMEs had their case upheld by the FOS
- Companies and firms with 'Other' legal form are most likely to have their case upheld by FOS.

Case upheld by FOS by firm age

		Firm Age				
		<1 year	>=1 and <5 years	>=5 and <10 years	>=10 years	Total
Case upheld by FOS	Yes	66	230	185	377	858
		38.8%	39.0%	32.8%	31.0%	33.8%
	No	104	360	379	841	1684
		61.2%	61.0%	67.2%	69.0%	66.2%
Total		170	590	564	1218	2542
		100.0%	100.0%	100.0%	100.0%	100.0%

- Younger firms are more likely to have their case upheld by FOS than older firms

Redress paid by FOS by legal form

		Legal form				
		Sole trader	Partnership	Company	Other	Total
Redress paid by FOS	Yes	90 68.2%	31 53.4%	242 65.8%	4 30.8%	367 64.3%
	No	42 31.8%	27 46.6%	126 34.2%	9 69.2%	204 35.7%
Total		132 100.0%	58 100.0%	368 100.0%	13 100.0%	571 100.0%

- Sole Traders and Companies are most likely to be paid redress by FOS.

Redress paid by FOS by firm age

		Firm Age				
		<1 year	>=1 and <5 years	>=5 and <10 years	>=10 years	Total
Redress paid by FOS	Yes	34 75.6%	121 77.1%	71 58.2%	141 57.1%	367 64.3%
	No	11 24.4%	36 22.9%	51 41.8%	106 42.9%	204 35.7%
Total		45 100.0%	157 100.0%	122 100.0%	247 100.0%	571 100.0%

- Start-up firms aged up to 5 years are most likely to receive redress from FOS. The percentage of those in receipt of redress in this group is nearly 20 per cent higher than that of firms aged 10 years and older.

SMEs Nature of complaint by year of complaint

		Year of complaint				
		2015	2016	2017	2018	Total
Nature of complaint	Unsuitable advice	2449	2687	1611	362	7109
		2.2%	2.0%	1.3%	1.1%	1.8%
	Unclear guidance / arrangement	713	738	1183	339	2973
		0.6%	0.6%	0.9%	1.0%	0.7%
	Disputes over sums / charges	15245	14045	11308	2998	43596
		13.8%	10.7%	8.9%	8.9%	10.8%
	Product performance / features	4873	5893	3136	964	14866
		4.4%	4.5%	2.5%	2.9%	3.7%
	Product disclosure / information	1352	1833	1631	432	5248
		1.2%	1.4%	1.3%	1.3%	1.3%
	Errors / not following instructions	16786	22421	28833	7719	75759
		15.2%	17.0%	22.7%	23.0%	18.8%
	Delays / timescales	17593	19532	19516	5460	62101
		16.0%	14.8%	15.4%	16.3%	15.4%
	Other general admin / customer service	38901	49163	42351	10486	140901
		35.3%	37.3%	33.4%	31.3%	35.0%
	Arrears related	1743	1736	1486	189	5154
		1.6%	1.3%	1.2%	0.6%	1.3%
	Other complaint	10497	13798	15859	4575	44729
		9.5%	10.5%	12.5%	13.6%	11.1%
Total		110152	131846	126914	33524	402436
		100.0%	100.0%	100.0%	100.0%	100.0%

- The number of complaints has grown by about 20,000 between 2015 and 2016, however, the number decreased by nearly 5,000 between 2016 and 2017.
- There has been a decrease in some complaint types between 2015 and 2017 (as a proportion of *all* complaints), including: unsuitable advice, disputes over sums / charges, product performance / features, arrears related and other complaints.
- However, there has been an increase in complaints related to 'Errors / not following instructions' in the same period.

Outcome of complaint within banks' internal procedures by year of complaint

		Year of complaint				
		2015	2016	2017	2018	Total
Outcome of complaint within banks internal procedures	Complaint settled and upheld by bank	56398 63.5%	67824 65.1%	66698 68.4%	17143 66.7%	208063 65.8%
	Complaint not upheld by bank	32262 36.3%	35998 34.6%	30294 31.1%	8427 32.8%	106981 33.8%
	Complaint ongoing in banks own procedures	130 0.1%	286 0.3%	553 0.6%	114 0.4%	1083 0.3%
Total		88790 100.0%	104108 100.0%	97545 100.0%	25684 100.0%	316127 100.0%

- There has been a gradual increase in the proportion of 'complaints settled and upheld' by banks between 2015 and 2017.

