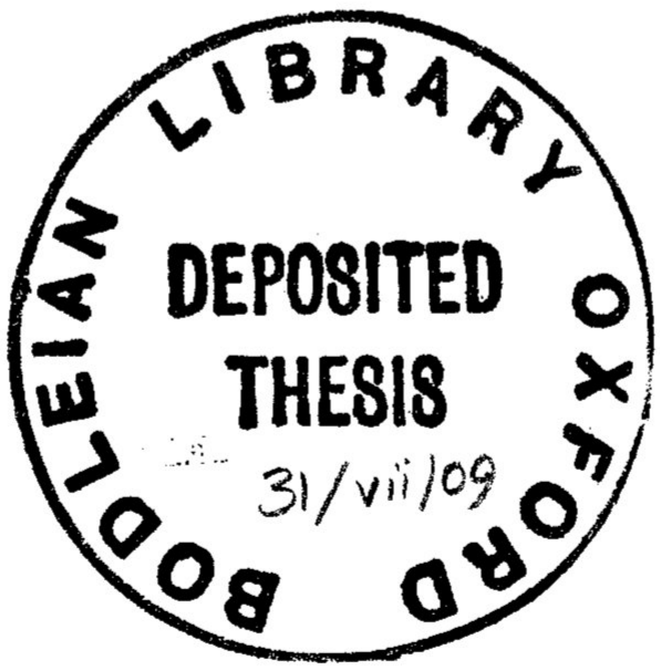
An Intra-Organisational Perspective on the Role of Consumer Complaint Handling in the UK Retail Investment Regulatory Regime (1981-2004)

Sharon Gilad

Nuffield College

A thesis submitted to the University of Oxford in partial fulfillment of the requirements for the Doctor of Philosophy degree

Trinity Term, 2006 [i.e. 2007 - LTS = 29/vii/07]



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ABSTRACT

The thesis examines the determinants of regulatory responsiveness to consumer complaints in the context of third-party complaint handling. In contrast to a rational choice hypothesis, according to which regulatory responsiveness is shaped by external pressures, the thesis hypothesises that the latter are mediated by intra-organisational institutions (ethos and control structures). It further challenges the expectation that regulatory complaint handling functions as an accountability mechanism.

The case of the UK Financial Ombudsman Service (FOS), which handled consumer complaints regarding the retail selling of financial products, and its relationship with the Financial Services Authority (FSA), is employed to assess the above hypotheses. Data collection combined non-participant observation, sampling of complaint files, interviews and archival research. Data analysis combined quantitative and qualitative methods. The findings reveal the hypotheses' strengths and limitations.

The FOS's ethos stressed the individual nature of complaint handling. It embodied a strategic exchange between the Ombudsman and the financial industry, allowing the former broad discretion to respond to consumer grievances but restricted legal scope for its decisions.

In contrast to the hypothesis that ethos shapes responsiveness, the FOS's emphasis upon the individuality of its decisions had limited impact upon complaint handlers' decision making. Yet, the research findings further refute the expectation of 'rational' responsiveness to resistant firms and persistent complainants. Rather, complaint handlers' decisions were shaped by their adherence to internal guidance and, in its absence, by their reliance upon heuristics for firms' and complainants' credibility.

The thesis highlights the FOS's latent function as a pressure-releasing mechanism for some consumers' high expectations for risk mitigation. It depicts the therapeutic nature of complaint handlers' interpersonal communication with complainants, and the FSA's disinclination to perceive FOS decisions as indicative of systemic failures. However, it also demonstrates how this function was undermined by media coverage of FOS decisions and by firms' reputation sensitivity.

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Abbreviations

A	(A)	Interviewee with an adjudicator
	ABI	Association of British Insurers
B	BIOA	British and Irish Ombudsman Association
D	DTI	Department of Trade and Industry
E	(E)	An interview with FOS Executive
F	FIMBRA	Financial Intermediaries and Managers and Brokers Regulatory Authority
	FOS	Financial Ombudsman Service
	FSA	Financial Services Authority
	FSA 1986	Financial Services Act 1986
	FSMA 2000	Financial Services and Markets Act 2000
I	IFA	Independent Financial Adviser
	IOB	Insurance Ombudsman Bureau
L	LAUTRO	Life Assurance and Unit Trust Regulatory Organisation
M	(M)	Interview with a team or assistant team manager
O	(O)	Interview with an ombudsman
	OFT	Office of Fair Trading
P	PIA	Personal Investment Authority
	PIAOB	Personal Investment Authority Ombudsman Bureau
S	(S)	Interview with a FOS support unit member
	SIB	Securities and Investment Board

	Split Caps	**Split Capital Investment Trust**
	SRO	**Self Regulatory Organisation**
T	**(T)**	**Interview with a non-FOS participant**

Overview

Despite the prevalence of third-party complaint handling institutions, operating as part of regulatory agencies and beside them, there has been no explicit attempt in regulatory theory to assess their responsiveness to consumers and their role within regulatory regimes. This thesis contributes to filling this gap.

The study of regulatory responsiveness in the context of third-party complaint handling intersects two broad literatures. One is the literature that analyses the determinants of regulatory responsiveness to concentrated vs. diffused interests, which to date has focused upon regulatory policymaking and enforcement. The second is the literature regarding third-party complaint handling schemes, which has largely investigated the handling of citizen complaints in the public sector. Uniting the focuses on complaint handling and regulation, the following chapters explore two major questions, merging micro- and macro-level perspectives: (a) What are the determinants of complaint handlers' responsiveness to consumer complaints, and (b) What is the role of third-party complaint handling in regulatory regimes?

With regard to the first question, the thesis challenges the emphasis of current rational choice theory upon contextual factors as the direct determinants of individual-level regulatory responsiveness. It explores the extent to which responsiveness to external demands is mediated by intra-organisational institutions. That is, by organisation members' core beliefs regarding their role, as well as organisations' structure and systems of control.

Regarding the second question, the thesis contests the common representation of third-party complaint handling in current literature as a means for voice and accountability. It argues that responsiveness to the complaints of resolute individuals outside the public sphere may serve to mitigate regulatory responsiveness to consumers at large. However, the thesis further reveals the limitations of this argument.

The empirical object of enquiry of this thesis is the Financial Ombudsman Service (FOS) and its predecessors. This British statutory organisation was established in 1999 with the merger of five former self-regulatory schemes, the first of which was established in 1981. It handled consumer complaints with regard to the retail financial industry. The FOS operated alongside the Financial Services Authority (FSA) which regulated the financial services industry. Between 1999 and 2004 the FOS's yearly caseload dramatically increased from 25,000 complaints to over 100,000. During this period, media coverage of the retail investment industry, of the FSA's operation and of the FOS's decision making were all intense. Investors' returns on retail financial products were poor due to the stock market's decline from September 2001 to the end of 2003. The thesis investigates how the FOS responded to consumer complaints regarding retail investment products amidst this turbulent environment.

The research included a one year non-participant observation at the FOS, random sample of over 140 complaint files of two complaint handling teams, collection of internal documents, archival research and interviews with complaint handlers and with participants outside the FOS. Data analysis combined qualitative and quantitative methodologies.

The chapters that follow are grouped according to their analytical aims as follows:

Part I (chapters one and two) lays down the study's theoretical framework and research design and the background to the retail investment regulatory regime.

Chapter one draws upon Jerry Mashaw's (1983) administrative justice models to delineate four ideal-type third-party complaint handling institutions in regulatory regimes. These ideal types assume coherence between complaint handlers' micro-level responsiveness to consumer complaints, the complaint handling agency's internal structure and its macro-role within the regulatory regime. The typology distinguishes between bureaucratic, professional, fairness and therapeutic complaint handling configurations. While the first three models presume that complaint handling acts as a means for calling firms to account for their actions, the fourth model suggests that it may serve to contain consumer dissatisfaction and pressure for systemic change outside the public sphere. The chapter further outlines the research design and methodology.

Chapter two maps the historical development of the retail investment sector and its regulation. It shows how the sector has become prone to generate recurrent scandals since the 1990s. It further demonstrates that in contrast with the expectations of current literature, scandals did not result in prescriptive and consumer-responsive regulatory discourse. Rather, the FSA's regulatory discourse emphasised restrained risk-based regulation, consumer responsibility and a meta-regulatory technique that relied upon firms' self-regulation. The chapter concludes with the hypothesis that the

FOS supported the viability of the FSA's risk-based regulation by satisfying consumers with high demands for regulatory protection on an individualised basis.

Part II (chapters three to five) analyses the evolution of the FOS's intra-organisational institutions; i.e. its 'interpretative scheme', structure and controls.

Chapter three aims to familiarise the reader with the FOS and to analyse change over time to the FOS's and its predecessors' intra-organisational structure and processes. It shows how the financial ombudsman's configuration was transformed between 1984 and 2004 as a result of change to its recruitment base from the legal profession to the retail financial industry.

Chapter four proceeds to analyse the FOS's delineation of its role, or what I term its 'domain perception'. It shows how complaint handlers came to perceive and articulate their role in terms of individual, informal and confidential dispute resolution. I propose that the ombudsman's articulation of its domain embodied an implicit exchange with the financial industry on behalf of consumers. This was intended to enable the ombudsman wide discretion to satisfy the demand of individual complainants, while having no coercive impact upon firms' handling of similar complaints and transactions. I further show how the ombudsman's demarcation of its domain aimed to differentiate its role from that of the civil courts and the FSA.

Chapter five analyses the development of the ombudsman's heterogeneous goals and control system. I show how the ombudsman's increasing caseload and its reliance upon case fee income led its executives to introduce a performance management

scheme that set targets for complaint handlers' disposal of complaints and remunerated them for performance above these targets. I propose that the introduction of this performance management scheme was facilitated by the aforementioned change in the ombudsman's recruitment base (from the legal profession to the retail financial industry) given the prevalence of this form of control within the industry. I further demonstrate how, as a result of internal and external criticism, quantitative performance management was countered by quality assurance of complaint handlers' decision making. Finally, I describe and trace the motivation for the FOS's attempts to satisfy and manage consumer satisfaction with its complaint handling. The analysis links complaint handlers' concern with consumer satisfaction to their belief that consumer expectations for redress were unrealistic due to their fuelling by the media, by firms' aggressive marketing and possibly by a general 'compensation culture'.

Part III (chapters six to eight) analyses the shaping of complaint handlers' decision making and of their interaction with other actors in the regulatory regime (complainants, firms and the FSA).

Chapter six analyses the effect of the FOS's heterogeneous control system, as described in chapter five, upon complaint handlers' decisions in individual complaints. Building upon rational choice utility theory, I delineate the expected effect of the case closure target system upon complaint handlers' responsiveness to consumer complaints. The rational choice utility model suggests that in order to maximise their target achievement complaint handlers were likely to be most responsive to those firms and complainants that were least likely to accept adverse decisions. In contrast to these expectations, quantitative analysis of complaint files

suggests that complaint handlers' responsiveness was shaped by their strict adherence to internal guidance and their reliance upon heuristics for firms' and complainants' credibility. The hypothesis of rational strategic responsiveness to resistant firms and persistent complainants is largely rejected.

Chapter seven analyses the strategies which complaint handlers employed in their interpersonal interaction with complainants. I suggest that this interaction took the form of a *therapeutic* model of complaint handling. That is, a process that was focused upon the management of consumer expectations and appeasement of their frustration with their investments, with their interaction with firms and with the complaint handling process. The chapter describes complaint handlers' attempts to humanise the complaint handling process and their skilful use of rhetoric to achieve consumer satisfaction and trust even when rejecting complaints. I argue that complaint handlers' work was a form of 'emotional labour' (a term which I borrow from Hochschild (1983)), whereby they absorbed consumers' anger, disappointment and guilt regarding financial loss, while suppressing their own emotions.

Chapter eight seeks to explain the FOS's adversarial relationship with some large retail investment firms against the counter-expectations of rational choice cooperation theory. Analysis of complaint files shows that firms were frequently unwilling to engage in informal settlement of complaints and that this strained the ombudsman's resources. Firms were especially resistant when a complaint was part of a larger set of cases. This required the FOS to investigate and to issue formal decisions on a case-by-case basis in analogous complaints. The data suggests that the FOS's adversarial relationship with these firms was primarily caused by the unpredictability of the

environment within which these interactions took place. While the FOS articulated its role in terms of individual and confidential dispute resolution, it had limited control over other actors' usage of its decisions. Firms were concerned that their agreement to redress individual complainants would be interpreted by the FSA as admitting a larger systemic problem and that it would thereby result in large-scale compensation beyond the cases that reached the FOS. Equally, firms faced the risk that individual FOS decisions would be picked up and 'enforced' upon them by the media as *de facto* precedents. Moreover, I suggest that the FOS's failure to attain firms' cooperation was related to internal factors that inhibited its 'rational' strategic action in search of firms' cooperation. Finally, I demonstrate that while the FOS used the threat of reporting systematic failures to the FSA as its ultimate tool to induce firms' cooperation, the FSA was often disinclined to act upon information received from the FOS due to the regulator's concern with the adverse implications of wide-scale compensation for firms' financial stability. The chapter further discusses the consequences of the FOS's interaction with firms, the FSA and the media for the ombudsman's role in the retail investment regulatory regime.

Thereafter, *chapter nine* pulls together the findings of the previous chapters in light of the theoretical framework and questions as set in chapter one. It shows how the ombudsman's configuration shifted from a hybrid of the *fairness* and *professional* complaint handling models towards a hybrid of the *bureaucratic* and *therapeutic* models. It assesses the implications of this shift for the determinants of complaint handlers' responsiveness to complaints and for the role of the ombudsman in the retail investment regulatory regime. I assess what generalisations can be made from the findings and suggest directions for future research.

Part I

Theory, methodology & empirical background

Chapter 1: Ideal-type consumer complaint handling in regulatory regimes

Introduction – complaint handling in regulatory regimes

This is a thesis about regulatory responsiveness to consumer complaints in the context of third-party complaint handling.[1] It explores the determinants of complaint handlers' micro-level responsiveness to consumer complaints and the role of third-party complaint handling in regulation. The key hypothesis, which is elaborated below, is that complaint handlers' micro-level responsiveness is shaped by variance in complaint handling agencies' intra-organisational institutions. It is further hypothesised that coherence exists between complaint handling agencies' internal configuration and their macro role in regulatory regimes.[2] These hypotheses are contrasted with a rational-contextual perspective, according to which complaint handlers' responsiveness and the role of complaint handling are shaped by extra-organisational pressures.

The prevalent representation of complaint handling and ombudsmen schemes in political science and socio-legal literature is that these are instruments for citizen-consumer voice and accountability (Ansel & Gingrich, 2003; Hirschman, 1970, 1982; Mulgan, 2000a, 2003; Scott, 2000; Stirton & Lodge, 2001; but see: Nader, 1980). The complaint handling process is envisaged in this literature in terms of an *account model* (Lloyd-Bostock and Mulcahy, 1994), wherein complainants call organisations to account for their actions. However, this literature has little to say about the

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[1] The discussion below does not aim to cover the scholarship regarding firms' and public bodies' handling of complaints against themselves.

[2] The concept of 'regulatory regimes' was introduced as a focus for regulatory research by Hood *et al.*, 2001. It has been conceptualised as the variety of institutions that "attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information gathering, and behaviour modification" (Black, 2003, p. 65).

responsiveness of regulators to consumer complaints. Despite the prevalence of third-party complaint handling schemes as part of regulatory agencies and beside them, there has been no explicit attempt in regulatory theory to assess their responsiveness to consumers and their role within regulatory regimes.

This thesis contributes to filling the above gap. It seeks to disentangle and challenge current uniform labels, suggesting variance in complaint handling agencies' internal configuration. This internal variance is expected to shape complaint handlers' micro-level responsiveness to complaints and to reflect these agencies' diverse roles in regulatory regimes.

Below I draw upon Jerry Mashaw's (1983) typology of administrative justice models, and upon my inductive experience in researching the FOS, to develop a typology of four ideal-type, third-party complaint handling institutions in regulatory regimes. Mashaw's three administrative justice models, as applied here, all adhere to the account model of complaint handling in different manners. In contrast, the proposed fourth *therapeutic* ideal type suggests that third-party complaint handling effectively functions as a *cooling- off* or pressure-releasing mechanism. The macro impact of therapeutic complaint handling, whether intended or unintended, is the containment of consumer dissatisfaction outside the public sphere.

A. **Regulatory responsiveness: an institutional perspective**

Responsiveness, in this thesis, denotes the extent to which complaint handlers satisfy explicit consumer demands for redress. The analysis of this concept may be linked to

the broader literature regarding regulatory responsiveness, which seeks to explain how regulators balance the interests of consumers and firms.

Rational choice analyses of regulatory responsiveness to consumers and firms suggest that this is primarily shaped by extra-organisational factors. These contextual factors include: the alternation of political control (e.g. Moe, 1985; Olson, 1995; Shipan, 2004; Wood & Waterman, 1991; but see: Carpenter, 2004), the concentration of interests in the agency's environment (e.g. Bernstein, 1955; Pelzman, 1976; Stigler, 1971; Wilson, 1980, 1989) and the role of public and media opinion (e.g. Carpenter, 2002; Hood *et al.*, 2001).[3] The behaviour-shaping mechanism that is presumed by this literature is organisations' and/or individuals' rational, elastic, responsiveness to external demands in search of cooperation and mitigation of conflict with other actors in the regulatory sphere.[4] Similarly, an effectively rational choice approach to public administration suggests that bureaucrats' responsiveness is shaped by 'situational imperatives' (Wilson, 1989, Ch. 3) and by low-level employees' attempts to mitigate their workload and tension with clients (Lipsky, 1980). The intra-organisational variance – i.e. organisations' ideology, internal structure and dynamics – which mediates the transformation of external demands to outputs is implicitly treated in these analyses as one source of unexplained residual variance in the dependent

---

[3] In concert with the emphasis upon external factors, in this literature regulatory responsiveness is typically measured in terms of change over time in agencies' aggregate outputs (e.g.: formal enforcement, authorisation of drugs, the average time to authorisation).