Redress paid by bank by year of complaint

		Year of complaint				
		2015	2016	2017	2018	Total
Redress paid by bank	**Yes, financial loss**	23499	22392	18778	4375	69044
		32.4%	27.8%	26.7%	23.4%	28.5%
	Yes, distress and goodwill	6351	7158	6664	1549	21722
		8.8%	8.9%	9.5%	8.3%	9.0%
	Yes, unspecified	15134	14448	4607	970	35159
		20.9%	17.9%	6.6%	5.2%	14.5%
	None	27513	36681	40226	11764	116184
		38.0%	45.5%	57.2%	63.1%	48.0%
Total		72498	80679	70276	18658	242111
		100.0%	100.0%	100.0%	100.0%	100.0%

- There has been a noticeable decrease between 2015 and 2018 in the proportion of firms not receiving redress by their bank for financial loss –from 38% to 63.1% in 2018
- There has been a slight increase in the proportion of firms paid redress related to 'distress and goodwill'.
- Where the nature of redress was 'unspecified' there has been a significant decrease in those receiving redress over the 3-year period.

(This could be the cases in receipt of *both* financial loss and distress-related redress?)

APPENDIX 3.3

Multivariate Analysis of SME Banks' Complaint Data

Analytical Technique

The analysis is based on the data provided by UK Finance. This analysis controls for the influence of other variables, and thus allows us to isolate the specific effect of each variable.

Table 3.3.1 shows how the probability of the nature of a complaint changes across different SME characteristics. These results are derived from a multinomial logit model. For example, being based in *multiple regions* increases the likelihood of having a 'general administration / customer service complaint' by 25%.

Table 3.3.2 shows how the probability of a complaint lasting less than a day, 1 day, 2-5 days, 6-11 days etc. changes across different SME characteristics. These results were obtained via an ordered logit regression model. For example, being in the *Real Estate, Professional Services and Support Activities* sector reduces the probability of having the complaint resolved in less than a day by 7.3% compared to the base category of Agriculture.

Table 3.3.3 shows results from a binary logit model. Increases in predicted probabilities greater than 3% are highlighted in green, whilst decreases of more than 3% are highlighted in red.

1. Relationship with Nature of complaints (Table 3.3.1)

Turnover

- The larger the firm, the *more likely* it will complain about delays/ timescales and other admin and customer services. (ie. Compared with firms having a turnover less than £250K, firms having turnover over £500K-2m are 3.2% and 4.2% more likely to raise complaints about delays/ timescales and other general admin/customer services. Whereas, this rate increases with firms having turnover from £2m-6.5m (4.5% and 7.5% more likely) and 7% and 9% more likely with firm having turnover within the range £6.5m-£25m.
- Larger firms with a turnover over £2m are also *less likely* to raise disputes about 'unsuitable advice, disputes over sums/ charges, and arrears related.

Legal Form

- "Companies" and "Other" legal forms are *less likely* to raise a dispute over unsuitable advice than "Sole-traders", (approximately 5% less likely), and disputes over sums/ charges (approximately 4% less likely)

- "Companies" and "other" legal forms are more likely to complain about delays/ timescales and other general admin/ customer service.

Sector

- SMEs in all other sectors are *less likely* to complain about unsuitable advice compared with those in Agriculture.
- SMEs in Manufacturing, Real Estate and Public Administration are *more likely* to complain about delays/ timescales.

Firm Age

- Younger firms (less than 1 year old) are *more likely* to raise complaints about unsuitable advice compared with older firms. There are no differences in regard to other types of complaints.

Region

- Complaint types vary by region. SMEs in the West Midlands and South East of England are *more likely* to raise complaints about unsuitable advice
- SMEs in the East of England and Scotland are more likely to complain about other general admin / customer service.
- SMEs in Wales tend to have more complaints about errors and delays/ timescales. SMEs located in multiple regions are less likely to complain about unsuitable advice but more likely concern about disputes over charges/ sums

Type of complaints over time

- Between 2015 and 2108, there was an increase in the likelihood of SMEs complaining about errors/ not following instructions (10.8% and 12% more in 2017 and 2018 respectively)
- There was a decline in the likelihood of SMEs complaining about unsuitable advice and disputes over charges/ sums between 2015 and 2018.

2. Relationship with the Duration of complaint (Table 3.3.2)

Turnover has very little effect on the time taken to close the complaint.

Legal form: Overall, sole traders are more likely to have their complaint resolved within one day than "company" and "other" legal forms

- However, there is no difference in the overall time taken to resolve complaints between firms of different legal forms.

Sector: SMEs in agriculture are more likely to have their complaint resolved within one day than all other sectors. SMEs in Real Estate sector, followed by 'Transport, storage and communication' are *less* likely than those in Agriculture SMEs to have the complaints resolved within a day.

- There are no differences between sectors regarding complaints lasting for more than 1 day.

Region has minimal effect on the duration of the complaints.

Firm Age: Younger firms (less than 5 years old) are *more likely* to have the complaints closed within a day (compared with firms 10 year or more).

Duration of complaints over time

There is little variation in the time taken to resolve a complaint over the three years. For example, compared to 2015, complaints in 2017 are only 5% less likely to be closed within a day, and no difference regarding complaints lasting for longer than 1 day.

Nature of complaint: Overall, there is a significant relationship between the nature of the complaint and the duration of complaint.

- Complaints about unsuitable advice are 40% *less likely* to be resolved in less than 1 day compared with "other general admin/ customer service complaints"
- Complaints about unclear guidance are 10% *less likely* to be resolved in less than 1 day compared with "other general admin/ customer service complaints".
- Complaints about "unsuitable advice" are much *more likely* to take longer to resolve than "other general admin/ customer service" complaints.
- "Disputes over sums/ charges" are 8% *more likely* to be resolved in less than 1 day, followed by complaints about "product disclose/information" (6% more likely) compared with "other general admin/customer service" complaints.

3. Relationship with Outcome of Complaint (Table 3.3.3)

Turnover

– Turnover has an effect on having the complaint upheld the bank: Larger SMEs (<£6.5 million and <£25 million) have a higher chance (by 6%) that a complaint is upheld compared with the smallest turnover category (<£250k).

Legal form

– Having "other" legal form increases the likelihood of the complaint being upheld by 10% compared with a sole trader.

Sector

SMEs in Accommodation, food service etc, real estate and professional services and public administration, defence etc increases the chance the complaint is upheld by around 4%

Region

- SMEs in multiple regions are more likely to have their complaint upheld (by 14%) compared with those in London (a size effect?)
- SMEs in Scotland are *more likely* to have their complaint upheld (by 14%) compared with those in London
- SMEs in the South East (excluding London) are more likely to have their complaint upheld (by 5%) compared with those in London

Firm Age

- Older firms (10 years or more) are slightly more likely to have their complaint upheld

Changes between 2015-18

- There was a *slight increase* in the likelihood of a complaint being upheld by the bank

Table 3.3.1: Relationship with Nature of complaints (N= 259,792)

Nature of complaint	1	2	3	4	5	6	7	8	9
Turnover (base = <£250k)									
>£250k and <£500k	-1.35%	0.03%	-1.33%	-0.35%	-0.45%	1.11%	1.10%	2.35%	-1.12%
>£500k and <£2m	-2.97%	0.01%	-2.29%	0.10%	-0.50%	1.09%	**3.22%**	**4.17%**	-2.81%
>£2m and <£6.5m	**-4.94%**	0.06%	**-3.44%**	-0.03%	-0.59%	0.42%	**4.47%**	**7.56%**	**-3.50%**
>£6.5m and <£25m	**-6.31%**	-0.01%	**-5.78%**	0.09%	-0.54%	0.70%	**7.10%**	**8.93%**	**-4.19%**
Legal form (base = Sole Trader)									
Partnership	-1.25%	0.19%	-2.51%	0.04%	0.11%	1.03%	1.78%	1.18%	-0.58%
Company	**-4.81%**	0.05%	**-4.17%**	0.56%	0.01%	1.62%	**3.47%**	**4.79%**	-1.52%
Other	**-5.33%**	0.28%	**-4.72%**	-0.66%	-0.47%	2.45%	**8.51%**	**3.61%**	**-3.66%**
Sector (Base = Agriculture)									
Mining & quarrying AND Electricity, gas & water supply	**-3.50%**	0.26%	2.01%	-1.74%	-0.02%	0.68%	1.18%	**3.56%**	-2.42%
Manufacturing	**-4.24%**	0.03%	-1.56%	-1.71%	-0.07%	0.34%	**4.53%**	2.03%	0.66%
Construction	**-3.51%**	0.02%	-0.04%	1.14%	0.09%	-1.22%	2.41%	2.16%	-1.03%
Wholesale and retail	**-4.97%**	0.05%	2.00%	0.39%	0.08%	0.90%	1.90%	0.68%	-1.03%
Accommodation & food service AND Recreational, personal & community service activities	**-4.89%**	0.17%	-0.16%	-0.11%	0.19%	1.34%	2.60%	2.52%	-1.65%
Transport, storage & communication	**-4.09%**	0.12%	0.90%	-0.25%	0.23%	0.16%	0.64%	**3.30%**	-1.00%
Real estate, professional services & support activities	**-5.73%**	0.13%	-0.72%	0.76%	0.12%	-0.26%	**3.88%**	**3.62%**	-1.80%
Public administration & defence AND Education AND Human health & social care	**-4.50%**	-0.04%	-0.11%	0.97%	0.07%	-0.01%	**3.23%**	1.59%	-1.20%
Region (base = London)									
North East England	**6.31%**	-0.07%	-2.55%	0.09%	0.03%	-0.85%	-0.79%	-1.53%	-0.65%
North West England	2.32%	-0.02%	-2.01%	-0.22%	0.09%	0.06%	0.04%	-0.13%	-0.12%
Yorkshire & the Humber England	**3.98%**	-0.06%	-1.49%	0.02%	-0.17%	-0.88%	-0.20%	-1.81%	0.61%
East Midlands England	**5.10%**	-0.05%	-0.48%	-0.51%	-0.05%	-1.74%	-0.70%	-2.02%	0.47%
West Midlands England	**3.39%**	-0.04%	-1.87%	-0.21%	-0.07%	-1.17%	0.75%	-1.12%	0.34%
East of England	1.11%	0.06%	-3.35%	-0.36%	-0.05%	0.22%	0.57%	2.91%	-1.11%
South East England	-0.08%	0.01%	-2.85%	0.45%	0.04%	-0.40%	1.32%	2.46%	-0.95%
South West England	**4.06%**	0.02%	-0.16%	0.15%	-0.16%	-1.86%	0.65%	**-3.34%**	0.64%
Scotland	-0.07%	-0.09%	1.84%	-2.16%	-0.78%	**-6.38%**	**-4.65%**	**15.75%**	**-3.46%**
Wales	**7.64%**	0.02%	-0.11%	-0.28%	-0.24%	-2.40%	-1.22%	**-4.83%**	1.42%
Northern Ireland	1.67%	-0.24%	-0.08%	1.05%	-0.61%	**3.34%**	1.32%	**-6.52%**	0.07%
Multiple regions	2.85%	-0.12%	**5.18%**	**-5.71%**	-1.31%	**-9.40%**	**-11.58%**	**25.06%**	**-4.97%**
Firm age (base = <1 year)									
>=1 and <5 years	**-7.08%**	1.06%	0.71%	-2.35%	0.14%	**5.45%**	**5.17%**	-0.17%	-2.92%
>=5 and <10 years	**-5.64%**	0.27%	**3.82%**	-1.02%	1.00%	**4.87%**	-2.04%	-0.65%	-0.61%
>=10 years	**-4.47%**	0.13%	**3.11%**	-0.84%	0.15%	2.76%	-1.68%	-0.29%	1.12%
Year (base = 2015)									
2016	-0.60%	-0.02%	**-3.88%**	0.21%	0.46%	**4.09%**	-0.35%	0.79%	-0.69%
2017	**-3.00%**	0.22%	**-5.69%**	-1.76%	0.59%	**10.81%**	1.22%	-1.71%	-0.67%
2018	**-3.49%**	0.33%	**-5.47%**	-0.82%	0.70%	**12.01%**	2.79%	-2.88%	**-3.18%**