[4] Another set of political science literature refers to the role of post-failure regulatory reform in rendering regulators responsive to consumers (e.g. Baradach & Kagan, 2002; Vogel, 1986, 2003; Wilson, 1980, 1989). This literature differs from the above since it does not assume agencies' flexible responsiveness to external demands. Rather, this institutional perspective suggests that regulatory reforms result in long-term transformation of agencies' dispositions.

variable. Hence, the effect of intra-organisational variance upon regulatory responsiveness remains a black box.[5]

In contrast, institutional organisational sociology (e.g. Laughlin, 1991; Greenwood & Hinings, 1988) emphasises that organisations performing similar tasks may nevertheless hold diverse interpretative schemes (i.e. core beliefs regarding appropriate domain of operations, about organising and evaluation criteria) and structures, which mediate their response to external demands. Institutionalists further propose that the members of organisations aim for coherence between their interpretative scheme, organisational structure, mechanisms of internal control and operation.[6] Therefore, institutionalists would expect members of organisations to resist external demands that are incongruent with their interpretive scheme, organisational structure and controls. The analysis in this thesis adopts an institutional perspective and contrasts it with the contextual rational-choice perspective. It analyses how intra-organisational institutional factors (i.e. interpretative scheme and structure) and dynamics shape street-level complaint handlers' responsiveness to firms and complainants.

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[5] Hood *et al.* 2001, while focusing upon the effect of external factors, are explicit about the extent to which some of their findings are better explained by reference to specific intra-organisational variance.
[6] This institutional approach contrasts with more recent New Institutional emphasis upon isomorphism, which suggests uniformity of structures across organisations in search of external legitimacy, and possible decoupling of organisations' formal structure and actual operation (e.g. Powell & DiMaggio, 1991).

Figure 1.1: Organisations as institutional bundles
(adapted with modifications from Laughlin, 1991, p. 211)

Intangible ↓ **Tangible**	**Organisational levels**
	Interpretative scheme; i.e. widely-shared beliefs regarding an organisation's *domain* (which activities are appropriate and inappropriate for it to engage in); *principles of organising* and *evaluation criteria* for assessment of success and failure.
	Structure; i.e. division of labour, recruitment base and mechanisms of internal control.
	Individual strategies and decision outputs

In addition, going beyond analysis of street-level responsiveness, the thesis explores the macro role of third-party complaint handling in regulatory regimes. As a starting point, the thesis anticipates coherence between the complaint handling agency's interpretative scheme and its role in the regulatory regime. This anticipation is based on an assumption that organisations' interpretative schemes reflect their accepted role within their environment.[7]

Moreover, employing an intra-organisational perspective does not justify ignoring the possible role of extra-organisational factors. Rather, the thesis analyses the interaction of contextual and internal factors in shaping complaint handlers' responsiveness and the complaint handling agency's macro role. It explores both the hypothesis of rational response to contextual factors and the institutional mediation of such response. Consequently, some of the following chapters explicitly set out from a

[7] The reader could argue that this claim is inconsistent with my proposal above that micro-level responsiveness is likely to be shaped by intra-organisational institutions. Yet, the hypothesis that *individual* level responsiveness is internally shaped does not entail rejecting the influence of contextual factors upon organisations' delineation of their goals.

rational-contextual hypothesis and thereafter use the empirical data to show the shortcomings of this approach.

Accordingly, the thesis seeks to ascertain the interaction of intra- and extra-organisational factors in shaping three levels of responsiveness: (a) macro: the role of third-party complaint handling in regulatory regimes; (b) meso: the evolution of institutional structures within complaint handling agencies; and (c) micro: the shaping of complaint handlers' decisions and interaction with consumers and firms. This chapter delineates how intra-organisational institutional variance is *expected* to shape complaint handlers' micro-level responsiveness and the role of third-party complaint handling in regulatory regimes.

B. **Varieties of complaint handling and responsiveness configurations**

In light of the intra-organisational variance hypothesis, this chapter develops four ideal type configurations of third-party complaint handling institutions in regulatory regimes, with congruent intra-organisational structures and micro-mechanisms of responsiveness to consumer complaints. The delineation of alternative complaint handling configurations, as summarised in Table 1.1 below, draws upon Jerry Mashaw's (1983) typology of administrative justice models. Mashaw's typology offers a natural starting point since it was developed in the context of bureaucratic adjudication of claims, which makes it germane to regulatory complaint handling. Mashaw distinguishes three logics of administrative adjudication: bureaucratic, professional and moral judgment. To these I add a fourth model of 'therapeutic complaint handling', wherein adjudication aims at attaining compromise and consumer satisfaction. As the next chapters will show, the elaboration of these models

further builds upon what I have inductively learnt while empirically studying the FOS. The four ideal-type configurations are summarised in Table 1.1 and elaborated in sections 1 to 4 below.

Table 1.1 Four ideal-type complaint handling models[8]

Models	Bureaucratic	Professional	Fairness	Therapy
Macro role & interpretative scheme	Enforcement	Raising standards	Attribution of blame	Consumer satisfaction
Organisational structure	Machine bureaucracy	Professional bureaucracy	Independent referee	Procedural bureaucracy
Budget sources	Taxation	Membership fees	Litigation costs	User fees
Micro-mechanisms of responsiveness	Rule following	Professional knowledge & ethos	Moral judgment	Communication & evaluation of persistence

The expectations regarding organisational structures, which are linked to the alternative models of complaint handling, build on taxonomies in contingency theory and public administration (e.g. Mintzberg, 1983; Wilson, 1989, Ch. 9). These taxonomies were developed in response to the Weberian ideal-type bureaucracy, stressing the actual variety of bureaucracies' structures.

I further draw on scholarship regarding bureaucracies' interface with the public (e.g. Blau, 1963; Brown, 1988; Goodsell, 1981; Katz & Danet, 1973), and inspectorates' interaction with regulated firms (e.g. Hawkins, 1984, 2002; Hutter, 1997, Lloyd-Bostock, 1992), to illustrate the distinct micro-mechanisms of responsiveness that are expected to dominate each ideal-type complaint handling model. The scholarship regarding bureaucratic encounters with the public, especially with regard to citizen initiated contacts, is of relevance to complaint handling given the commonality

[8] For comparison see Mashaw's (1983) table summary of his typology of administrative justice models (*ibid,* p. 31).

between bureaucrats' and complaint handlers' direct contact with the public. Ethnographies of inspectorates are of relevance because complaint handling, like regulation, entails balancing the interests of firms and consumers. However, since these examples are drawn from studies of service delivery agencies and inspectorates, rather than complaint handling organisations, they are intended only as analogies to what responsiveness under each model might look like.

To elucidate the four alternative models I open the discussion of each ideal type with a hypothetical example of a third-party complaint handling body dealing with complaints regarding the selling of retail investment products. While hypothetical, the examples borrow from facets of the UK retail investment regulatory regime and debates regarding its reform. In all four examples, retail investment firms, via their client-facing financial advisers, market investment products to the public. These products embody different levels of risk, depending primarily on the degree of investment diversification. Consumers, who have suffered financial loss as a result of investment, are entitled to file a complaint with the complaint handling agency. Complaints are handled by the complaint handling agency's adjudicators. It is further assumed that the complaint handling agency operates alongside a regulatory bureaucracy, which sets regulations and supervises firms' sales of investment products to the public.

It should be stressed that the ideal types are theoretical constructs. In some cases the analytical linkage between the different components of each ideal type may seem stronger and more convincing than in others. Additionally, my discussion below already goes beyond the ideal types to analyse the expected pathologies and

unintended consequences of these models. The conclusion of this chapter further clarifies how the ideal types, as delineated below, will add value to the empirical analysis in the following chapters.

1. Ideal type I: Bureaucratic regulation

The bureaucratic ideal type displays the following configuration: (a) Complaint handling is integral to regulation, contributing to rule enforcement; (b) The complaint handling body is structured as a state-funded machine bureaucracy; (c) Complaint handlers' responsiveness to consumers and firms is shaped by formal rules.

> **Hypothetical example**: Imagine a system wherein regulators make explicit rules regarding firms' risk rating of their investment products and firms are required to risk-rate their products accordingly. Assume further that advisers are required to assess the risk profile of their prospective clients according to detailed regulatory prescriptions, and thereby to offer them investment products from within the range that is adequate to this profile. Accordingly, handling consumer complaints involves adjudicators' assessment of firms' adherence to regulatory prescriptions regarding product risk rating and sales practices. Complaints statistics are analysed to discern trends in firms' sales to inform regulatory supervision. Complaints league tables are publicised to allow consumers to benchmark firms' performance so as to exert bottom-up enforcement pressure. Prominent cases wherein firms were required to pay large sums of redress are given wide publicity as a means of deterrence.

Role of complaint handling: In this ideal-type model complaint handling is integral to regulation, and the complaint handling body closely collaborates with the regulator in enforcing regulations upon firms.

The handling of complaints involves the application of general regulations to individual cases. Regulators encourage consumer complaints as a source of intelligence regarding firms' adherence to standards. (For example, Hutter's (1997) study of environmental health officers showed their reliance upon citizen complaints as a source of intelligence.) Complaint handlers assemble and report information from complaints to the regulator.

Moreover, complaint handlers can generate bottom-up consumer pressure on firms to improve their services by publicising comparative information regarding the number and ratio of complaints which they uphold per firm. For example, the UK Local Government Ombudsman provides the public with comparative statistics regarding the total number of complaints per local authority and the number of complaints which were upheld by either the ombudsman or the authority itself. As Yeung (2005) observes, communicating comparative information to the public differs from individual *naming and shaming*, as it primarily aims to generate financial incentives for organisations to improve their services, rather than to damage their reputation.[9]

Structure and process*:* A bureaucratic complaint handling system entails a Weberian 'machine' structure. That is, an organisation wherein decision making is homogenised through detailed formal rules and routines (Mintzberg, 1983). It further requires

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[9] Yeung (2005) further provides evidence that questions the actual effectiveness of regulatory information provision to the public.

vertical integration, or close organisational ties, between the complaint handling body and the regulator's policymaking and supervision units. The ideal bureaucratic complaint handling agency is financed through general taxation, thereby increasing its autonomy from both firms and consumers.

Micro mechanisms of responsiveness: Complaint handlers' responsiveness to consumer complaints in the bureaucratic model is shaped by formal rules and routines. These are centrally determined at the apex of the organisation or the regulatory regime. While individual responsiveness is determined via rules, rather than *ad hoc* responsiveness to external demands, this model is not entirely incompatible with the rational-contextual hypothesis. As elaborated below, under certain conditions the rules and routines, which complaint handlers apply, institutionalise the organisation's exchange with (and defensive response to) politicians, external groups and major shifts in media and public opinion.

Mashaw's (1983) study of the US Social Security Administration (SSA) handling of disability claims exemplifies the working of a rule-bound adjudication system. Counter to the contention that street-level bureaucratic discretion cannot be eliminated (e.g. Lipsky, 1980), Mashaw suggests that the SSA's executives succeeded in developing comprehensive criteria for what was to be considered a 'disability' and rigorous quality assurance controls over adjudicators' decisions. In order to render decision making (and its review) more manageable, the SSA tended to rely upon medical documentation and document-based in-house vocational assessment, rather than claimants' testimony and external physicians' opinion. This practice reduced adjudicators' contact with claimants and external consultants, resulting in limited

client influence over their decisions. In addition to rules, adjudicators' responsiveness was shaped by the balance which they struck between accuracy (quality) and case closure (quantity). Hence, it would be going too far to claim that rules alone shaped adjudicators' responsiveness. However, by and large, the SSA achieved consistent decision making, which was unresponsive to *ad hoc* demands. Indeed, a less positive evaluation would suggest that the SSA underwent a process of 'goal displacement' (Merton, 1952), whereby the assessment of disability was substituted by easily verifiable, but loosely connected, categories in order to make the system more manageable. Mashaw himself makes a similar point (*ibid*, Ch. 8).

In the context of regulation, Black (2005) describes the Financial Services Authority's (FSA) attempt to standardise and rationalise the uncertain task of assessing the risk that individual firms and financial activities posed to its regulatory objectives in order to prioritise its regulatory tasks. Black notes that the FSA's risk-based regulation "seems to emphasise homogeneity and commensurability…certainty and knowability…designed to be a system of systematisation and enhanced rationalisation of the regulatory process …it suggests that the notoriously complex task of regulating can be made manageable and that the contingencies of unpredictable events can be made controllable" (*ibid*, p. 540). She further warns about the expected displacement of goals, suggesting that strict adherence to the mitigation of predicted risks is likely to render regulators blind to actual unpredicted risks (*ibid,* p. 543).

In contrast with individual employees' bounded techno-rationality, Mashaw stresses that the SSA, as a collective, was responsive to external political control. Mashaw links the SSA's increasing internal standardisation to congressional demands that the

agency restricts the expenditure of disability awards. He further claims that standardisation rendered the SSA's policy more transparent, which was conducive to political scrutiny and continual dialogue between the agency and its overseeing congressional committee. Thus, while individual bureaucrats' decision making was rule-bound, organisational rules and routines embodied the agency's responsiveness to political control.

Similarly, Black's 'archaeology' of the FSA's risk-based regulation suggests that its standardisation was driven by dual defensive pressures of low-ranking officials vis-à-vis their management, and of its executives in relation to politicians, firms and the public. Regarding the former, FSA officials were assured that if they followed the risk-based framework they would not be criticised in the event of regulatory failure. From the perspective of the FSA executives, a standardised risk-based approach allowed them to justify the organisation's actions and inactions in the face of politicians and the public's high expectations and demand from regulation. Thus, standardisation was both a buffer against political intervention and a blame avoidance strategy wherein adherence to a consistent and transparent set of risk mitigation procedures, rather than eradication of risk, was the regulator's claim to competence and legitimacy. Indeed Black's (2005, 2006) research of the development of risk-based regulation frameworks by the FSA and the Australian Prudential Regulatory Authority (APRA) suggests that both were initiated after the regulators attracted blame for their late detection of major regulatory failures.[10]

[10] Barings bank in the case of the FSA's predecessor prudential regulator, and HIH with regard to APRA.

To conclude: The proposed bureaucratic model is distinctive in its integration of complaint handling and regulation. Complaint handlers apply regulatory rules and complaints are utilised for the generation of regulatory intelligence. The above literature suggests that a state-funded machine bureaucratic structure mitigates street-level responsiveness to *individual* demands. Black shows how standardisation embodies a strategy, which aims to buffer the organisation from its political environment while maintaining external support and legitimacy. Mashaw, in contrast, proposes that a bureaucratic structure facilitates executive-led collective responsiveness to political control. Taken together, what these studies seem to suggest is that the rules, which state-funded machine bureaucracies apply, institutionalise external demands inasmuch as these cannot be otherwise contained. Both Mashaw and Black's analyses contrast with Merton (1952), Gouldner (1955) and Crozier's (1963) analyses, which would predict increasing standardisation to render bureaucracies rigid and unmanageable. However, Black, in comparison to Mashaw, is more sensitive to the likelihood of goal displacement as a result of the standardisation of complex tasks.

2. Ideal type II: Professional self-regulation

Complaint handling in a professional self-regulatory regime exhibits the following ideal type configuration: (a) Consumer complaints and complaint handling are means for peer coaching and learning, rather than for punishment and rule enforcement; (b) Complaint handlers are recruited from within the industry. The complaint handling body is structured as a professional bureaucracy and typically financed through firms' membership fees; (c) Complaint handlers' responsiveness to complainants and firms is shaped by universal disciplinary knowledge and a client-serving ethos.

Hypothetical example: In this ideal type model the sale of retail investment products is regulated by professional norms, according to which financial advisers tailor investments to the special needs of their clients. Complaint handlers are drawn from within the retail investment advice sector on the assumption that only professionals can judge the adequacy of other professionals' judgment. Their decisions assess the extent to which the sales of retail investment products adhere to accepted professional norms regarding the suitability of financial products for clients' needs. Firms disseminate complaint handlers' decisions to their financial advisers and draw upon these decisions in their internal training. Complaint handlers publish anonymous cases in professional bulletins, which they perceive as setting important principles of best practice. They further provide firms, but not the public, with comparative statistics regarding their performance in comparison to other firms. Complaint handlers distinguish firms' illegal actions from those that are legal, but incompetent. They do not pass information from complaints to the regulator, unless they perceive a firm's action to be strictly illegal.

The role of complaint handling: The philosophy underlying professionalism maintains that the tasks of certain occupations are too complex to be standardised, and that their performance requires judgment and the application of abstract specialised knowledge. Also inherent in this ideology are the notions of professional autonomy and professionals' devotion to the service and needs of their clients (e.g. Freidson, 2001; Mintzberg, 1983).

The assumption of this model is that the complaint handling body and the industry share common professional knowledge and client-serving values. Complaint handlers' decisions are a source of learning and improvement for the industry. They delineate principles of best practice that the industry is expected to learn from and apply to similar complaints and future commercial activity. Complaint handlers' transformative capacity is rooted in their authority (i.e. the consent and legitimacy which others confer upon them) rather than in legal powers.[11] The prevalent limitation on public sector ombudsmen's power in the UK, according to which they may recommend but not command the government to change an administrative decision or procedure, is compatible with this professional-educational model. Complaint handlers may nevertheless perceive certain egregious behaviour as criminal and therefore requiring punishment rather than mere education. However, handling of the latter will be perceived in this system as incidental to the complaint handling agency's core educational task.

While implicit, the notion of professional self-regulation is a common justification for ombudsman institutions in public law studies. In accordance with this model, studies of the UK public sector ombudsmen, while emphasising the ombudsman's role in dispute resolution,[12] suggest that ombudsmen further perform a broader role in rectifying systemic problems and raising service standards (Birkinshaw, 1995; Harlow & Rawlings, 1997; Mulchay & Tritter, 1996; Seneviratne, 2002). For instance, Seneviratne (2002) asserts that:

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[11] For analysis of 'authority' as a resource for regulatory capacity see Black (2003) p. 75.
[12] This notion of 'dispute resolution' is compatible with the 'fairness' model as delineated below.

"Complaints can be used to provide *feedback* to public bodies about their performance…in the way complaints are dealt with internally…It can also relate to improvements in other procedures and practices where complaints reveal failures in the system. Ombudsmen thus perform a quality control function and provide general oversight of the administration…assist in *raising standards* in public services, and thus improve the position of citizens in general" (*ibid,* p. 310) (my emphases).

Dunleavy and colleagues, in a research procured by the National Audit Office, *Citizen redress: what citizens can do when things go wrong with public services* (2005), likewise maintain:

"Citizen redress procedures have an importance for the overall quality of public services...Complaints are an important source of feedback to central departments and agencies about where things are perceived by citizens as going wrong…they are a significant source of information on possible improvements in organizational arrangements" (*Ibid*, p. 8).