1= unsuitable advice, 2 = unclear guidance / arrangement, 3 = disputes over charges / sums, 4 = product performance / features, 5 = product disclosure information, 6 = errors / not following instructions, 7 = delays / timescales, 8 = other general admin / customer service, 9= arrears related

Table 3.3.2: Relationship with the Duration of complaint (N= 259,592)

Variable	< 1day	1day	2-5 days	6-10 days	11-30 days	31-60 days	61-90 days	91-180 days	181-365 days	366 days+
Turnover (base = <£250k)										
>£250k and <£500k	1.13%	-0.13%	-0.16%	-0.08%	-0.25%	-0.35%	-0.10%	-0.05%	-0.01%	0.00%
>£500k and <£2m	0.23%	-0.03%	-0.03%	-0.02%	-0.05%	-0.07%	-0.02%	-0.01%	0.00%	0.00%
>£2m and <£6.5m	-0.80%	0.09%	0.11%	0.05%	0.18%	0.25%	0.07%	0.04%	0.01%	0.00%
>£6.5m and <£25m	-0.29%	0.03%	0.04%	0.02%	0.06%	0.09%	0.03%	0.01%	0.00%	0.00%
Legal form (base = Sole Trader)										
Partnership	-2.82%	0.30%	0.38%	0.19%	0.62%	0.89%	0.27%	0.13%	0.04%	0.01%
Company	**-4.28%**	0.44%	0.56%	0.28%	0.94%	1.37%	0.42%	0.20%	0.06%	0.02%
Other	**-6.84%**	0.66%	0.87%	0.45%	1.50%	2.23%	0.69%	0.33%	0.10%	0.03%
Sector (base = Agriculture, hunting & forestry AND Fishing)										
Mining & quarrying AND Electricity, gas & water supply	**-3.02%**	0.32%	0.40%	0.20%	0.66%	0.96%	0.29%	0.14%	0.04%	0.01%
Manufacturing	**-3.94%**	0.41%	0.52%	0.26%	0.86%	1.26%	0.38%	0.18%	0.05%	0.01%
Construction	-1.35%	0.15%	0.18%	0.09%	0.30%	0.42%	0.13%	0.06%	0.02%	0.00%
Wholesale and retail	-2.81%	0.30%	0.37%	0.19%	0.62%	0.89%	0.27%	0.13%	0.04%	0.01%
Accommodation & food service AND Recreational, personal & community service activities	**-4.41%**	0.45%	0.58%	0.29%	0.97%	1.41%	0.43%	0.21%	0.06%	0.02%
Transport, storage & communication	**-5.31%**	0.53%	0.68%	0.35%	1.16%	1.71%	0.52%	0.25%	0.07%	0.02%
Real estate, professional services & support activities	**-7.30%**	0.70%	0.92%	0.47%	1.59%	2.39%	0.74%	0.36%	0.10%	0.03%
Public administration & defence AND Education AND Human health & social care	**-4.76%**	0.48%	0.62%	0.32%	1.04%	1.53%	0.46%	0.22%	0.06%	0.02%
Region (base = London)										
North East England	2.39%	-0.28%	-0.34%	-0.17%	-0.53%	-0.73%	-0.21%	-0.10%	-0.03%	-0.01%
North West England	0.27%	-0.03%	-0.04%	-0.02%	-0.06%	-0.08%	-0.02%	-0.01%	0.00%	0.00%
Yorkshire & the Humber England	2.33%	-0.27%	-0.33%	-0.16%	-0.51%	-0.71%	-0.21%	-0.10%	-0.03%	-0.01%
East Midlands England	**3.69%**	-0.44%	-0.53%	-0.26%	-0.81%	-1.12%	-0.33%	-0.16%	-0.04%	-0.01%
West Midlands England	0.51%	-0.06%	-0.07%	-0.04%	-0.11%	-0.16%	-0.05%	-0.02%	-0.01%	0.00%
East of England	-0.39%	0.04%	0.05%	0.03%	0.09%	0.12%	0.04%	0.02%	0.00%	0.00%
South East England	-1.85%	0.20%	0.25%	0.13%	0.41%	0.58%	0.17%	0.08%	0.02%	0.01%
South West England	2.20%	-0.26%	-0.31%	-0.15%	-0.49%	-0.67%	-0.20%	-0.09%	-0.03%	-0.01%
Scotland	-2.88%	0.30%	0.38%	0.19%	0.63%	0.91%	0.27%	0.13%	0.04%	0.01%
Wales	1.77%	-0.20%	-0.25%	-0.12%	-0.39%	-0.54%	-0.16%	-0.08%	-0.02%	-0.01%
Northern Ireland	0.76%	-0.09%	-0.10%	-0.05%	-0.17%	-0.23%	-0.07%	-0.03%	-0.01%	0.00%
Multiple regions	-1.93%	0.21%	0.26%	0.13%	0.42%	0.61%	0.18%	0.09%	0.03%	0.01%
Firm age (base = <1 year)										
>=1 and <5 years	**3.69%**	-0.44%	-0.53%	-0.26%	-0.81%	-1.11%	-0.32%	-0.16%	-0.04%	-0.01%
>=5 and <10 years	**3.26%**	-0.39%	-0.46%	-0.23%	-0.72%	-0.99%	-0.29%	-0.14%	-0.04%	-0.01%
>=10 years	2.82%	-0.33%	-0.40%	-0.20%	-0.62%	-0.86%	-0.25%	-0.12%	-0.03%	-0.01%
Year (base = 2015)										
2016	-2.81%	0.30%	0.37%	0.19%	0.62%	0.89%	0.27%	0.13%	0.04%	0.01%
2017	**-5.22%**	0.52%	0.67%	0.34%	1.14%	1.68%	0.51%	0.25%	0.07%	0.02%

	< 1day	1day	2-5 days	6-10 days	11-30 days	31-60 days	61-90 days	91-180 days	181-365 days	366 days+
2018	-1.64%	0.18%	0.22%	0.11%	0.36%	0.52%	0.15%	0.07%	0.02%	0.01%
Nature of the complaint (base =other general admin / customer service										
unsuitable advice	**-40.64%**	0.58%	1.99%	1.47%	**6.94%**	**16.95%**	**7.24%**	**3.94%**	1.20%	0.32%
unclear guidance / arrangement	**-10.47%**	0.93%	1.26%	0.66%	2.27%	**3.51%**	1.10%	0.54%	0.16%	0.04%
disputes over sums / charges	**8.43%**	-1.09%	-1.26%	-0.60%	-1.86%	-2.46%	-0.70%	-0.33%	-0.10%	-0.03%
product performance / features	2.43%	-0.29%	-0.34%	-0.17%	-0.54%	-0.74%	-0.22%	-0.10%	-0.03%	-0.01%
product disclosure / information	**6.34%**	-0.79%	-0.93%	-0.45%	-1.40%	-1.88%	-0.54%	-0.26%	-0.07%	-0.02%
errors / not following instructions	2.37%	-0.28%	-0.33%	-0.16%	-0.52%	-0.72%	-0.21%	-0.10%	-0.03%	-0.01%
delays / timescales	-0.94%	0.10%	0.13%	0.06%	0.21%	0.29%	0.09%	0.04%	0.01%	0.00%
Arrears related	1.67%	-0.19%	-0.23%	-0.12%	-0.37%	-0.51%	-0.15%	-0.07%	-0.02%	-0.01%

Table 3.3.3: Relationship with outcomes of the complaint (N= 258,943)