Similarly, Hill's (2002) analysis of the Hawaii state ombudsman asserts that the ombudsman's ability to attain government departments' cooperation is based on its appeal to shared bureaucratic and professional values (*ibid,* p. 36).

Structure and process: Professional self-regulation calls for peer judgment of regulatees' application of abstract professional norms to individual cases. Consequently, a system of professional self-regulation entails a complaint handling

agency, which embodies a professional bureaucratic structure (Mintzberg, 1983). That is, a system in which decision making is decentralised and non-standardised. Complaint handlers are drawn from within the regulated industry. They have similar formal educational background and they are coached on the job by their peers. While not essential, in a coherent configuration, the professional self-regulator is financed by the industry through a general membership levy. All firms equally participate in financing the complaint handling agency, irrespective of the number of complaints that they each generate, since the agency provides them with a service of raising industry standards.

Micro mechanisms of responsiveness: In the ideal professional model, individuals' responsiveness is shaped by professional knowledge and ethos. Going beyond the classic professions, Kaufman's (1960) ethnography of forest rangers in the US demonstrated the role of training, informal communication, peer control and service ethos as alternatives to formal standardisation of tasks. Similarly, Heclo and Wildavasky's (1974) study of the British Treasury demonstrates the role of informal norms in guiding Treasury officials' interaction with spending departments. Uniform education, training and ethos render professional responsiveness consistent, and in this sense similar to the machine bureaucratic model. Moe (1995) makes the point that professionalism makes the decision making of bureaucrats highly predictable: "If individuals are known to be accountants or securities lawyers or highway engineers…they will have specialized educational, training and occupational experiences. They will apply theories, analyze issues, collect data, and propose solutions in characteristic ways. They will hew to the norms and standards of their professional communities...the behavior of these experts is highly predictable" (*ibid*,

p. 134). However, in contrast with the bureaucratic model, a decentralised professional bureaucracy is less amenable to executive-led adaptation to external demands. Thereby, according to Moe, by choosing which type of professionals would be recruited to an agency, politicians and interest groups exert ex-ante control, while relinquishing ex-post control.

Blau's (1963) study of a job placement agency portrays both how professionalism may be undermined and how it can shape bureaucratic responsiveness to clients. His analysis shows how the introduction of quantitative assessment of job interviewers' work had the effect of rendering them competitive in their interaction with one another and simultaneously less responsive to those clients who did not match their individual production needs (e.g. clients who needed more consultation). This further resulted in augmentation of their conflicts with clients and subsequent anti-client orientation. However, Blau also demonstrated how in one department job security and professional norms, which dictated preference to client service over productivity, resulted in group resistance to competition.

Studies of decentralised professional bureaucracies have further demonstrated the likely emergence of local habituated decision rules, which guide professional judgement in recurring decisions (Emerson, 1983; Hawkins, 1992; Lloyd-Bostock, 1992). Lloyd-Bostock has shown how factory inspectors' discretion over whether to investigate an accident was shaped by the resemblance of events to the characteristics of 'typical accidents'. In interviews inspectors asserted that there was "pressure …on the agency …to display that something is being done about industrial accidents and disasters" (*ibid,* p. 60) and that their decisions to investigate were motivated by both

"enforcement of safety regulations, together with [the aim of] displaying a response to serious accidents" (*ibid,* p. 61). Lloyd-Bostock explains the *automatism* of inspectors' decisions as stemming from efficiency considerations as a consequence of the agency's limited resources and the political pressure to show results.

In summary, the following are the expected implications of an ideal-type professional regime to complaint handling. Consumer complaints instigate professional learning and complaint handling aims to improve services for clients at large. Complaint handlers' responsiveness is guided by disciplinary knowledge and a client-serving ethos. This model further suggests that professionalism, and a professional bureaucratic structure, renders complaint handling resistant to external demands, which are incompatible with professional norms. However, empirical analyses of both inspectorates and client-serving bureaucracies challenge the validity of the professional model. First, as explained above, studies of inspectorates found that 'professional' decision making tends towards habituated response to similar events. Additionally, as elaborated in the following section, the consistent finding of ethnographic research of decentralised bureaucracies reveals the key role of moral judgment, heuristics and prejudices, rather than detached professionalism, as the determinant of bureaucrats' interaction with clients.

3. Ideal type III: Fairness

The fairness ideal type manifests the following composition: (a) The complaint handling process is focused upon the attribution of blame in individual instances in light of their overall circumstances. It is adversarial, rather than educational; (b) In common with the professional model, complaint handling is decentralised. Yet

decision makers are independent referees, who are deliberately recruited from outside the industry, rather than members of a cohesive professional group; (c) Complaint handlers' responsiveness to complainants and firms is shaped by imprecise norms of fairness and moral labelling rather than by a specialised body of professional knowledge.[13]

Hypothetical example: Firms' marketing of retail investment products is constrained by norms of fairness and adequate disclosure. Adjudicators assess whether a consumer's claim for redress of financial loss is fair and reasonable in the specific circumstances of the case. Complainants are compensated if they can convince the adjudicator that in their individual case it would be unfair to allow the firm to stick to the stipulations of the contract. This might be because they were intentionally misled or pressurised into buying the product, or because their situation has substantially changed since making the investment. Similarly, complaints are rejected if consumers claim a contractual right, which the adjudicator perceives as unreasonable given an unexpected change in the firm's circumstances. Firms are *named and shamed* in the public domain if a complaint is decided against them. Equally, complaint handlers condemn consumers' vexatious complaints when they find these to be greedy or unreliable.

The role of complaint handling: The aim of the complaint handling process in the fairness model is to ascertain personal culpability and worthiness for remedy in individual instances. This contrasts with the bureaucratic and professional models

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[13] A Group-Grid analysis (Douglas, 1982; Hood, 1998) would classify what I here term the 'fairness' model as an egalitarian form of complaint handling. However, since the analysis here builds upon Mashaw, I resisted the temptation to add another theoretical perspective.

wherein complaint handlers seek the enforcement of rules or service improvement for the benefit of consumers at large.

This model is congruent with the portrayal of ombudsman institutions by some scholars as mechanisms for *particular* accountability and protectors of individual rights, rather than drivers of general administrative change (e.g. Mulgan, 2000b; 2003). The fairness model is equally compatible with a perception of ombudsmen as an economical alternative to the courts. Likewise, Thompson (1975, Ch. 8) suggests that ombudsmen are intended as a solution to the conflict between bureaucracies' impersonal rule-based operation and individuals' expectations to be regarded as singular human beings.[14]

Structure and process: Adjudicators are laypeople, who are recruited from outside the regulated industry. They operate as independent referees, or within loose organisational structures. Their substantive discretion is broad – no formal rules, or explicit knowledge base, guide their decisions. In contrast with the professional model, complaint handlers' decisions are binding upon firms, rather than a recommended solution. The attribution of blame, which is inherent to this model, entails securing firms and consumers due opportunity to present their case in a semi-judicial procedure. Consequently, hearings of both sides, rather than paper-based investigations, are likely to be more prevalent.

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[14] Thompson (1975) claims that ombudsmen are unlikely to be able to fulfil this role. He suggests that ombudsmen either have a small and meaningless impact upon public administration, or develop into a bureaucratic rule-based agency and thereby lose their ability to act as mechanism for infusing a particularistic perspective into government.

Micro mechanisms of responsiveness: The proposition that bureaucratic responsiveness is shaped by *ad hoc* assessment of moral deservingness sharply contrasts with the Weberian rational-legal conception of bureaucracy. Yet, the moral shaping of micro-level bureaucratic responsiveness is in fact a ubiquitous finding of ethnographic studies of bureaucracies. The question is, however, how are perceptions of deservingness and credibility constructed? In theory, moral judgement is shaped by reference to evidence regarding intentionality and the circumstances surrounding the individual case. However, the following review suggests that moral judgment is also sensitive to regulatees' and clients' behaviour during the bureaucratic process, to social status and to group affiliation as heuristics for credibility and deservingness.

i. Assessment of motivation

Compatible with the ideal-type fairness model are studies which show how assessment of motivations shapes inspectorates' responsiveness to both firms and complainants. For example Hawkins' (1984) study of environmental inspectors' inclination to use formal sanctions in response to violations suggests that this was shaped by their labelling of firms as socially responsible, unfortunate, negligent or malicious. Bardach and Kagan's (2002) description of US social regulation until the late 1960s similarly suggests that inspectors perceived their job as selective rule enforcement, whereby formal prosecution distinguished between serious and minor violations, and between well-intentioned and recalcitrant firms (*ibid*, pp. 39-44). More broadly, Hawkins' (1984, 2002) account suggests that regulators were most likely to act upon what they perceived as egregious behaviour, while adhering to a compliance strategy in all other cases. Hawkins (2002) maintained that when the violator's blame was considered to be high, and when there was a potential for a high

level of public concern, inspectors perceived formal prosecution as an imperative. Hence, Hawkins' description suggests that inspectors' responsiveness is guided by their moral judgement of blame (in addition to their concern with managing their own public image). Indeed, the moral basis of enforcement is one of the main thrusts of Hawkins' (1984) conclusions.

A similar pattern of relationship between moral judgment of motivations and responsiveness is depicted in Hutter's (1997) study of environmental inspectors' responsiveness to citizen complaints. Interviews with inspectors suggested that their perception of complainants' motivations (as genuine, financially motivated, intolerant, and psychologically or mentally manufactured as a result of media publicity) were an important consideration in their response to complaints (*ibid*, pp. 101-102).

ii. Disruptive behaviour

Public administration ethnographies of street-level bureaucracies show that bureaucrats' responsiveness to clients/citizens is shaped by the latter's attitude during the bureaucratic process. Prottas (1979) found that, all other things being equal, bureaucrats were more responsive to compliant and ignorant clients in comparison with aggressive and knowledgeable ones. Both aggressive and knowledgeable clients were perceived by bureaucrats with disdain, since the interaction with them was both emotionally draining and time-consuming. Bureaucrats' responsiveness to preferred clients was manifested in their provision of information to clients regarding the agency's regulations, and by manipulation of information to their superiors regarding clients' attributes. Likewise, beyond the context of responsiveness to citizen-initiated contacts, Brown's (1988) ethnography of police patrolmen reveals their tendency to

employ an 'attitude test' when deciding whether or not to conduct an arrest upon minor violations. Patrolmen were less inclined to arrest individuals who manifested deference towards the police, whereas overt disrespect for police authority was likely to result in an arrest. Brown explains this tendency as emanating from patrolmen's need to maintain control and respect for their authority, as well as a heuristic for the violator's propensity to commit further violations. Similarly, in the context of regulation, Fineman and Sturdy's (1999) study of environmental inspectors found that "Extreme feelings, such as anger, rage or fear were a feature of [inspectors'] dealings with some operators – especially the deliberately obstructive, the duplicitous or the physically threatening. *They were deemed deserving of harsh treatment*" (*ibid,* p. 642) (my emphasis).

iii. Institutionalised prejudice

Other studies suggest that bureaucrats' responsiveness is shaped by their prejudices and social affinity to certain groups of consumers and firms. In other words, their perception of deservingness and trustworthiness is shaped by institutionalised labels associated with regulatee and client demographics and group affiliation.

The claim that bureaucracies are responsive to higher-status individuals, to white majority groups and/or to clients of common demographic background more broadly is familiar (e.g. Hasenfeld, 1983). However, there is relatively little evidence to corroborate it in the context of citizen-initiated contacts. Roth's (1974) ethnographic study of hospital emergency wards found that patients of higher social status, as revealed from their race, age, dress and accent, were likely to receive prompt service. While this may be attributed to bureaucrats' prejudices, Roth acknowledges that it is

equally plausible that employees' responsiveness was shaped by the greater propensity of individuals of high socio-economic groups to file complaints.

A number of studies have shown bureaucrats' reliance upon categorisation of groups to guide their judgment. Gilboy's (1991) ethnography of immigration inspectors in a US airport demonstrates how their decision to refer certain travellers for further investigation was shaped by localised categorisation of travellers' profiles as high or low risk, according to their nationality, age, the airline that carried them and recurring 'stories'. Halliday's (2000) ethnography of local government housing departments' response to homeless applications for housing similarly reveals a link between group affiliation and bureaucrats' assessment of the legitimacy of individuals' applications. Similarly, the factory inspectorates, researched by Lloyd-Bostock (1992) explained that they were more likely to investigate a reported accident if the injured was a young person, or if the firm involved had a bad reputation.

iv. Relational distance

Going beyond institutionalised prejudices, socio-legal studies propose that regulators' propensity to employ formal sanctions is shaped by their 'relational distance' – i.e. the frequency, length and scope of interactions – from regulatees (Black, 1976). Relational distance and institutionalised prejudice explanations share a common denominator inasmuch as they reflect labelling and negative attitudes towards certain groups. However, the notion of 'relational distance' suggests that attitudes are embodied in social interaction. Hood *et al.*'s (1999) application of this concept to inside- government regulation in the UK found that low relational distance (measured as regulators' background in the regulated organisation and frequency of contact

between regulators and regulatees) was associated with less formalistic regulation. Blau's (1963) study of an enforcement agency equally demonstrated how social distance shaped responsiveness. In this case, the rotation of employees between inspection and quality review departments rendered reviewers more inclined to unofficially return files to inspectors for correction before their final review. This unofficial strategy was not applied to cases from inspection offices located outside the city, where reviewers had no social connection, resulting in higher reported error rates. Hutter's (1997) study of four departments of an environmental inspectorate showed that inspectors operating in an industrialised heavily-populated area were more likely to initiate formal enforcement proceeding than those operating in small rural communities. One of her explanations for this variance was that inspectors in small rural communities had a wider scope of relationships with violators.[15]

The above seems to suggest that relational distance mediates bureaucrats' choice between a professional-educational vs. bureaucratic-standardised mode of interaction. Yet, this is not necessarily the case. Of special interest is Hutter's finding that in those departments which applied a more legalistic approach, the internal supervision of staff was rigid in comparison to the departments that operated a conciliatory approach. This suggests that it is not relational distance alone that shapes responsiveness, but also agencies' internal structure. It is possible that in a machine or professional bureaucracy relational distance would have lesser impact upon bureaucratic responsiveness. This anticipation is compatible with Black's (2005, 2006) analysis, which shows how the adoption of standardised risk-based regulatory frameworks

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[15] In contrast, Grabosky and Braithwaite (1986) and Makkai and Braithwaite (1995) found no impact to either frequency of contact or to industry background on the level of enforcement. Makkai and Braithwaite (1995) found modest correlations between industry background and identification with firms and sympathy to their difficulties and between such sympathy and leniency in the implementation of regulatory standards.

results in stringent supervision of larger firms and the focus of enforcement upon violations by prominent firms; i.e. those firms with which regulators had the most frequent interaction.

In summary, in the fairness model complaint handlers seek justice and attribution of blame in the individual case, with no implications to other complaints and to industry practices. Ethnographies of bureaucracies' encounters with the public and regulatory inspectors' interactions with firms suggest that moral judgment is pervasive in decentralised bureaucracies. Yet, the same ethnographies show how bureaucrats' assessment of individuals' deservingness and credibility is shaped by prejudices and heuristics. Studies seem to further suggest that these are rooted in group norms and interaction patterns, rather than bureaucrats' individual background and perceptions.

4. Ideal type IV: Therapy

The delineation of the above ideal types relied upon Jerry Mashaw's administrative justice models. What is common to the above models is that they all assume an *account model* (Bostock and Mulcahy, 1994) of complaint handling. The bureaucratic, professional and fairness models all adhere to this prevailing conception of complaint handling in different manners. The third-party complaint handling body facilitates the accountability process by either enforcing rules upon firms, instigating their learning from complaints or via public allocation of blame and redress. Yet, inductive analysis of the FOS suggests the possibility of a fourth *consumer-satisfaction*-oriented model (although the FOS differed from the ideal-type configuration below).

Therapeutic complaint handling manifests the following features: (a) It is focused upon confidential conciliation in individual cases and the attainment of complainants' trust, consent and ultimately their satisfaction; (b) In common with the fairness model, adjudicators' discretion is broad and unregulated. However, complaint handlers' interpersonal interaction with complainants is closely monitored; (c) Complaint handlers' responsiveness is adjusted to the intensity of complainants' persistence in pursuing their case, resulting in greater responsiveness to those complainants that are hardest to satisfy; (d) Complaint handling in effect, although not necessarily by conscious design, contains consumer dissatisfaction outside the public sphere. It thereby serves to buffer firms and the regulator from consumer demand for increased regulation in response to systemic failure.

Hypothetical example: Firms' marketing of retail investment products is based on fierce market competition. When consumers complain, adjudicators aim to resolve the dispute and to contain its expansion. Informal mediation and conciliation is preferred to formal judgment. Complaint handlers are service professionals. Complaint handling training is focused upon techniques of pacification and the psychological aspects of complaining, rather than on the technical features of retail investment products. Complaint handlers' decisions are individual and confidential. The complaint handling agency does not pass information from complaints to the regulator, nor does it publish comparative statistics. From both firms and the regulator's perspective, the complaint handling body is useful in containing consumer dissatisfaction and pressures for knee jerk responses to frequent retail financial crises.

The role of complaint handling: In this ideal type, the immediate goal of the complaint handling process is to resolve conflict to the satisfaction (or at least the consent) of the complainant. Integral to complaint handling is a cooling-off process, wherein complainants release their anger and frustration. Complaint handlers offer sympathy, empathy and absorb complainants' anger towards firms. Decisions are confidential, and formulate the conflict and its solution in terms of the sides' problems, needs and interests, rather than as derivatives of systemic problems and general legal rights. Complaint handlers avoid questions of culpability and deservingness, since these could exacerbate conflict, rather than pacify it. Their expertise is measured in interpersonal, rather than analytical, skills (Edelman, Lande and Erlanger, 1993; Hofrichter, 1987; Silbey and Sarat, 1988).

Hill (2002) comments pejoratively on institutions of this kind, which he terms mediator-ombudsmen, suggesting that they "have little or no interest in achieving justice…their job is simply to facilitate the resolution of disputes through mediation. Rather than searching for justice, the mission of the mediator ombudsman is 'representing interests' or 'getting to yes'" (*ibid*, p. 38).