Characteristic	Change in probability of complaint being upheld
Turnover (base = <£250k)	
>£250k and <£500k	-0.20%
>£500k and <£2m	1.70%
>£2m and <£6.5m	**3.70%**
>£6.5m and <£25m	**6.10%**
Legal form (base = Sole Trader)	
Partnership	**3.40%**
Company	**3.70%**
Other	**10.50%**
Sector (Base = Agriculture)	
Mining & quarrying AND Electricity, gas & water supply	1.10%
Manufacturing	**4.30%**
Construction	1.80%
Wholesale and retail	1.60%
Accommodation & food service AND Recreational, personal & community service activities	**4.20%**
Transport, storage & communication	1.50%
Real estate, professional services & support activities	**4.30%**
Public administration & defence AND Education AND Human health & social care	**4.60%**
Region (base = London)	
North East England	**3.70%**
North West England	2.30%
Yorkshire & the Humber England	2.50%
East Midlands England	-0.30%
West Midlands England	**3.90%**
East of England	**3.90%**
South East England	**5.00%**
South West England	**3.20%**
Scotland	**13.70%**
Wales	-0.50%
Northern Ireland	-0.70%
Multiple regions	**13.80%**
Firm age (base = <1 year)	
>=1 and <5 years	0.50%
>=5 and <10 years	**-3.30%**
>=10 years	**-4.00%**
Year (base = 2015)	
2016	0.20%
2017	**3.00%**
2018	1.50%

Appendix 3.4

BDRC Online Complaints Survey

September 2018

Data Source

Online research was conducted by BDRC to better understand the incidence of complaints amongst businesses towards their bank, and the way in which these were resolved. 750 businesses were interviewed online, using a number of online business panels. Larger businesses were over-sampled and this was corrected by weighting the data by number of employees, a classic B2B sample design. Interviews were conducted across sectors and regions and all respondents had some responsibility for banking.

Overall summary

- A minority of businesses had complained to their bank (17%) and very few wanted to but didn't (4%).
    - That said, 4 in 10 larger SMEs had complained, and more had felt like complaining (1in 10).
- Most complaints were resolved to the customer's satisfaction, and their working relationship and trust in the bank were unaffected.
    - The small proportion of businesses whose complaints had not been resolved, or were resolved unsatisfactorily were less likely to trust their bank, more likely to wish they had a more active relationship and more likely to say the business had been adversely affected by the complaint eg management time diverted to deal with the complaint
    - The even smaller group that saw their complaint referred were more likely to have noted a detrimental effect to the business (eg cost cutting) but were no less likely to trust the bank
- Around half of these businesses had heard of FOS, increasing to 6 in 10 who had complained, but only a minority had a good idea of the services they offer. If available to them though, 7 in 10 thought it likely they would take a complaint to FOS if it was unresolved with the bank.

Key findings

A minority of businesses have complained, or felt like complaining, about their bank

- 8 in 10 businesses (79%) reported no cause for complaint in the previous 5 years
- 4% had thought about complaining but didn't
- 17% reported making a complaint (some made more than one type of complaint)

4 in 10 of the largest businesses had complained in the last 5 years

- 16% of businesses with fewer than 10 employees had complained to their bank, increasing by size to 37% of those with 10-99 employees and 43% of those with 100+ employees. Amongst these larger businesses 1 in 10 had felt like complaining (compared to 1 in 20 of smaller businesses)
- Those in Manufacturing (22%) and Distribution (19%) were slightly more likely to have complained at all than those in the Service sector (14%)
- Those in the South (20%) were slightly more likely to have complained than those in the North (16%) or Midlands (15%)
- Amongst those who had complained, half (54%) had complained once in the past 5 years, 40% had complained 2-3 times and a small proportion (6%) had complained 4 or more times

Most complaints were resolved to the customer's satisfaction and very few were referred on

- 12% of businesses had complained and had the complaint resolved to their satisfaction – the equivalent of 7 in 10 of all complaints reported
- 5% had complained and it was resolved but not to their satisfaction
- 1% said the complaint remained a dispute between them and the bank
- 1% of businesses had had a complaint referred on – either to FOS, to mediation, or to court

Day to day banking issues make up the majority of complaints

- Half of the complaints satisfactorily resolved (48%) and a third of the complaints resolved unsatisfactorily (37%) were to do with day to day banking issues
- Other issues mentioned were fraud and branch closures
- The few complaints that were referred on were more likely to be about branch closure, staff behaviour or lending issues

Few businesses sought legal advice but were more likely to do so if the complaint was referred on

- 1 in 7 of those who had a complaint satisfactorily or un-satisfactorily resolved had seen the involvement of either a legal professional or a bank legal representative
- This increased to around half of the small group who saw their complaint referred on

Half or more of complainants had not been seeking compensation

- Half of the complaints satisfactorily resolved (55%) and two thirds of the complaints unsatisfactorily resolved (66%) said they had not been looking for any compensation
- Amongst those seeking compensation, the amount received was satisfactory for almost all those whose complaint was satisfactorily resolved (97%) compared to only 15% of those who were not satisfied with how their complaint was resolved - 61% of this group got compensation but said it was not enough
- 6 in 10 of the small group who went to FOS were not happy with the compensation received

If the complaint was resolved to their satisfaction, it was unlikely to have had a negative effect on the business

- Overall, 6 in 10 who complained (60%) said that there had been no negative effect on their business , but with clear variations by the nature of the complaint
- Negative effects were reported by a quarter (26%) of those where the complaint had been resolved to their satisfaction, but by 82% of those who were dissatisfied with the complaint's resolution and 9 in 10 of the small group where the complaint remained unresolved – the main issues for these two groups were management time away from the business and running the business being more of a struggle
- 6 in 10 of the group where the complaint was referred said it had impacted the business. Whilst they also mentioned taking management time away from the business they were more likely than the other groups to mention effects on the business itself in terms of having to make cutbacks or not expanding the business as they would have liked

Just under half of SMEs have heard of FOS. Although use to date was minimal, 7 in 10 thought it likely they might use the service in the event of an unresolved complaint

- 45% of all respondents said they had heard of FOS, increasing to 58% of those who had complained
- 16% of businesses said that they had a good idea of the services FOS offers, but almost twice as many (37%) said they were not aware that some businesses could use FOS. Amongst those who had complained, the split was more even (24% had a good idea v 21% not aware some businesses could use FOS)
- 2% of all businesses, and 7% of those who had complained said that they had used FOS in the past
- 72% of all businesses thought it likely they would take an unresolved complaint to FOS in the future, while 13% thought it unlikely. Those who had complained gave the same likely to use score (72%) while 17% were unlikely to use

The outcome of the complaint has had a varied effect on the overall bank relationship

- 14% of all businesses said that they had a strong working relationship with their bank
- This increased to 27% of businesses who had a complaint resolved to their satisfaction and to 34% of those who had their complaint referred
- Meanwhile 15% of those whose complaint remained in dispute and 7% of those unsatisfied with the way their complaint was resolved described their relationship with the bank as strong. Instead they were more likely to say that they wished they had a more active relationship with their bank (36% and 18% compared to 6% of all businesses)
- 12% of those with no cause for complaint had a strong relationship with their bank, with most, 83% saying the relationship was fine, but transactional

Trust in main bank is also affected

- 48% of all businesses said that they had a high level of trust in their main bank, and 52% if they had not complained
- Businesses who had a complaint resolved to their satisfaction were as likely to have a high level of trust (48%), falling to 30% of those who had their complaint referred
- Meanwhile, just 18% of those whose complaint remained in dispute and 15% of those unsatisfied with the way their complaint was resolved had a high level of trust in their bank. Instead they were more likely to say that they had a low level of trust (both 42% compared to 10% of all businesses)
- Trust in the banking industry more generally is lower (21% have a high level of trust and 28% a low level of trust). Those whose complaint remained in dispute and those unsatisfied with the way their complaint was resolved were as untrusting of banks generally as they were of their own bank (37% and 43% low trust for banking generally v 42% for main bank). For other groups, around 3 in 10 were untrusting of the banking industry generally v <10% for their main bank

Appendix 3.5

Research into SME-Bank dispute resolution in the UK

Topic Guide for Businesses

Profile of the Interviewee *(fill in prior to interview)*

Name / business:

Position within business:

Complaint completed, or raised, in the past 3 years: YES / NO

Complaint taken beyond banks' internal dispute resolution system: YES / NO

Dispute resolution procedure taken forward by the business:

(i) Financial Ombudsman Service

(ii) Mediation / conciliation / arbitration

(iii) Ad hoc redress scheme (e.g. IRHP review)

(iv) Litigation (i.e. court hearing)

(v) Other

Date of interview

Interviewer

Thank you for agreeing to help with the study. As I mentioned on the telephone, we are interested in hearing about your experiences of filing a complaint with your bank and whether and how your complaint was resolved. Your views will be analysed in aggregate and all data will be anonymised so that no individuals or organisations can be identified in any reporting. Any personal information will be kept confidential, stored securely on the university network drive and not shared with any third parties.

Is it Ok if I audio record the interview for accuracy and speed? An audio recording of your interview and your personal information will be deleted on completion of the study.

Business background

To start with, we have some questions about your business (Unless already known).

1. What goods and services does the business provide to its customers?

2. When did the business start trading?

3. How many people currently work for the business *(including owners, partners and directors)*? How many of them are full-time / part-time?

4. What is the legal form of the business? *Prompts:* sole trader, limited company, LLP, ordinary partnership, etc.

Nature of complaint and banks' complaints resolution systems

We want to understand the nature of complaints that SMEs raise with their banks and their experiences of banks' internal complaints systems.

5. What was your complaint / dispute with your bank about? *(If more than one complaint, talk about the main one first)*

6. Can you talk us through your experience of raising a complaint and each stage in the dispute resolution process?

(Allow the interviewee to describe their experience stage-by-stage)

Prompts: What happened next? Why do you say that?

a) What were your reasons for making a complaint?

b) How did you find out you could make a complaint under the bank's internal complaints system?

c) When did you raise the complaint? (month / year)

d) How did you complain? (e.g. formal letter, online, telephone, in person)

e) Did you consult anyone / take advice from anyone inside or outside the business before raising your complaint. (If yes: who and what was their advice?)

f) What was the outcome of your complaint? (e.g. upheld, rejected)

g) Was the outcome fair, in your view? What happened next?