Complaint handlers' investment in attaining the satisfaction of individual complainants has the additional consequence of mitigating the propensity for consumer collective action in response to systemic failure. Thus, the complaint handling agency's individual and confidential response to consumer dissatisfaction curbs public and political demand for wide scope regulation. It therefore buffers firms and the regulator from public demand for increased regulation in the event of failure.

Structure and process: Complaint handlers are recruited from service professions. Their training focuses upon communication, conciliation and pacification techniques. They are delegated broad discretion, which allows them to tailor a compromise to the expectations and relative resistance of individual complainants. However, in contrast with the fairness model, therapeutic complaint handling does not entail full debureaucratisation. Rather, in order to ensure consumer satisfaction, the organisation and its managers structure and closely monitor complaint handlers' interpersonal interaction with complainants. As elaborated in chapters five and seven, this monitoring involves rationalisation of complaint handlers' display of their own emotions and their management of complainants' feelings. Consequently, I label an organisation that manifests this form of control a 'procedural bureaucracy' (Wilson, 1989).

Micro-mechanisms of responsiveness:

A therapeutic complaint handling agency is designed to respond to the intensity of complainants' pressures. Complaint handlers' responsiveness is tailored to fit consumer-relative persistence. Under these conditions, aggressive, immovable, complainants are the ones whose complaints are most likely to be upheld. In contrast, complainants who can be dismissed or satisfied by other means (e.g. empathy and sympathy) are more likely to be denied monetary compensation.

To an extent, the ideal type therapeutic model, as illustrated above, matches the expectations of the rational-contextual hypothesis, but it is nevertheless distinct. First, as discussed above, therapeutic complaint handling is sensitive to the *ad hoc* intensity of consumer demand. Yet, in contrast with the rational-contextual model, complaint

handlers manifest a bias for satisfying complainants over firms. Second, as explained, therapeutic complaint handling has the effect of pacifying, placating and individualising consumer reaction to regulatory failures, thereby buffering firms and the regulators from public demand for increased regulation. A rational institutional approach would be fast to conclude that therapeutic third-party complaint handling agencies are *purposely* designed to achieve such buffering. Yet, this may be an unintended latent consequence of this model (Merton, 1957). In the following chapters, and especially in chapter seven, I probe the link between a therapeutic model and the rational-contextual hypothesis.

C. **Conclusion**

Rational-contextual approaches to regulation and to public administration would expect complaint handlers to tailor their responsiveness to the relative intensity of firms' and complainants' demands in search of support and conflict mitigation. Such approaches overlook the way in which intra-organisational institutions (interpretative scheme, structure, controls) and dynamics mediate bureaucrats' responsiveness to external demands. The thesis seeks to analyse this mediating role of intra-organisational institutions. Yet, going beyond analysis of micro-level responsiveness to complaints, it further explores the role of consumer complaint handling institutions in regulatory regimes.

In light of the above two aims, this chapter drew on Mashaw's (1983) administrative justice models and my inductive analysis of the FOS to develop a typology of four ideal-type, third-party complaint handling institutions in regulatory regimes. These ideal type institutions embody distinct configurations of: (a) macro-level roles,

(b) meso-level intra-organisational institutions (i.e. interpretative schemes and structures), and (c) micro-level responsiveness mechanisms.

In the bureaucratic model, complaint handling is integral to the enforcement of regulation. The complaint handling agency manifests a state-funded machine bureaucratic structure. Complaint handlers' micro-level responsiveness to consumer complaints is shaped by general rules. Consequently, complaint handlers are unresponsive to *ad hoc* individual demands. Yet, the rules, which complaint handlers enforce, comprise the organisation's exchange with politicians and interest groups and its responsiveness to media and public opinion inasmuch as these cannot be contained otherwise. Hence, while individual complaint handlers' decision making is rule-bound, the decision outputs of the organisation may nevertheless approximate the expectations of the contextual-rational choice hypothesis. Yet, due to transaction costs among other things, such response is expected to be incomplete.

In the professional model, the complaint handling body is a mechanism for firms' learning and improvement, rather than a system for coercive enforcement. Complaint handlers are recruited from within the industry. Decision making is decentralised, allowing complaint handlers to exercise individual judgment. Complaint handlers' micro-level responsiveness to complaints is framed within an elaborated body of professional discourse, which is shared between the complaint handling agency and experts in the industry. Professional norms and the agency's professional structure mitigate complaint handlers' responsiveness to incompatible external demands.

In the fairness model, complaint handlers allocate blame in individual instances, according to what they perceive as fair in the specific circumstances of individual cases. They are independent referees, who are deliberately recruited from outside the industry. No special background is required in order to perform the task of complaint handling. Rather, complaint handlers are respected laypeople. They are entrusted with unrestricted discretion. Complaint handlers' perceptions of complainants' deservingness are shaped by both societal and local group norms. Yet the scope of their decisions is limited to the individual complaints that reach the complaint handling body, with no implications for firms' other complaints and transactions.

In the therapeutic model complaint handlers process complaints individually and confidentially. While complaint handlers enjoy broad discretion, their interpersonal interaction with complainants is closely monitored by their managers. Complaint handlers' responsiveness is tailored to fit complainants' (but not firms') relative persistence in pursuing their case. Complaint handling has the effect of pacifying, placating and individualising consumer reaction to regulatory failures. Consequently, it serves to buffer firms and the regulatory regime from public demand for increased regulation in response to alleged failure. In its pure form, as presented above, the *consequences* of the therapeutic model are to a degree compatible with the expectations of the rational-contextual hypothesis. Yet, as demonstrated in chapter seven, complaint handlers may seek consumer satisfaction as an end in itself, irrespective of their *need* to attain consumers' and firms' external support.

Up until this point, the discussion has been conducted in the realm of ideal types. However, I do not assume that congruence between intra-organisational institutions

(i.e. interpretative scheme and structure), micro-mechanisms of responsiveness and the macro role of complaint handling *necessarily* occurs in practice. Rather, the thesis uses empirical evidence to analyse whether the FOS manifested a coherent configuration and the extent to which this configuration was congruent with its role within the regulatory regime. The above ideal types are used as a means of detecting consistency and tension in the FOS's intra-organisational configuration and its macro role in the regulatory regime. Additionally, beyond a description of the FOS's configuration, the thesis aims to explain how this configuration came about and how it changed over time.

D. **Research design and methodology**

This section gives an overview of the research design and methodology. In addition, in each one of the following empirical chapters I elaborate the relevant sources of data and the distinct features of the methodology.

1. Research questions

In accordance with the above theoretical framework, the thesis explores the configuration of the FOS's micro-level responsiveness to consumer complaints, meso level intra-organisational institutions and its macro role in the regulatory regime. The analysis focuses upon three questions:

(a) What were the determinants of complaint handlers' micro-level responsiveness to consumer complaints?

(b) What were the determinants of the FOS's intra-organisational institutions (i.e. its interpretative scheme, structure and controls)?

(c) What was the role of the FOS in the retail investment regulatory regime? How did it impact upon the regulatory regime's responsiveness to consumer complaints?

2. Case selection

The focus upon the role of intra-organisational factors as determinants of regulatory responsiveness to consumer complaints entailed access to the inner workings of a complaint handling agency. Researching the role of third-party complaint handling within regulatory regimes further required selecting an area of complaints that had potential regulatory implications. Finally, in order to test the hypothesis that intra-organisational factors shape responsiveness, I had to choose a critical case of an agency that faced a rapidly changing external environment.

Consequently, the study involved a non-participant observation that I conducted at the offices of the FOS. As explained in the introduction, the FOS handled consumer complaints against retail financial firms. I focused upon the FOS's handling of retail investment complaints because this was an area that was also regulated by the Financial Services Authority (FSA).[16] This focus allowed me to combine an analysis of the FOS's micro-level responsiveness to consumer complaints and its interface with regulation by the FSA.

Additionally, the FOS's circumstances rendered it an ideal test case for the interaction between intra- and extra-organisational factors. As elaborated in chapter two, the external environment of the FOS's handling of retail investment complaints was under rapid change during the research period. Since the 1990s, the selling of retail

[16] As explained in chapter three, the FOS's activities combined compulsory and voluntary jurisdiction. Its compulsory jurisdiction regarded retail financial sales, which were regulated by the FSA.

investment products became increasingly prone to generate political scandals. Adverse media coverage of the retail investment sector likewise intensified. The FOS itself received substantial attention from the media, which its predecessors did not. Finally, between 2002 and 2003 retail investment firms and investors faced a long-term market decline. The combination of frequent scandals, adverse media publicity towards the industry, intensive media coverage of the FOS, and market decline resulted in a 340% escalation in the FOS's caseload between 1999 and 2004. This turbulent environment rendered the FOS a critical case for the hypothesis that intra-organisational factors shape complaint handlers' responsiveness, and mediate the effect of contextual factors.

3. Triangulation of data sources, mix- methods and within-case-analysis

The thesis adopted a distinctive and rarely-used approach to the study of the inner workings of bureaucracies. Data collection combined non-participant observation and interviews, systematic sampling of complaint files and archival research (see: Hawkins (2002) and Lloyd-Bostock (1992) for a similar combination of interviews and sampling of files). Data analysis included discourse analysis of interviews and complaint files, quantitative analysis of variance in complaint handlers' decision outputs and historical tracing of the development of the ombudsman's intra-organisational institutions. The aim of this strategy was to maximise the reliability and internal validity of the findings through triangulation of three types of data, and by analysis of both change over time and variance within the case study. The key sources of data are listed below. (Additional data sources, which were collected to supplement the analysis in specific chapters, are reported in the relevant chapters and detailed in appendices A to C.)

Fieldwork: I conducted research at the FOS's offices in Docklands (London) between October 2003 and December 2004 with few intervals. On average, I attended the office four days every week.[17] I was given a desk in the office, and a computer including an internal email address and access to the FOS's intranet. The latter provided me access to the organisation's internal communication (i.e. general emails and internal news), to a variety of internal guidance and policy documents and to managers' computer-based control systems.[18] During the research period I was attached to two different adjudication teams (which I refer to in the text as teams A and B), which opened opportunities for informal communication with complaint handlers and their administrators. Occasionally, I aided team administrators with administrative tasks (filing complaints and uploading notices regarding incoming mail) and talked over the phone with complainants who were awaiting allocation of their case for investigation. This gave me better grasp of the administration of complaint handling. The open-space structure of the FOS's office, as described in chapter three, facilitated my observation of interaction.[19] I also attended a few internal talks given by senior staff, and training sessions.[20]

Sample of complaint files: The FOS provided me with an Excel dataset of all cases, which were closed between April 2001 and March 2004 by twelve adjudicators in two

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[17] The first three month of the research included further negotiation and a pilot study. Additionally, during the research period three months were devoted to analysis of data at Oxford before progressing to the second stage of the fieldwork.

[18] Appendix A gives further information regarding the range of electronic communication and documents to which I had access.

[19] During the period of the study I moved between four desks. At first, I sat among the adjudicators of a general insurance complaint handling team, which was not one of those that I researched. I was then allocated a desk, which was situated among the adjudicators of team A. Later on, I sat next to the administrator of a senior executive. Finally, during the second period of the research, I was allocated a desk that was situated among the administrators of team B.

[20] As explained in chapter three, training at the FOS's was mostly done via individual coaching. Therefore, centralised training sessions were relatively rare events.

teams.[21] The twelve adjudicators were selected by their team manager. These were well-regarded and experienced adjudicators, most of whom coached other members in their respective teams.[22] I randomly sampled from within this dataset 143 complaint files regarding three broad categories of retail investment products.[23] The data collection pooled information from paper files (which I obtained from the FOS's archive) and computerised files (from an in-house program to which I was given access).

Data from complaint files was analysed quantitatively using data analysis software (SPSS). The main thrust of the quantitative analysis was to account for *variance* in the decision making of the twelve adjudicators by reference to the micro conditions of their work. Since the sample was drawn from the work of twelve adjudicators and two teams and their handling of certain categories of products, it could not represent the work of the FOS as a whole.

Complaint files were also analysed qualitatively to trace the development of local policy regarding the handling of certain type of systemic complaints. Additionally, discourse analysis of 15 complaints files was conducted to analyse complaint handlers' communication strategies.

Interviews: Semi-structured interviews were conducted with thirty-four officials within the FOS and with eleven additional interviewees outside the FOS. My

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[21] This sample does not include additional cases that I analysed during the pilot study, wherein administrators provided me with complaint files from a large number of teams.
[22] Only one of them had been in the organisation for less than three years and even this adjudicator, despite being new to the organisation, was already coaching newer members of staff.
[23] The three product categories included: endowment mortgages, personal pensions and single premium bonds (the latter included with-profits bonds, unit trusts and non-cash ISAs).

interview strategy was to ensure equal representation of different levels and roles within and outside the organisation.[24] On average, interviews lasted between one hour and one and a half hours. Formal interviews were taped and transcribed. Interviews were systematically coded using qualitative data analysis software (Atlas ti.).

Archival research and primary documents: In order to analyse the origin of the FOS's interpretative scheme and structure, I collected data regarding two of the FOS's predecessor organisations (the Insurance Ombudsman Bureau and the Personal Investment Authority Ombudsman bureau). Archival data included annual reports and unpublished internal correspondence.[25]

The analysis in chapter two of the retail investment sector and its regulation relies predominantly upon secondary literature, but it was supplemented by analysis of key primary documents.

Media search: Lexis-Nexis media search was used to gauge change over time in the intensity and nature of media coverage of the retail investment sector and of the ombudsman. In addition, I used media search to complement my analysis of the FOS's handling of matters that reached the public domain.

Secondary literature: In addition to the above-mentioned primary sources, analysis of changes to the retail investment regulatory regime and description of the FOS's predecessor organisations relied upon previous academic studies.

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[24] Appendix B gives further information about the variance within the interviewee sample.
[25] Appendix C lists unpublished internal correspondence of the FOS's predecessor – the Insurance Ombudsman Bureau – which I relied upon.

4. Access and research ethics

The FOS's executives, with whom I negotiated access to the organisation, allowed me generous access terms. I was permitted to use the data and publish the conclusions of the data analysis. The FOS did not require a right to unilaterally censor any of the analysis and findings. Yet, it was agreed that the FOS would be given first opportunity to comment on any of my drafts before their publication and that these comments would be given serious consideration. A draft copy of each of the thesis chapters was sent to the FOS's Chief Ombudsman for comments.[26]

I promised all interviewees anonymity (while clarifying that the data would be used and would form the basis for publication). In order to ensure anonymity, interviewees are represented by a letter (according to their role) and a number. *Executives* are assigned the letter E, *Ombudsmen* the letter O, *team managers* and their assistants the letter M, *adjudicators* the letter A, members of the FOS *support* units the letter *S,* and interviewees outside the FOS the letter T.

E. **Research contribution**

The thesis contributes to the study of complaint handling in regulatory regimes, to public administration studies of responsiveness, to New Institutionalism, to the methodology of public administration research as well as to the empirical study of retail investment complaint handling.

[26] To date I received comments on only one of these drafts, which I fully adopted.

1. The macro role of complaint handling in regulatory regimes

Despite the prevalence of third-party complaint handling agencies and units besides and within regulatory agencies, no study has yet centred upon describing and explaining their role in regulatory regimes. The uniqueness of this study is in linking the study of the FOS's inner life with analysis of its broader role in the regulation of retail investment.

2. Intra-organisational institutions as determinants of micro-level responsiveness

As explained earlier, prevalent rational-contextual approaches to regulatory and administrative responsiveness focus upon the relationship between extra-organisational variance and organisational outputs. Little has been done to *systematically* disentangle the effect of intra- and extra-organisational factors upon street-level responsiveness.[27] The thesis explores the interaction between the ombudsman's contextual environment and intra-organisational institutions in shaping complaint handlers' micro-level responsiveness to complaints and the ombudsman's role in the regulatory regime.

3. The formation of intra-organisational institutions

The study provides comprehensive micro-level analysis of the development and change of the ombudsman's intra-organisational institutions, focusing upon the formation of organisational interpretative scheme, structure and control systems.

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[27] Hawkins (2002) emphasises the importance of individual, organisational and extra-organisational factors in shaping inspectors' discretion. Yet, because his methodology was restricted to qualitative analysis and did not involve operationalisation of variables, his analysis does not allow discerning the interaction between these different factors.

4. Methodological advancement

As explained above, focusing upon the role of intra-organisational factors entails access to the inner workings of bureaucracies. One way to do this is by conducting interviews with bureaucrats. The obvious problem with interview-based research is that while it is suitable for exploring organisational rhetoric, ideology and conscious motivations, it is problematic as a tool for the exploration of organisational practices and habituated routines. Combining interviews with ethnographic observation improves the ability to analyse both organisational ideology and practices. Yet, ethnographic studies often lack rigorous sampling and analysis of variance when compared with both comparative and large *n* quantitative research. The current study minimised this shortage by focusing the analysis upon a medium to large *n* sample of complaint files, which were randomly drawn as explained above. Thus minimising bias in the selection of observations and maximising the ability to systematically analyse within-case variance of organisational practices. A unique feature of the methodology regarded the validation of statistical analysis by reference to qualitative data and vice versa. Information from interviews and qualitative analysis of complaint files were used in the generation of hypotheses and operationalisation of variables for quantitative analysis. Thereafter, the validity of preliminary statistical analysis was assessed against interview data and in-depth analysis of certain types of complaint files. In the conclusion, I assess the extent to which this methodology proved fruitful and how it can be improved in the future.

5. Consumer complaints in the retail investment regulatory regime

In addition to the above theoretical and methodological contributions, the empirical focus upon retail investment complaints is valuable *per se*. Consumer complaint

handling is one facet of the conduct of business regulation of financial firms. A few political and socio-legal studies have analysed the development of the conduct of business regulation of the UK retail investment sector, although more recent studies are necessary (Black, 1997; Clarke, 1999; Knights, 1997). In contrast, research on the politics and sociology of retail investment complaint handling, which is the focus of this thesis, is practically non-existent.[28]

[28] Limited socio-legal research exists with regard to the handling of general insurance complaints by the Insurance Ombudsman Bureau (Birds & Graham, 1992) and regarding the UK private sector ombudsmen more broadly (James, 1997).