7. Have you raised more than one complaint over the past 3 years? *(If yes: repeat Q6)*

8. Were there any difficulties in raising, and trying to resolve, a complaint using your bank's process?

(If yes: how did you address these difficulties?)

Prompts: time it took, identifying the right person in the bank, using the online complaints system.

9. Have you ever had a grievance with your bank, but decided NOT to make a complaint? *(If more than one grievance, talk about the main one first)*

a) What was the grievance?

b) What was your reason for NOT making a complaint?

c) Did you consult anyone / take advice from anyone inside or outside the business before deciding not to make a complaint? (If yes: who and what was their advice?)

Taking further action in SME-bank dispute resolution

We want to understand why and how business owners take further action where banks do not uphold their complaints or businesses are unhappy with the banks' internal complaints process.

10. If dissatisfied with bank's complaints process or outcomes, what options did you consider?

Probe: Financial Ombudsman Service / mediation / litigation

a) *How did you find out about these different legal processes?*

b) Did you consult anyone / take advice from anyone inside or outside the business about what your options might be?

c) Why did you choose one route over another?

d) If did nothing, go to Q 12.

If used FOS / mediation/ litigation:

11. You mentioned that you used the FOS / mediation / litigation to take further action in resolving the dispute with your bank. Can you talk us through the process of what you did and why? *(Allow the interviewee to describe their experience stage-by-stage)*

Prompts: What happened next? Why do you say that?

a) Why did you use FOS / mediation / litigation?

b) How did you learn about this option?

c) Did you consider any other options? (If not: what was the reason?)

d) Can you remember how long after the bank's decision you waited before taking further action?

e) Did you consult anyone, or take any advice from anyone, inside or outside the business before taking further action? (If yes: what was their advice?)

f) Did you in any way warn your bank about your intention to take further action? (If yes: what was the response?)

g) What was the eventual outcome of your dispute with your bank? If FOS/litigation produced an award: do you think the award was fair?

h) Did you take further action? (If yes: repeat Q11)

If stopped complaint after bank's process:

12. What made you stop pursuing your case?

Probe: *did not have time; length of period of process; cost of prosecuting case etc.*
Is there anything else that might have encouraged you to pursue your grievance further?

All respondents:

13. Was there any wider impact on your business as a consequence of the dispute with your bank? *If so, what were the effects?*

Prompts:

(a) negative effects. e.g business performance

(b) positive effects – e.g. being more aware of legal issues

(c) relations with the banks - eg borrowing

Alternative dispute resolution mechanisms for SMEs and banks

To conclude, we are interested in your views on how the existing system of dispute resolution could be modified to help improve access to justice for SMEs.

14. How do you think the current system be improved to help business owners make a complaint about a bank product / service?

Probe: what would be the main features of the disputes system (eg. cost; speed; location)

15. Is there anything you would like to add to help us understand how business owners resolve disputes with their banks?

THANK YOU

Appendix 3.6

Charterhouse Research Results

Bank complaints by type 2011-2018

Table 3.6.1: Types of SMEs' bank complaints 2011-2018 weighted

Type of complaint	2011	2012	2013	2014	2015	2016	2017	2018
Customer Service	14%	12%	16%	18%	20%	20%	20%	21%
Errors /mistakes	25%	23%	24%	19%	22%	19%	21%	20%
Poor service	7%	7%	10%	10%	13%	15%	18%	21%
Online banking	7%	9%	8%	9%	7%	11%	10%	10%
Branch related	7%	5%	6%	9%	9%	9%	11%	11%
Charges	16%	18%	12%	12%	10%	8%	9%	7%
Poor communication	7%	7%	7%	6%	6%	7%	9%	7%
Relationship manager	7%	7%	6%	7%	6%	6%	5%	3%
Money transmission	8%	10%	7%	5%	6%	6%	5%	5%
International service	2%	2%	3%	2%	3%	4%	4%	4%
Fraud	X	1%	2%	2%	2%	4%	4%	4%
Lending	5%	7%	8%	7%	5%	4%	5%	4%
Lack of interest in my business	4%	3%	3%	3%	2%	2%	3%	2%
Merchant services/own cards	2%	4%	2%	1%	1%	1%	1%	1%
Other	9%	8%	9%	11%	8%	10%	9%	9%
Unweighted N	*3,200*	*3,073*	*3,168*	*2,501*	*2,255*	*2,232*	*2,265*	*2,261*
Weighted N	887,556	1,065,351	900,591	813,489	725,719	732,207	792,280	822,187

Source: Charterhouse UK business banking survey 2011 and 2018

Note: SME's turnover up to £25m