Chapter 2: Mapping the Retail Investment Regulatory Regime

Introduction

As elaborated in the previous chapter, the thesis explores how extra and intra-organisational factors interacted in shaping complaint handlers' responsiveness to consumer complaints and the ombudsman's role in the retail investment regulatory regime. The focus in the next chapters upon certain intra-organisational factors over others is derived from the theoretical framework as delineated in the first chapter. In contrast, this background chapter highlights some of the contextual factors that my data analysis, as elaborated in the next chapters, revealed as significant to understanding the ombudsman's interaction with consumers, firms and the Financial Services Authority (FSA). This context included the politicisation of the retail investment sector since the 1990s and the FSA's discourse of risk-based regulation.

Consequently, this chapter sets out to describe the causes of the increasing politicisation of the retail investment sector and the change over time in *regulatory discourse*. I use the term *discourse* so as to acknowledge the gaps between what regulators claim to do, what they actually do and the impact of their actions. Yet, I do assume that there is some positive association between change in discourse and regulatory practices. Hence, my usage of the term *discourse* goes beyond 'talk' to include practices. However, it acknowledges the partial gap between these different levels of analysis.

Section A describes the retail investment sector's propensity to generate political scandals and consumer complaints since the 1990s, and analyses the causes of this

pattern. The rational-contextual hypothesis, as reviewed in chapter one, would anticipate recurrent scandals and adverse public opinion to result in greater regulatory responsiveness to consumers. At the same time, adverse publicity is expected to result in a rigid and prescriptive regulatory approach (e.g. Bardach and Kagan, 2002; Power, 1997; Vogel, 1986, 2003). Section B, however, presents a more complex picture than that which current literature would predict. The FSA's regulatory approach indeed resulted in the rationalisation of its internal allocation of regulatory resources. Yet, the FSA's discourse diverged from the previous tendency of the regulatory regime towards increasing regulatory prescription. Rather, the FSA's discourse emphasised risk-based regulation, consumer choice and responsibility and a meta-regulatory technique. I suggest that the FSA's risk-based discourse and practices, coupled with media-driven consumer expectations for redress, required the FOS to handle massive number of complaints of a systemic nature. In the conclusion to this chapter I hypothesise how the FOS's management of (and responsiveness to) systemic complaints supported the FSA's risk-based regulatory approach.

The data, which forms the basis for the analysis in this chapter, is predominantly based on secondary literature research of the retail investment regulatory regime (e.g. Black, 1997, 2005; Clarke, 1999). I supplemented this secondary literature, where required, with analysis of primary documents, media analysis (LexisNexis) and statistics of the Association of British Insurers (ABI).[1] (When referring below to 'all UK national newspapers' or to 'all UK newspapers', I mean all those that were covered under these categories by the LexisNexis dataset in June 2006.)

[1] I was given access to an on-line statistics dataset, which ABI managed for the exclusive use of its members.

A. The Retail Investment sector – from prominence to disgrace

This section portrays how the retail investment sector became prone to generate recurrent political scandals. I show how this context was produced by changes to market structure, product innovation and proactive media coverage.

Retail investment, as defined here, refers to the marketing of packaged investment products (i.e. life assurance, personal pensions, units in collective investment schemes and packaged equities and shares). These were commonly designed and administered by life assurance firms, unit trusts, Open Ended Investment Companies (OEICs) and bancassurers,[2] and distributed by these bodies directly, or through banks, building societies or other intermediaries.

The financial sector's centrality to the British economy was traditionally associated with a light-touch regulatory ideology (e.g. Moran, 2003). However, since the early 1990s, the selling of retail investment products generated recurrent political crises, resulting in consumer dissatisfaction and pressures for increased regulation. This may be related to several factors. First, the selling of retail investment products was always likely to result in abuse of consumers due to information asymmetry between sellers and buyers. Information asymmetry was rooted in most investors' limited financial literacy and in the complexity and opacity of many retail investment products. It was further aggravated by the typically long time lapse between such investments and their maturity and by the fact that performance was dependent upon the future management of the investment by firms. All these factors inhibited consumers' ability to assess the quality of their investment at the time of sale (Scott *et al.*, 2000). Second, the retail investment sector's increasing competitiveness in the 1980s resulted in

[2] Bancassurers were in-house life assurance businesses within banks and building societies.

firms' fierce struggle over distribution channels, and consequently in the escalation of their commission payments to intermediaries. Variance in commission payments across firms and products induced intermediaries to maximise commission income, rather than clients' welfare. Third, firms' incentives to abuse their information superiority grew in the 1990s as a result of demutualisation of the previously widespread model of mutual life offices and building societies. Demutualisation created a conflict of interests between firms' loyalty to their shareholders and policyholders, which these firms did not previously encounter. Fourth, the performance of retail investment products is highly dependent upon market fluctuations. Products that generate high yield in rising markets are likely to result in bigger losses in declining markets. As shown below, retail investment scandals and the flood of complaints, which firms and the FOS experienced between 2002 and 2004, were partly related to market decline. I suggest that scandals were further associated with the spread of unit-linked investment products, the features of which made short-term losses more transparent to policyholders. Finally, increasingly hostile media coverage of the retail investment sector amplified consumer awareness to investment loss. "Negativity bias" (Kahneman, Slovic and Tversky, 1982) combined with consumers' limited understanding of the nature of financial products, generated dissatisfaction with the retail investment sector and its regulation. The discussion below presents evidence in support of the above claims.

1. The prominence of the retail investment sector

Study of regulatory responsiveness to consumer complaints should take account of the British government's long-standing concern for the viability of the retail investment sector. The prominent standing of the retail investment sector entailed that overburdening regulation and complaint handling could result in a political backlash.

The standing of the City was related, among other factors, to its contribution to the UK's economic growth. Financial services (insurance, pensions, banking, finance and auxiliary financial services) contributed 6.45% to Gross Value Added (GVA) in 1992 and 7.29% in 2003. Measured out of 123 single industries in the public and private sectors, in 1992 banking and finance were the eighth highest contributors to GVA, and insurance and pensions came twenty-first. In 2003, banking and finance were again the eighth highest contributors, and insurance and pensions were the twelfth. Insurance and pension funds were also the fourth fastest-growing UK industries between 1992 and 2003 (National Statistics Office, 2005).

The financial services sector was also a major employer. For example, in the last quarter of 2004 the financial sector employed a workforce of over 5.2 million out of 28.6 million in public and private employment (National Statistics Office, 2006). Additionally, insurance companies were the second biggest owners of UK listed shares, second only to international investors. In 2004, insurance firms, banks, unit trusts and investment funds together held 40.7% of all UK-listed shares (National Statistics Office, 2005a).

The retail investment sector's particular importance emanated from the British population's considerable reliance on this sector for the provision of pensions and financial security, partly as a product of conscious government policy. The government proactively encouraged saving and investment via the private sector. In 2001, the Treasury introduced Stakeholder Pensions, which were marketed by the retail investment sector subject to governmental prescription of their core features.[3]

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[3] These were intended as a substitute to the Second Earnings Related State Pension (SERPS) and as a supplement to the corporate and public service occupational pensions.

Additionally, the state promoted investment by tax exemptions to various packaged savings up to a prescribed amount. These included Tax Exempt Saving Accounts (TESSAs), Personal Equity Plans (PEPs) and Individual Savings Accounts (ISAs).[4]

Yet, as the next sub-section reveals, whereas the prominent standing of the City entailed light touch regulation, frequent retail investment scandals since the 1990s generated pressures for increased regulatory burden.

2. Politicisation of the retail investment sector

Below I outline the development of the UK retail investment sector since the 19th century. I show how intensified market competition and demutualisation generated risk of consumer abuse. I further show how, in addition to consumer abuse, changes to investment product characteristics and regulation itself contributed to the politicisation of retail investment marketing and its regulation since the 1990s.

Pre-politicisation

Life assurance business, based on the payment of periodical premiums, emerged in the 18th century.[5] During the early 19th century the life assurance sector expanded dramatically both in terms of the number of offices and their overall premium turnover. The expansion of life assurance business resulted in fierce competition.[6] Heightened competition precipitated the 19th century innovation of 'with-profits' endowment policies wherein policyholders acquired annual (and terminal) bonuses

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[4] See Clarke (1999) for discussion of some of these schemes.

[5] By 1800 six premium-based businesses were established: The Amicable (1706), Royal Exchange Assurance (1720), London Assurance (1720), Equitable Society (1762), Westminster (1792) and Pelican (1797). Source: Supple (1970).

[6] During the Napoleonic Wars (1803-1815) fifteen new life assurance offices were opened. By the mid-1850s the number of life assurance offices reached about 190. Not all offices survived and by 1871 the number fell to 114. Source: Supple (1970).

according to investment profits made by the firm. The introduction of with-profits endowments enabled life assurance offices to offer investors the prospect for higher yield, while reducing premiums (Supple, 1970). The characteristics of with-profits endowments rendered funds' short-term losses opaque to policyholders. Bonuses were declared and added to a basic guaranteed sum throughout the lifetime of the policy, and at encashment the policy value was raised by a final terminal bonus. The distribution of bonuses involved 'smoothing' of returns; i.e. holding back some of the returns, and not adding them to the guaranteed sum, when markets were high, and using these to compensate for poor returns when markets were low.

The opacity of firms' discretion over charges, bonus allocation and the determination of early surrender values exposed policyholders to abuse. Yet, presumably, this risk was mitigated by another characteristic of this period: the prevalence of mutual life assurance offices. That is, life offices which were owned by their policyholders, endowing them with membership voting rights in the General Meeting in addition to investment profits. More important, mutuals did not embody a conflict of interest between shareholders and policyholders.

Since their introduction in the 19th century and up until the 1970s with-profit endowments were the exclusive packaged saving instruments of the British middle classes.[7] Their popularity was advanced by tax incentives, which were first introduced in 1853 and maintained in different forms until their abolition in 1984. Unit trusts, which developed in the 1950s, became popular in the 1970s (Clarke, 1999). These

[7] Additionally, beginning in the late 19th century, some life offices came to specialise in 'industrial life assurance' business, which was targeted at working-class households. These were protection products (rather than savings), distinguished by the frequent collection of small premiums from policyholders' homes.

were open-ended pooled funds,[8] wherein individual investors were allocated a portion of units against their investment. The performance of the units depended on the management of the underlying investment by the unit trust manager, or, alternatively, their performance tracked the value of an asset or a certain index (e.g. FTSE 100). A major difference between with-profits policies and unit trusts was that the latter did not involve smoothing of returns. Rather, individual units' value at any one time was automatically derived from that of the fund's overall value and investors could follow the performance of the respective funds in the broadsheet newspapers. Consequently, the introduction of unit trusts rendered short-term losses more transparent to investors and less open to manipulation by firms.

As unit trusts gathered popularity, life assurance firms begun to market unit-linked life assurance policies and single premium bonds. That is, life assurance products in which the premiums, above a small amount designated to the purchase of a protection component, were used to buy units in a unit trust. Essentially, unit-linked life policies or bonds constituted a unit trust 'wrapped' in life assurance. This had two advantages. First, unit-linked life assurance enjoyed a tax relief, which unit trusts did not. Second, whilst the marketing of unit trusts was regulated by the Department of Trade and Industry (DTI) under the Prevention of Fraud (investments) Act 1958, life assurance products were specifically exempt. The main implication being that while life assurance policies were marketed from door-to-door, the common understanding of the industry was that unit trusts could be sold in the same manner (Gower, 1984). It was this striking difference in regulation between unit trusts and unit-linked life assurance that prompted the nomination of the Scott Committee (1973) to investigate

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[8] Open-ended, i.e. the total investment within the fund changed as investors joined or withdrew from it.

unit-linked life assurance, and thereafter the emergence of preliminary life assurance Conduct of Business regulation with the Insurance Companies Act (1974).

While some forms of customer abuse were probably prevalent in the above era of mutuality and pre-regulation, it was only post-regulation that abuses (beyond cases of firms' collapse and outright fraud) became apparent and resulted in political scandals. In fact, during the above period it was mostly general insurance, rather than retail investment, which came under media and political scrutiny.

Retail investment scandals

Increasing competition and demutualisation in the 1980s and 1990s enticed firms and their intermediaries to take advantage of their information superiority vis-à-vis consumers. This resulted in the overselling of investment products, most prominently endowment mortgages and personal pensions, the features of which consumers failed to fully understand. However, it was only after the collapse of the housing market in the early 1990s and the exposure of the personal pension mis-selling by the Securities and Investment Board (SIB) in 1994 that overselling was translated into recurrent overt scandals. Scandals further resulted in massive numbers of consumer complaints, especially when regulators chose to avoid direct intervention.

In the 1980s, as a result of deregulation, banks broadened their business to the provision of mortgages, and the building societies entered the market for banking services, insurance and retail investment. Coupled with the 1980s boom of the housing market, deregulation accelerated competition and product innovation in the retail investment sector (Black, 1997; Clarke, 1999). Additionally, between 1992 and 2001 twelve major mutual life offices demutualised and were either floated on the

stock market or, more commonly, bought by other financial groups. Consequently, whereas in 1995 mutuals' share of the life assurance market was over 50%, by 2003 it was only 16% (Myners, 2004). Intensified competition and oversupply were followed by conglomeration and consolidation.[9] Yet, the relative share of financial groups was in constant flux. Additionally, the distribution channel consisted of thousands of small firms of advisers, operating either individually or as part of larger networks.

Deregulation and competition resulted in synergies between the mortgage and retail investment markets. Different products, most prominently endowment mortgages,[10] were marketed by banks and building societies on behalf of insurers together with their mortgage loan. Thereafter banks and building societies established their own in-house life assurance businesses, which further facilitated the selling of investment products to their current accounts and mortgage client base. Consequently, endowment mortgages became the most popular mechanism for mortgage repayment, peaking at 83% of the mortgage market in 1988. Home Income Plans were another combination of mortgages and investment. These allowed consumers, by re-mortgaging their home, the liquidity of a loan that was invested in a packaged equity product with the prospect of achieving growth beyond the capital and interest due on the loan.

It was with the collapse of the housing market in the early 1990s, together with low inflation and rising mortgage interests, that the potential risks of Home Income Plans

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[9] In 1998 the top 5 life assurance firms had a market share of 27%, while the top 10 firms had a share of 43 % (London Economics, 2000, p. 43). In contrast, by 2004 the five top financial groups controlled 46% of the life assurance market. The top ten groups had a market share of 74% and the top 20 groups had an overall market share of 99% (ABI statistics).

[10] These were with-profits endowments, which were linked to mortgages, with the objective that the premium contributions would achieve enough growth to both repay the mortgage loan and offer the policyholder additional savings.

and endowment mortgages became clearer. Home Income Plans reached the headlines of the national newspapers in 1991/2.[11] The Insurance Ombudsman Bureau (IOB) received two hundred complaints in 1992 and around 690 in 1993 with regard to Home Income Plans, almost all of which it decided in favour of the complainants.[12]

In contrast, as further described below, it was only in 1999 that endowment mortgages were denounced by the regulators as potentially detrimental to consumers in comparison with repayment mortgages. Regulatory warnings, together with heightened media attention, led to a substantial reduction in new mortgage endowments sales. Yet, in 2004 there were still 8.5 million endowment mortgage policies in force, 80% of which were expected to fall short of covering their linked mortgage loans (Great Britain, Parliament, House of Commons, Treasury Committee, 2004). Past sales of endowment mortgages generated an unprecedented number of consumer complaints. By the end of 2003, about 500,000 policyholders (although only 6% of all endowment mortgage policyholders) complained to firms.

In 1994 the SIB uncovered massive personal pensions mis-selling. The Social Security Act (1986) enabled employees to opt-out of the State Earnings Related Pension Scheme (SERPS) and/or their occupational pension and to transfer their benefits to individual personal pensions. The purchase of personal pensions was promoted, in addition to firms' marketing, by a vigorous governmental campaign, rebate on National Insurance contributions and tax incentives. The result was that four million people opted-out of SERPS and/or out of their occupational pension schemes, or joined a personal pension scheme to begin with. A major implication for employees

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[11] Home Income Plans were mentioned 70 times in national UK newspapers in 1992, 54 times during 1991, while only 22 times during 1990 (Source: LexisNexis search).
[12] Sources: annual reports of the Insurance Ombudsman Bureau.

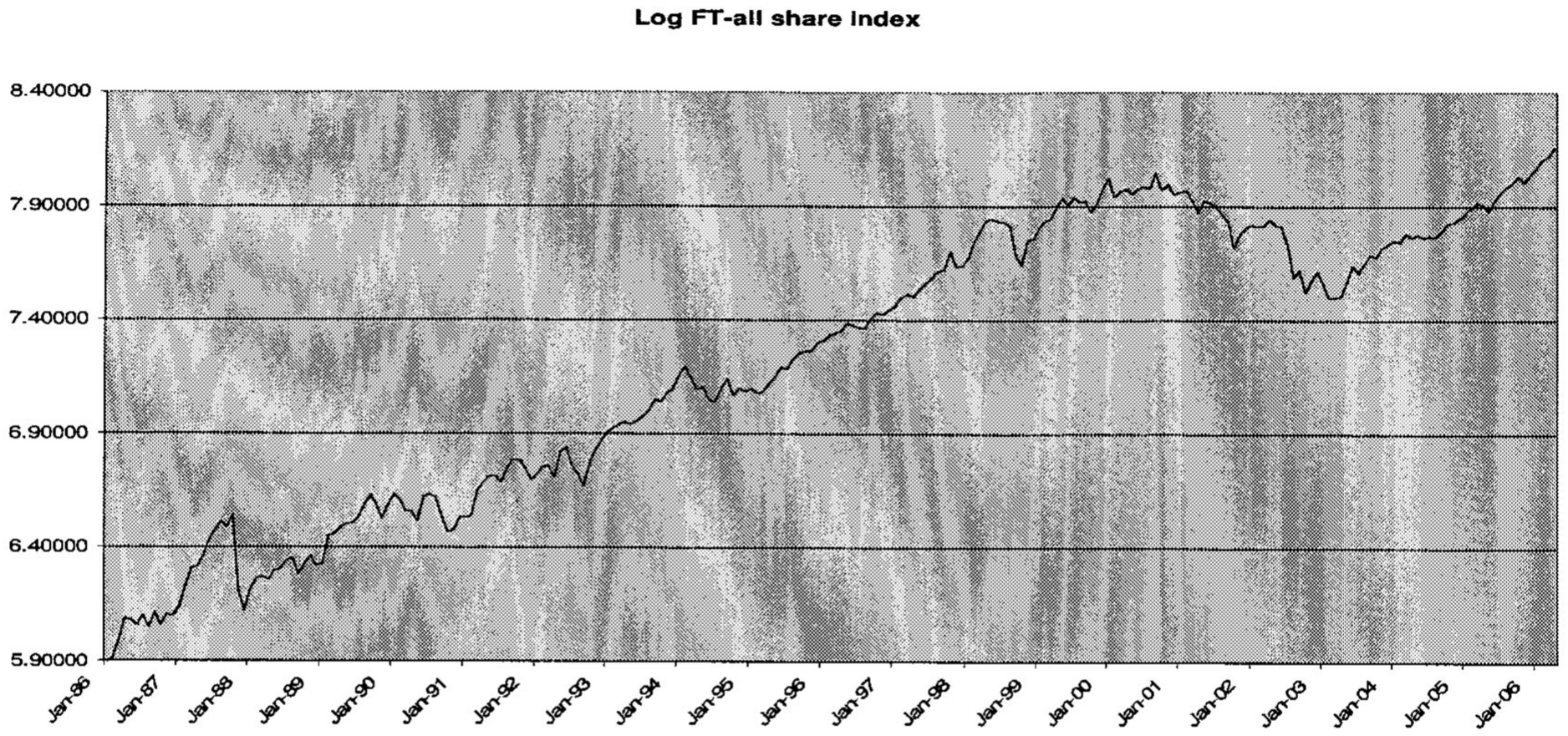
who opted-out or did not join their occupational schemes was that they lost their rights to employers' contribution to their pensions. Additionally, both SERPS and many of the occupational pensions were defined-benefits schemes, while personal pensions were defined-contribution schemes, thereby exposing pensioners to greater market risk.

High profile retail investment scandals during the period of this research (2002-2004) included the marketing of high income single premium bonds (nicknamed 'precipice bonds') and shares in Split-Capital investment trusts (Great Britain, Parliament, House of Common, Treasury Committee, 2003).[13] The former culminated in a large number of complaints to firms and to the FOS and a few enforcement actions by the FSA. In the latter case, the FSA negotiated an agreement with the relevant firms according to which they contributed to a mutual fund from which investors could claim partial capital refund. Consumer loss during the research period was linked with the collapse of financial markets. As depicted in the time series trend of the UK FT all-share index below, what was prominent about 2002/3 was the long-term nature of the market decline that started on September 11 and persisted throughout 2002-3.

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[13] In 2002 the shares of 19 split-capital investment trusts were suspended from the stock market as a result of their dramatic drop, and others faced major difficulties. The House of Commons Treasury Committee, which looked into the split-capital crisis, concluded that this collapse resulted from a combination of extreme borrowing by the relevant investment trusts' managers, high levels of cross-holding and possible collusion between them to the detriment of investors.

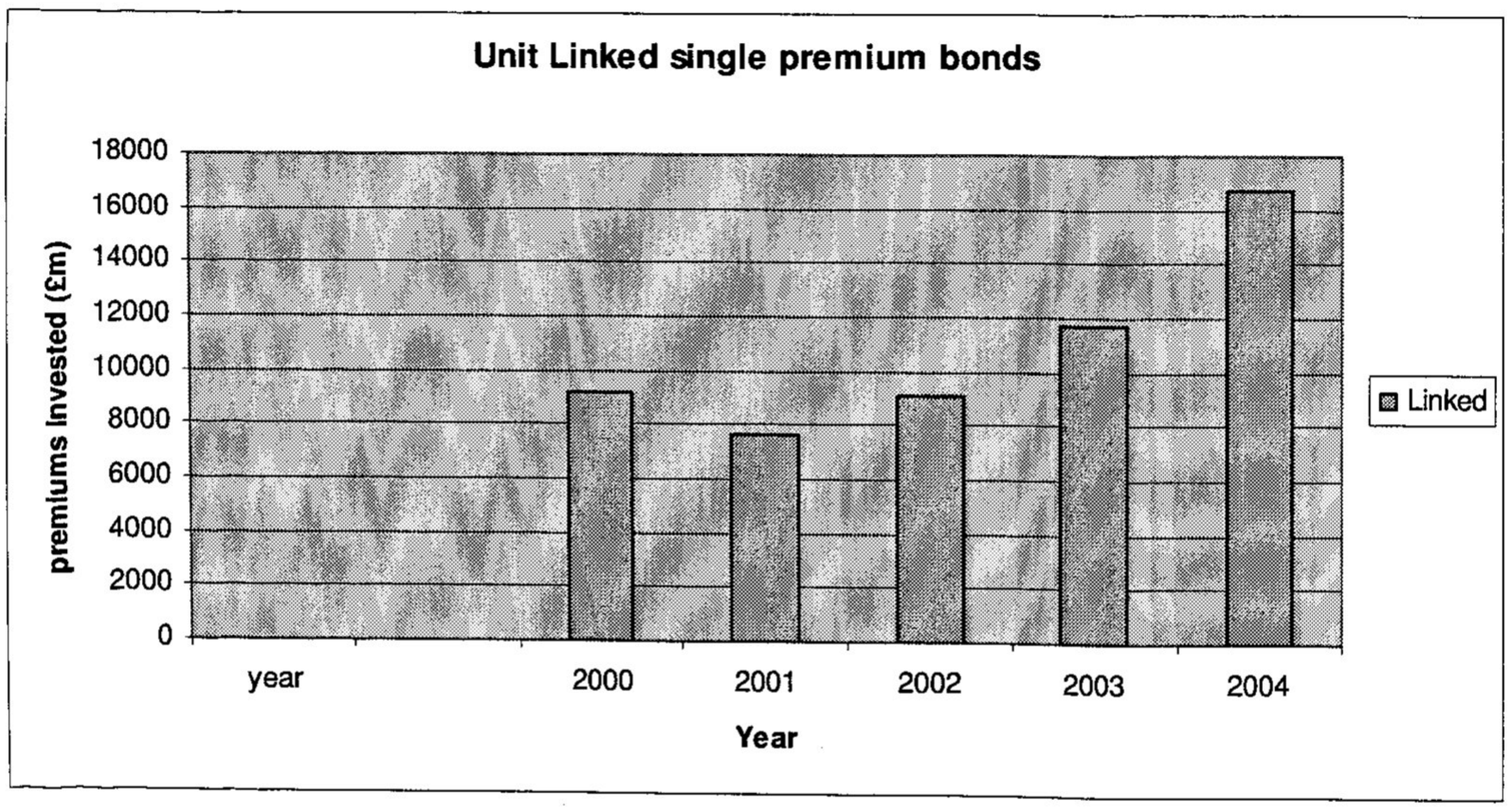
Figure 2.1: FT-all share index (January 1986 to January 2005)



*Source: DataStream dataset

The transparency of consumer loss during this period was enhanced by the popularity of unit-linked single premium investments and the decrease in the traditional with-profits endowments. Figure 2.2 encapsulates an increase in premiums invested in unit-linked single premium bonds between 2002 and 2004.

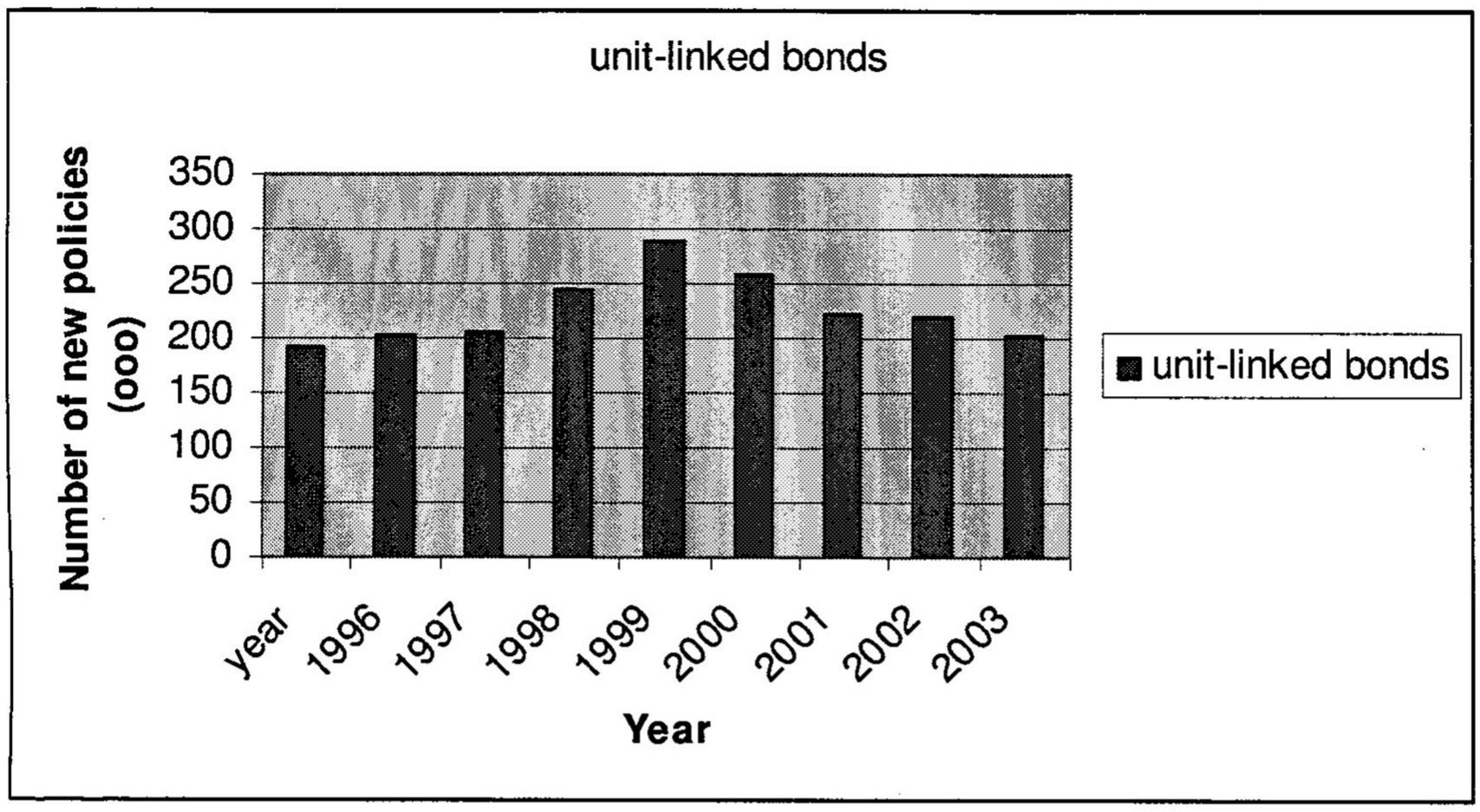
Figure 2.2: Premiums invested in unit-linked single premium bonds (2000-2004)



*Source: ABI; unpublished statistics.

Figure 2.3 suggests a more stable picture of investment in single premium bonds since 1995.

Figure 2.3: Changes to holding of unit-linked single premium bonds (1995-2004)



Source: ABI, unpublished statistics

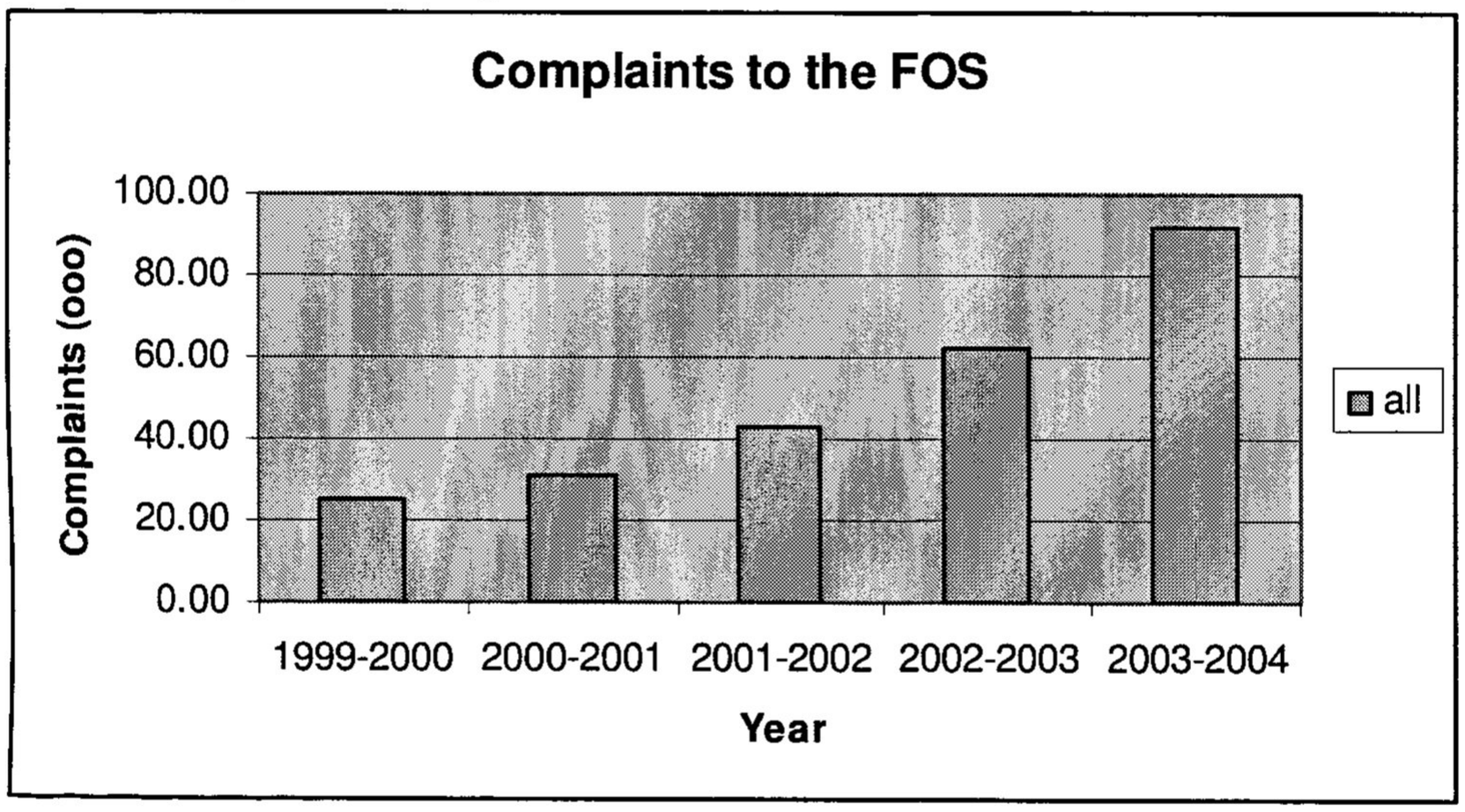
Hence, while premium invested in unit-linked bonds increased between 2002 and 2004, the number of new policies actually decreased during this period after peaking in 2000, thus suggesting concentration of investment (and loss) in unit-linked bonds between 2002 and 2004.

To sum up, increasing competition and demutualisation in the 1980s and 1990s resulted in higher risk for consumer abuse by retail investment firms. The collapse of the housing market and the SIB's exposure of the personal pensions mis-selling revealed the potential for further abuse. Consumer dissatisfaction increased with the decline of financial markets in 2002/3. The transparency of short-term consumer loss increased with the expansion of unit-linked products since the 1970s. As depicted below, the above instigated a massive number of consumer complaints.

Consumer complaints

Recurrent retail investment scandals since the mid-1990s resulted in rising numbers of consumer complaints. The first industry ombudsman scheme (IOB) received 59 complaints in 1981 (the year of its establishment), 1240 complaints in 1986 (the year in which the Financial Services Act 1986 was passed), and 8500 complaints in 1994 (after which its powers regarding retail investment were transferred to another body). The FOS received a total of 25,000 complaints in 1999/2000 reaching a total of nearly 111,000 in 2004/5.

Figure 2.4: Complaints to the Financial Ombudsman Service



*Source: FOS annual reports.

While the number of complaints to the FOS increased rapidly, these nevertheless represented only a small fraction of financial services transactions and of complaints to firms. An FOS executive estimated that less than 1% of financial transactions resulted in consumer complaints (E6b). According to interviewees' assessments, the volume of complaints received by the FOS amounted to a maximum of 10% of those

that reached the financial industry (T7, E6b).[14] With regard to endowment mortgages, these figures were higher, with the ratio of complaints to the FOS amounting to 20% of complaints to firms (E1). The overall ratio of 10% is relatively high when compared with the public sector, where in 2003/4 only 3% of citizen complaints were handled by ombudsmen and third-party mediators (NAO, 2005, p. 44). The higher ratio of complaints to the FOS might have been a consequence of its relatively salient media profile as discussed below.

This study's complaints sample suggests that complaints were usually filed by the complainants themselves and less frequently by a close relative on their behalf. In a few cases a complaint was handled by an IFA on behalf of the complainant. I have not encountered any case wherein an MP was involved in filing a complaint on behalf of a constituent. An internal FOS research, which compared the profile of its complainants with the clientele of one financial firm and the UK population more broadly, suggested that those who pursued their case all the way to the FOS were more likely to be among high socio-economic status groups (professionals, managers and technicians).

Hostile media coverage and consumer complaints

The media was a major player in the construction of retail investment scandals and a key driver behind the rise in consumer complaints and the politicisation of the regulatory regime. Below I assess the change over time in media attention to the retail investment sector and to the ombudsman, which I operationalise in terms of the quantity of relevant quotations in UK newspapers.

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[14] Birds and Graham's (1992) research on the IOB would suggest that the ratio of 10% was fairly stable. In their sample of 230 complaints to firms, 20 (i.e. 8.6%) proceeded to the IOB. However, there is no comparative information which would allow us to analyse variance in the ratio of complaints to the ombudsman out of those complaints that firms rejected.

The term *mis-selling,*[15] which came to denote some form of deficient investment sale, entered the media lexicon in 1991.[16] As of 1993, media coverage of *mis-selling* was most frequently associated with the personal pensions mis-selling, with reference to endowment mortgages intensifying as of 1999. Yet, as Table 2.1 below demonstrates, the notion of *mis-selling* was not confined to these major episodes.

Table 2.1: Usage of the term *mis-selling* in UK national newspapers

Year	Media attention to mis-selling	Personal pension mis-selling	Endowment mortgages mis-selling
1991	2	0	0
1992	10	1	1
1993	78	32	7
1994	249	152	12
1995	408	315	33
1996	272	220	8
1997	765	666	10
1998	909	734	4
1999	731	449	154
2000	486	268	143
2001	652	263	141
2002	998	304	240
2003	995	150	260
2004	Over 1000	169	337

Source: LexisNexis search

The association between regulatory intervention and media coverage of *mis-selling* is apparent from Table 2.1. Media reference to the term *mis-selling* initially peaked in 1995 with the full revelation of the scope of the personal pensions mis-selling. Coverage then declined and peaked again in 1997 and 1998 with the Economic Secretary Helen Liddell's pressure on the retail investment industry to progress the

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[15] Mis-selling was not a formal regulatory term. Its content was ambiguous, meaning different things to different people. Indeed applying the typology, which was delineated in the theoretical chapter, one can suggest varieties of interpretations to mis-selling, including: violation of firms' regulatory duties, breach of retail investment professional norms, immoral action and/ or letting down consumer expectations.

[16] The term 'hard-sell' was previously used, but it was not as prevalent as the current use of 'mis-selling' (Source: LexisNexis search 1980 to 1990).

pensions review, the discussions surrounding the introduction of stakeholder pensions and the reorganisation of financial services regulation under the current FSA regime. Hence, in these instances, trends in media coverage largely followed regulatory intervention, rather than prompting them.

It is noteworthy that in 1997 and 1998 reference to the personal pensions mis-selling accounted for over 80% of the use of the term mis-selling. Yet, at this point in time, it was not the selling of personal pensions itself that was at the centre of media attention. Rather, it was the industry's delay in conducting the review and the SIB's failure in supervising it.

The dramatic peak in media coverage of *mis-selling* during the period of this research (2002-2004) reflected a shift towards proactive media coverage, which was independent from regulatory intervention. During this period, both media coverage and regulatory intervention were stimulated by evident consumer loss subsequent to the collapse of the stock market. An FSA official remarked with regard to Split-Capital investment trusts:

> "You get cases where things …break out in the press first …like the business with Splits Capital investment trusts, where...we as regulators largely reacted to what we were starting to see by way of coverage of the financial press." (T2)

An FOS support area manager similarly remarked with regard to single premium 'precipice bonds':

> "Precipice bonds…it was very high profile …journals …get a feel for what issues are from investors, they get letters to their newspapers [as to] what people

are complaining about …and suddenly everybody is talking about them. Sometime it's not really clear what the driver is." (S3)

The independence of media coverage during this period can be explained by reference to the relative transparency of unit-linked products and investment trusts. Recognising the occurrence of consumer loss as a result of purchasing a personal pension or an endowment mortgage rather than an occupational pension and repayment mortgage required considerable sophistication. Consequently, the overselling of personal pensions and endowment mortgages were not widely perceived as *mis-selling* until labelled as such by regulators and other experts. In contrast, losses on precipice bonds and Split-Caps were easily discernible to investors, the media and politicians. Hence my argument that greater product transparency had the unintended effect of rendering consumer financial loss more susceptible to amplification by the media.

The FOS has also attracted increasing attention from the press, resulting in a rapid rise in complaint volumes. Table 2.2 reveals a strong association between media coverage of the FOS and variance in the volume of non-mortgage endowment-related complaints. It shows that as national newspapers' coverage of the FOS peaked in 2002, so did non-mortgage endowment-related complaints. In contrast, the trend in mortgage endowment complaints was relatively independent from media attention to the FOS.[17]

[17] This difference probably reflects the fact that mortgage endowment complaints were driven by regulatory mandated policy growth projection letters and the proliferation of firms that specialised in filing mortgage endowment complaints on behalf of consumers.

Table 2.2: UK newspapers' attention to the FOS and complaints' volume

Year	Media attention to mis-selling	Media attention to the FOS	Ombudsman/mis-selling	Endowment mortgage complaints	Non endowment mortgage complaints
1999/0	731	109	15%	3,135	21,865
2000/1	486	131	27%	9067	22,280
2001/2	652	321	49%	14,595	28,735
2002/3	998	753	75%	13,570	48,600
2003/4	995	600	60%	51917	39,960
2004/5	Over 1000	622		69,737	41,226

Source: LexisNexis search

A comparison with media attention to the IOB, one of the FOS's predecessor bodies, demonstrates a radical difference in the environment faced by these organisations.

Table 2.3 UK newspapers attention to the IOB (1982-1994)

Year	Media attention to the IOB	Year	Media attention to the IOB
1982	0	1989	10
1983	0	1990	8
1984	1	1991	3
1985	4	1992	11
1986	4	1993	15
1987	5	1994	27
1988	3		

Source: LexisNexis search

Analysis of the content of media coverage of the FOS further explains the increase in consumer complaints. This suggests that coverage of the FOS tended to be positive, while critical of the retail investment industry. I reviewed all 'major stories' regarding the FOS in the *Daily Mail* and *Mail on Sunday*, published between March 2002 and January 2005.[18] I focused on the *Mail* because both my analysis of complaints files and interviews suggest its predominance among those who complained to the FOS.

[18] There were a total of 32 relevant major stories out of two hundred and fifty-six entries without this limitation. I coded the articles according to an overall assessment of their content as 'negative', 'positive' or 'neutral'.

Out of thirty-two articles only four (12.5%) revealed a negative or critical tone towards the FOS. Negative coverage regarded the FOS's backlogs and delays in handling complaints, allegations of its employees' inadequate training and experience and the inconsistency of its decisions. Negative coverage started in 2004, while earlier coverage was uniformly positive. All other stories tended to be critical towards the retail investment industry, while positive or neutral towards the FOS and its judgments.

The relationship between media coverage and consumer propensity to complain was further evident from complaint files. In my sample of complaints, consumers referred to media coverage as the trigger for their complaints in 20% of cases. In a number of cases complainants attached the newspaper article which triggered their concern to the complaint form. A number of complainants threatened firms (and the FOS) that if their complaint was rejected they would pursue it further with the press. In contrast, I did not encounter cases wherein complainants asserted that they were advised by their local MP or that they threatened to involve their political representative.

B. Conduct of business regulation (1986-2004)

I have analysed the causes of increasing politicisation of retail investment marketing since the 1990s. I have shown how media attention to *mis-selling* rose in 1998, with criticism of the Securities and Investment Board (SIB) and the industry's failure to handle the personal pensions review, and peaked during the research period (2002-2004) in response to evident consumer loss.

If responsiveness is contextually driven, as current literature would lead us to expect, regulatory responsiveness to consumers and the rigidity of regulations should have

escalated in line with recurrent scandals and hostile media coverage. Yet, the history of the retail investment sector presents a more complex picture of shifting regulatory discourses. Until the mid-1970s, life assurance regulation was restricted to the supervision of firms' prudential status. As already mentioned, in 1974 limited conduct of business regulation was introduced in response to the apparent disparity between the regulation of unit trusts and unit-linked life assurance products. Additionally, as elaborated in chapter three, in 1981, in response to pressure from the Office of Fair Trading and adverse publicity regarding general insurance, insurance firms voluntarily established the IOB.

In 1988, as part of the general financial service regulatory reform under the Financial Services Act (1986), enforced self-regulation was introduced to the retail investment sector. The SIB and the Self-Regulatory Organisations' (SROs) discourses merged notions of consumer informed choice with an attempt to professionalise retail investment advising. In the mid-1990s, with the exposure of the personal pensions mis-selling, the SIB and the Personal Investment Authority (PIA) shifted towards a more bureaucratised approach. This involved greater emphasis to standardisation and formalisation of retail investment advising. In contrast to this tendency towards bureaucratisation and despite the above-mentioned escalation of adverse publicity and soaring consumer complaints, the FSA's discourse reverted to advocating a less prescriptive regulatory approach. Table 2.4 summarises the argument regarding regulatory discourse shifts between 1986 and 2004. It further portrays variance over time in the relationship between redress and regulation, which is addressed in the next chapter.

Table 2.4: Shifts in regulatory discourse (1988-2004)[19]

Period	Regulatory agency	Regulatory discourse	The relationship between redress and regulation
1988-1993	SIB, LAUTRO & FIMBRA	Professionalism & consumer choice	Independent (IOB)
1994-1999	SIB and the PIA	Bureaucratisation	Integrated (PIAOB)
2000-2004	FSA	Consumer choice & responsibility	Independent (FOS)

1. From professionalism to bureaucratisation: the SIB and the SROs

Between 1988 and 1993, retail financial regulation amalgamated two types of discourses, which guided and legitimised the regulatory project: the making of consumers into informed buyers and the transformation of retail investment marketing into professional advising. The exposure of the personal pensions mis-selling in 1992-4 resulted in greater bureaucratisation and standardisation of retail investment advising.

The infrastructure of the 1986 regulatory regime

The Financial Services Act (1986) was motivated by the liberalisation process of the Stock Exchange in the late 1970s and early 1980s, which made the continuation of consensual self-regulation of securities unfeasible due to increasing competition among firms (Black, 1997; Moran, 1986, 1991, 2003; Vogel, 1996). While the retail investment sector was highly influenced by this regulatory reform, its regulation was secondary to the main goal of the institutional change, which was to develop and maintain the status of the City as an international financial centre.

[19] There is some resemblance between this categorisation of regulatory discourses and the typology of varieties of complaint handling schemes, which was presented in chapter one.

The 1986 Act created a three-tier regulatory regime.[20] The Secretary for Trade and Industry was empowered to nominate and delegate legislative, investigative and enforcement powers to the SIB. The SIB further delegated regulatory authority to self-regulatory organisations (SROs) inasmuch as their proposed rules secured investors with equivalent protection to that offered by the SIB rulebook.[21] Firms could choose to register with a relevant SRO or to be directly regulated by the SIB.

The retail investment sector was initially regulated by two SROs: LAUTRO, which regulated life assurance and unit trusts firms, and FIMBRA which regulated independent financial intermediaries. In addition, life assurance and unit trusts, which were subjected to regulation by LAUTRO, were legally required to join either the IOB or LAUTRO's complaints committee. Later the SIB induced the industry to form an integrated SRO – the personal investment authority (PIA) – which combined retail investment firms and their independent intermediaries. In July 1994, LAUTRO and FIMBRA transferred all their functions to the PIA.[22] SIB delegated supervisory functions to the PIA in relation to its directly supervised firms (mainly banks and building societies' life assurance businesses). In addition, the IOB transferred its functions and staff as related to life assurance to a newly created PIA ombudsman (PIAOB).

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[20] For an historical analysis of the legislation of the 1986 Act see Black (1997).
[21] The criterion for the SROs rule-making was later changed, in an agreement between the SIB and the SROs, from 'equivalent' to 'adequate', thus allowing the SROs more independence in creating detailed regulations for their members. The same agreement further empowered the SIB to delineate general core rules, which applied to all firms and thereby to all SROs. The distinction between core and detailed rules was carried forward to the FSA rule book.
[22] For an elaborated discussion of the circumstances surrounding the establishment of the PIA see: Clarke, 1999, Ch. 4.

Regulatory discourse and policy innovation

Retail investment regulation developed rapidly during the SIB's existence. Most of these innovations were carried forward into the FSA regime (but see *depolarisation* below).

A large number of SIB policy innovations aimed at allowing consumers to make informed choice by mandating firms to provide them with information regarding financial products. This included presentation of charges, of the effect of commissions upon consumer expected returns and projection of policy values.[23]

In addition to disclosure provisions, regulation aimed to restructure and professionalise retail investment advising. The restructuring of distribution – termed *polarisation* – was a major innovation of the new regulatory regime. Polarisation created a division between two types of investment advisers: 'tied-agents' (including firms' direct sales forces), who were restricted to selling the products of one company, vs. 'Independent Financial Advisers' (IFAs), who were to advise consumers on a range of products from the whole market. Polarisation further inhibited IFAs from receiving indirect benefits from firms. This was achieved through the *better-than-best* rule, which allowed IFAs to recommend a product of a provider which owned 10% or more of their business only if it was better than *any* alternative product in the market. Coupled with polarisation were requirements that tied-agents explain their status to consumers, and that IFAs disclose the amount of commission paid to them. The logic behind the polarisation regime was both to create a professional market of

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[23] LAUTRO's projection values, which were based on the high returns of the 1980s, turned out to be overly optimistic. The subsequent regulatory mandated communication of shortfalls to policyholders with regard to endowment mortgages was shaped by a correction down of these expectations. Additionally, the main concern of the FSA with regard to endowment mortgages had been with firms that illustrated charges as required by LAUTRO, while *de facto* charging more than was implied by these illustrations.

independent advice (i.e. the IFA sector) and to make it clear to consumers whether they were getting independent advice.

All advisers were required to *know their customers* and to offer only those products that were *suitable* to individual clients' needs, *affordable* given clients' financial circumstances and compatible with their *attitude to risk*. In broad terms, IFAs were required to offer clients the most suitable product in the market, while tied-agents were expected to offer the most suitable product from within the range marketed by their firm. Additionally, as of 1993/4, SROs were required to enforce competence regulations, agreed with the SIB, which detailed firms' training and supervision of advisers. Yet the content of the professional discourse, applied by firms and advisers – i.e. the notions of *suitability* and *attitude to risk* – remained largely unspecified. This remained the case under the regulation of the FSA, with the exception of personal pension transfer, which was standardised as a result of the personal pensions review.

The personal pensions review prompted a shift in regulatory discourse towards greater bureaucratisation of retail advising. It is also a key reference point to understanding the FSA's discourse of regulatory restraint as further described below. During 1992/3 the SIB reviewed a sample of pension transfer sales by its directly regulated firms, which it later expanded to SROs regulated firms. The analysis revealed that most firms failed to adequately record information about clients' circumstances and the grounds for investment advice. In 1994 the SIB formally required firms to review all their sales of personal pensions between 1988 and 1994 according to detailed standards and procedures and to provide redress where loss occurred as a result of non-compliant advice. Under these regulations, firms' failure to adequately record clients' information and the reasons for advising them to take out a personal pension

was interpreted as a non-compliant sale (Sandler, 2002, p. 96). As discussed below, the review's focus upon firms' record-keeping prompted firms to standardise and formalise their retail investment advice process.

Phase I of the personal pensions review was intended to take around two years and to be concluded by the end of 1996. In practice, it was only in 1997/8, following the naming and shaming of individual firms in the public domain by Helen Liddell (the Economic Secretary to the Treasury), that the review finally took off. Later, under the FSA regulation, firms were further required to review their sales of Free Standing Additional Voluntary Contributions (FSAVC) pension policies. Overall, the personal pensions review and the FSAVC review took until 2003 to complete and their costs to the industry accumulated to a total of £11.8 billion of compensation to consumers and £2 billion in administrative costs (FSA, 2002). The costs were more heavily borne by larger firms in comparison to IFAs, since the latter were found to be less involved in *mis-selling*. The reviews required the PIA, and later the FSA, to engage in time-consuming supervision of firms, including conducting reviews on behalf of IFAs whose professional indemnity insurers prevented review by firms.[24]

The unintended consequences of regulation

The personal pensions mis-selling affair had a decisive impact on firms' internal supervision and standardisation of retail investment advising. Sandler (2002) suggests that the cost of the review led firms to engage in standardised collection and documentation of information about clients and the grounds for investment advice. He further suggests that the PIA's supervisory approach reinforced this tendency due to

[24] For a detailed analysis of phase I of the personal pensions mis-selling affair see: Black & Nobles (1998).

its strong focus upon firms' record keeping (*ibid*, p. 97). He quotes an analysis by the ABI, which proclaimed that the average duration of a sale by firms' direct sales forces increased from 1 hour to 5.5 hours between 1990 and 2000 and from 2.5 hours to 6 hours in the case of IFAs. The same study suggested that compliance departments of some life assurance firms checked 100% of their direct sale forces' retail investment sales.

The rise in compliance costs and the reputation risks of *mis-selling* induced firms to alter their former distribution channels, increasing their reliance upon the IFA sector and especially upon IFA networks.

Prior to polarisation banks and building societies typically acted as agents to a number of life assurance firms. After polarisation, in order to avoid the training costs entailed in switching to the independent advice regime, most banks and building societies preferred to tie themselves to one insurance company. Subsequently they established their own in-house life assurance businesses. The independent advice sector, given its increasing costs and regulatory constraints upon money raising from insurance firms, initially contracted and specialised in more affluent customers (Clarke, 1999). There was also a considerable growth in IFA networks, which offered their members, in addition to information on products and negotiation of commission vis-à-vis product providers, compliance and complaint handling services.

However, the compliance and reputation costs of the personal pensions mis-selling resulted in the contraction of firms' distribution through their direct sales forces and expansion of distribution through the IFA sector and direct telemarketing. While in 1989 the IFA share of new life assurance business (measured in terms of premiums)

was under 40%[25], by 2004 it had reached 47.4%.[26] This was skewed towards the selling of single premium products over regular with-profits endowments and protection products. This trend accounts, at least in part, for the observation above regarding a decrease in with-profits endowment policies. With regard to single premium policies the IFA share of new business reached 65% in 2004, while making only 31% of the traditional regular premium policies.[27]

2. Restraining regulation: the Financial Services Authority

While retail investment scandals and media attention to retail investment advising continued to escalate, the FSA's discourse departed from the above tendency of the SIB and the PIA towards prescriptive regulation. In contrast, it emphasised risk-based regulation, consumer choice and responsibility and a meta-regulatory technique. The FSA's non-prescriptive regulatory approach further contrasted with its internal standardisation of the procedures according to which it allocated regulatory resources across firms and tasks.

The infrastructure of the FSMA 2000 regulatory regime

The Financial Services and Markets Act 2000 (hereafter FSMA 2000) resulted in the consolidation of regulation in the hands of the FSA. In May 1997, on the formation of the new Labour government, the Chancellor of the Exchequer announced the government's decision to centralise financial regulation in one statutory regulator (the SIB), and to merge banking supervision and insurance prudential regulation into the SIB. In October 1997 the SIB was renamed the Financial Services Authority. In June 1998 the Bank of England's responsibility for banking supervision was transferred to

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[25] London Economics (2000), p. 16.
[26] ABI, unpublished statistics.
[27] ABI, unpublished statistics.

the FSA. The Treasury delegated its authority to the FSA (transferred to it from the DTI) for authorisation and prudential regulation of insurance firms. All SROs delegated to the FSA their responsibilities, although in practice they proceeded to act under their various codes within the FSA structure. Finally, in June 2000, the FSMA 2000 completed the transformation to one-tier regulation and the integration of conduct of business and prudential regulation. The FSA, which had already operated for three years by that time, was an active participant in the legislation process. In 2004/5 the FSA had around 2000 employees, regulating nearly 26,000 firms.

The Chairman of the FSA and its Board were appointed by the Treasury.[28] Like its predecessor, the FSA was financed by the industry through levies. The FSA had the power to make regulations, to delineate codes of practice and to issue guidance on its rules. Its enforcement powers included public censure, imposing a civil financial penalty and the withdrawal of a firm's authorisation.[29] In discharging its powers the FSA was required to act in a way which was compatible with its statutory objectives and principles. The FSA's statutory objectives included: market confidence, public awareness, the protection of consumers and reduction of financial crime. The FSA's principles required it to have had regard: to the need to use its resources efficiently, to proportionately, to firms' responsibilities, to innovation, to competition and to the desirability of maintaining the City's competitive position as an international financial centre. The Act further prescribed that consumer protection entails *appropriate* protection, taking account of the degree of risk involved, consumers' relative

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[28] During the first ten years of the FSA's existence the Chairman of its founding Board, Howard Davies, also acted as Chief Executive. This was no longer the case with the second Chairman.

[29] The FSA's use of its powers was constrained by (and open to) numerous formal accountability mechanisms. It was required to consult with its permanent Practitioner and Consumer Panels and to hold a yearly public hearing about the extent to which its policies and practices conform to its statutory duties. It had to conduct public consultations on its proposed rules, which were further subjected to competition scrutiny by the OFT. Finally, firms could appeal the FSA's enforcement actions to an independent tribunal.

expertise and their need for advice and information, and "the general principle that consumers should take responsibility for their decisions".[30]

The FSA's regulatory discourse

In contrast with the centralisation of power as a result of FSMA 2000, the FSA emphasised non-prescriptive regulation and restriction of consumer expectations from regulation. The FSA's discourse consisted of the following closely-related core ideas: risk-based regulation, consumer responsibility and realistic expectations from regulation, and meta-regulation. These three ideas were encapsulated in the FSA's seminal delineation of its risk-based regulatory approach, *A new regulator for the new millennium,* published in January 2000 (FSA, 2000):

> "The aim is to shift to a regime which:
>
> - Is built on a clear statement of the realistic aims and limits of regulation;
> - Recognises the proper responsibilities of consumers…and of firms' own management, and the impossibility and undesirability of removing all risk and failure from the financial system."

i. Risk-based regulation

Risk-based regulation was central to the FSA's interpretation of its role. The FSA defined risk as the possibility that due to firms' or consumers' behaviour, or as a result of other environmental contingencies, it would fail to achieve its abovementioned regulatory objectives. Accordingly, the FSA assessed the probability and impact of the risk that individual firms posed to the realisation of its objectives. Its allocation of supervision resources was shaped by its ongoing risk rating of firms.

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[30] Section 5, FSMA 2000.

The FSA's risk-based regulation discourse emphasised that some risks were either too remote, or too small, to merit the cost of mitigation. Black (2005) suggests that the FSA's risk-based approach not only legitimised, but also dictated, erring on the side of not preventing risks that eventually materialise, rather than erring on the side of over-regulating remote risks.

Black (2005) argues that the FSA's motivation to design a comprehensive approach to regulation was motivated by its attempt to create a coherent culture, and stimulated by the SIB's and the Bank of England's experiences surrounding the personal pension mis-selling and the collapse of Barings Bank. According to Black, these incidents taught the FSA that it needed to be able to explain the basis of its risk management, and to manage public and political pressure for increased regulation following regulatory failures. Black emphasises that the FSA risk-based discourse was designed to both avoid blame for future failure, and to buffer its operation from political demand for increased regulation.

ii. Consumer responsibility and realistic expectations

In the FSA discourse, risk-based regulation was linked with the notion of consumer responsibility for financial decisions and the need to limit consumer expectations from regulation. This approach was articulated by the FSA's first Chairman in his evidence before the Joint Committee on Financial Services and Markets during the legislative scrutiny of the FSMA 2000 Bill. He explained his Board's preference for making explicit the responsibility of consumers and the limitations of regulation (Great Britain, Parliament, Joint Committee on Financial Services and Markets, 1999):

"(Lord Taverne) [referring to the principle of consumer responsibility] the legislation seems to have a slightly worrying bit…which seems to enshrine the principle of *caveat emptor*…

(Mr Davies) …we favour an element of *caveat emptor* in the legislation; partly…for selfish reasons; which is that without it might be possible for people to argue that regulators should go to any extent possible to remove the possibility of mis-buying."[31]

The FSA Chairman further concurred that the integration of regulation in one body could have the adverse effect of engendering unrealistic public expectations from regulation. He explained that making explicit the notion of *caveat emptor* was favoured by the FSA as a means for containing such expectations.

"(Mr Sheerman) Mr Davies, do you think there is going to be a revolution of rising expectations? Here we have nine regulatory bodies rolled into one…that is going to have high profile…

(Mr Davies)…I would find it difficult to say that this is not potentially a problem. I think that it could well be…it is important that people do not have unrealistic ambitions about what regulators can achieve…that is part of the justification why…an element of *caveat emptor* is appropriate…consumers should not be given the idea that we are sitting alongside every financial adviser or bank clerk ensuring that she does the right thing…I think people are reasonably realistic…but I can see there is a danger."[32]

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[31] *ibid*, paragraph 24.
[32] *Ibid*, paragraph 32.

iii. Firms' responsibility and meta- regulation

Black (2005, 2006) draws attention to the relationship between risk-based regulation and meta-regulation (Parker, 2002) or what Power (1997) refers to as auditisation. That is, a regulatory approach that focuses upon reviewing firms' internal controls rather than their transactions with consumers. Indeed, the FSA emphasised the responsibility of firms' senior management to run their business in a way that meets regulatory requirements, "and hence to decide what systems and controls to adopt to ensure…good quality business which meets customers' needs" (FSA, 2003, p. 3). Related to this was the FSA's disinclination to present firms with detailed regulatory prescriptions. In light of this general approach, the FSA resisted retail investment firms' requests for detailed definition of *mis-selling*, which would have given firms more certainty about regulatory expectations (*ibid,* p. 3). Hence, risk-based regulation provided firms with the advantage of autonomy on the one hand, while exposing them to the risk of ex-post regulatory intervention on the other.

Balancing conduct of business and prudential regulation

In addition to the above change in discourse, another major difference between the FSA and its predecessors regarded the merger of prudential and conduct of businesses regulation. Black (2005) found that one implication of the FSA risk-based framework was a shift in resource allocation from prudential to conduct of business regulation. She explains that this was a result of the FSA's realisation that a retail investment firm's breach of its conduct of business obligations may have grave implications for its prudential status. That is, the compensation and reputation costs of *mis-selling* could jeopardise firms' financial stability. However, chapter eight of this thesis shows that once alleged conduct of business failures did occur, and generated consumer complaints to the FOS, the FSA was frequently disinclined to intervene. This

disinclination may have reflected the FSA's acute concern with life assurance firms' financial stability in a declining equity market during 2002/3 (FSA, 2003a). Hence, it seems that the FSA's conceptualisation of 'risk' in terms of threats to the realisation of its own objectives entailed its perception of consumer redress as a risk to its prudential regulatory objectives.

Regulatory developments under the FSA

It is impossible, in a thesis that focuses upon the FOS, to cover the whole development of retail investment conduct of business regulation under the FSA. Below I focus on two key examples, which demonstrate the FSA's inclination towards a less interventionist regulatory approach.

i. Endowment mortgage mis-selling: As indicated above, media attention to the overselling of endowment mortgages started in the early 1990s. Yet, it was only in 1999 that the PIA (already under the umbrella of the FSA) issued its regulatory guidance regarding the future selling of mortgage endowments. With regard to past mortgage endowment sales, the FSA rejected calls to conduct an industry-wide proactive review of advice suitability and compensation according to regulatory prescribed criteria as the SIB has done in the case of personal pensions. Instead, the regulator embraced an initiative of the ABI, according to which mortgage endowment policyholders were advised by firms whether their policy was expected to fall short of the targeted amount and of the options available to them (PIA, 1999). Among policyholders' options was filing a complaint if they believed that the shortfall of their policy was a result of a *mis-sale* and therefore justified compensation. Consequently, firms conducted regular reviews of the projected maturity value of mortgage endowment policies and communicated these evaluations to their policyholders every

two years. In addition, the FSA required some of the larger firms to conduct proactive reviews of all their sales, on the basis of concerns indicated by sampled reviews.[33] As a result of the FSA's targeted proactive reviews five firms were fined and instructed to pay compensation, and 19 other firms agreed to give redress to their customers on a non-disciplinary basis, resulting in compensation to 436,500 consumers (Great Britain, Parliament, House of Commons, Treasury Committee, 2004). In addition, as explained above, by the end of 2003, around 500,000 complainants filed complaints with firms. Later, partly as a result of information provided by the FOS, the FSA fined a number of firms for their poor handling of endowment mortgage complaints.

ii. Depolarisation: Following a review by the OFT that suggested that polarisation (i.e. the distinction between tied-agents and IFAs and the restriction of the former to the selling of one firm's products) has had anti-competitive effects and after a series of consultations, the FSA set to liberalise – i.e. depolarise – the financial intermediation sector. The depolarisation rules, which came into full force in June 2005, enabled advisers to perform their services as tied-agents, multi-tied agents or as IFAs subject to adequate disclosure. IFAs were required to offer consumers the option of directly paying for advice by fee in lieu of commission from the product provider. The better-than-best rule was also abolished. Statistics regarding new life assurance business, measured in terms of premiums, suggest that the introduction (or the anticipation) of depolarisation has had an immediate impact on distribution. With regard to new regular premium business (e.g., with-profit endowments and term policies) there was a dramatic increase in the percentage of business via firms' direct sales forces and tied-agents (from 44% in 2004 to 81% in 2005). The change was smaller with regard

[33] These proactive reviews usually addressed the particular problem of some firms' application of administration charges, which were higher than those which they published in their promotional material on the basis of LAUTRO's mandated illustrations; (T7).

to single premium policies, which were typically aimed at more affluent consumers who were more likely to prefer the services of IFAs.

C. Conclusion

Current literature expects political scandals and adverse publicity to result in *both* defensive standardisation of regulation and increased responsiveness to consumers. Yet, the discussion above shows that such a relationship is not necessary. Intensive media coverage and recurrent retail investment scandals indeed coincided with the FSA's standardisation of its internal allocation of regulatory resources through an elaborated risk-based regulatory framework. However, in contrast with the expectations of the rational-contextual hypothesis, scandals and adverse public opinion did not lead the FSA to adopt a prescriptive regulatory approach and a consumer-responsive discourse. Quite the contrary was true in this case. The FSA discourse of risk-based regulation, consumer responsibility and meta-regulation diverged from the SIB and the PIA's tendency towards prescriptive regulation.

Black (2005) explains the FSA risk-based approach as attempting to *both* avoid blame and to buffer external demand for increased regulation in response to regulatory failure. Hence, while the FSA's risk-based regulation was a response to external threats, it was designed to render the organisation less responsive to future political pressures.

The FSA's designed unresponsiveness to external demands for increased regulation entailed that the FOS was bound to deal with more complaints of a systemic nature. The FSA's disinclination to conduct an industry-wide review of endowment mortgages, thereby resulting in massive number of complaints to the FOS, was the

most prominent example. Chapters four and eight will discuss additional examples based on my complaints sample.

In the following chapters, in addition to my focus upon the FOS's intra-organisational dynamics, I assess how the above context affected its micro-level responsiveness to consumer complaints and its role within the retail investment regulatory regime. One argument considered by this thesis – assessed in chapter eight – is that the FSA's risk-based approach and its capacity to balance conduct of business and prudential regulation were supported by the FOS's handling of individual complaints. I suggest that a politically unresponsive system of regulation, such as a risk-based regulatory framework, is supported by having a responsive 'exit' point for consumers with high expectations. Without such an exit point, an unresponsive system would be hard to sustain in an environment prone to recurrent scandals. I propose that the FOS provided consumers, firms and the FSA with this function. Yet, chapter eight further elucidates the limitations of this argument.

Part II

The development of the ombudsman's intra-organisational institutions: basic structure, domain perception & systems of control

Chapter 3: The evolution of structure and complaint handling processes

The aims of this chapter are twofold: to familiarise the reader with the FOS and to analyse the evolution of its structure against the complaint handling typology, which was presented in the first chapter. Consequently, this chapter analyses the change over time in the ombudsman's accountability mechanisms, 'basic structure',[1] mandate, budgeting and complaint handling processes. This analysis is intended as both a foundation for the next chapters as well as material for a preliminary analysis of the ombudsman's configuration. The next chapters will further probe the analysis here, resulting in its modification in the concluding chapter.

The analysis below traces the evolution of the FOS structure and complaint handling process back to two of its predecessor organisations: the Insurance Ombudsman Bureau (IOB) and the Personal Investment Authority Ombudsman Bureau (PIAOB). The analysis of the IOB and the PIAOB's structures and processes is based on these bodies' annual reports, unpublished internal correspondence of the IOB (comprising communication between the Ombudsman, Council and Board members) and previous academic research on the IOB (Birds and Graham 1992; Tyldesley, 2003). The analysis of the FOS's structure and process is based on my observation research, internal guidance and interviews.

Chapter one, drawing upon Mashaw's (1983) administrative justice models and my proposal for an additional therapeutic model, delineated four ideal-type complaint

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[1] Following Hood *et al.* (1981) I take the term 'basic structure' to mean an organisation's internal differentiation and specialisation (i.e. the number of different occupations within its structure), the degree of technocracy (i.e. the ratio of professionals to administrators) and levels of vertical hierarchy. The other measures used by these authors, regarding 'measures of dispersion' and 'number of associated bodies' are of lesser relevance to the typology as delineated in chapter 1.

handling regimes. With regard to organisational structure and budget, the typology differentiated the following alternative arrangements as summarised in Table 3.1:

Table 3.1: Four ideal-type complaint handling structures

Organisational structure	Machine bureaucracy	Professional bureaucracy	Independent referee	Procedural bureaucracy
Budget source	Taxation	Member fees	Litigation costs	User fees

Building on this typology, section A of this chapter shows how the ombudsman's structure shifted over time from that of an independent referee to a professional structure. To recapitulate, by *independent referee* I mean a layperson, operating independently or within a loose organisational structure, whose decisions are based on *ad hoc* moral judgment. In contrast, a *professional bureaucracy* is a flat hierarchy in which individual judgment is exercised within the boundaries of accepted professional knowledge, employees have a common formal educational background and they are coached and supervised on the job by their peers (Friedson, 2001; Mintzberg, 1983).

However, the FOS's structure was not entirely akin to that of a professional bureaucracy. The analysis below demonstrates how as a result of the ombudsman's historical development it ended up comprising a two-tier professional core consisting of two ranks: ombudsmen and adjudicators.[2] The two-tier structure gave rise to the establishment of a *de facto* appeal mechanism, wherein both firms and complainants could request an ombudsman's review of an adjudicator's decision. While ombudsmen were traditionally recruited from outside the financial industry, adjudicators were predominantly recruited from firms' sales and complaint handling

[2] As discussed below, it would be more exact to say that the FOS had a third rank of consumer consultants whose work concerned interface with consumers' initial queries.

departments. Wage disparity between ombudsmen and adjudicators was high. Additionally, the analysis in chapters five and seven demonstrates that while ombudsmen enjoyed high professional autonomy, the quantity and quality of adjudicators' decision making and their interpersonal interaction with complainants were closely monitored. Thus, while both adjudicators and ombudsmen, as shown below, possessed broad substantial discretion, adjudicators operated under a more controlled environment.

The FOS's handling of retail investment complaints further differed from a classic professional bureaucracy in yet another sense. Its knowledge base – the notion of advice suitability – had not reached a highly developed level. As explained in chapter two, the rules regarding advice suitability came into force in 1988 with the Financial Services Act (1986). When compared with the classic professions, the knowledge applied by the FOS was new and its content uncertain and contested. Yet, as discussed in chapters five and eight, the FOS's interpretation of 'suitability' and its application of this notion to complaints of a systemic nature were increasingly more consistent and even standardised.

Going beyond analysis of structure to process, section B describes the logic of complaints' progression from firms to the FOS and then within the organisation's sub-divisions. I show how the allocation of complaints across the organisation reflected not only units' specialisation in different retail investment products, but also expectations about firms' and complainants' relative amenability to adverse decisions. The prominence given by the FOS to considerations of consumers and firms' amenability to adverse decisions is further analysed in chapters five and seven.

A. From an independent referee to a multi-tier professional structure

Below I trace the change over time in the ombudsman's structure, showing how it transformed from an *independent referee* into a *professional bureaucracy*. This process entailed a greater tendency to recruit personnel from within the retail financial industry and lesser input from both laypeople and the legal profession. Chapters five and seven will suggest that this change in recruitment base facilitated a transformation in the ombudsman's articulation of its goals and internal controls.

1. The establishment of the ombudsman schemes

The Insurance Ombudsman Bureau (IOB) was established in 1981. The IOB was the first private ombudsman scheme in the UK, which was later replicated in other sectors[3] (James, 1997; Senevirante, 2002). It was a voluntary scheme, which was set up by three insurance firms in response to adverse publicity regarding general insurance business and pressure from the Office of Fair Trading on firms to reform their handling of consumer complaints (Birds and Graham, 1992). The establishment of the IOB was further prompted by the Law Commission's efforts to initiate a comprehensive reform of general insurance law during the late 1970s. Despite initial resistance (see: Tyldesley, 2003), within a few years the IOB's voluntary membership embraced two-thirds of the general and life insurance industry. Others – about one third of the industry – organised the rival Personal Insurance Arbitration Service. As explained in chapter two, the Financial Services Act (1986) made it obligatory for life assurance firms, but not for general insurance businesses, to join either the IOB or LAUTRO's complaints committee.

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[3] The Banking Ombudsman was created in 1985 and the Building Societies Ombudsman in 1987.

In 1994, with the creation of the PIA, the SIB decided to transfer the handling of retail investment complaints to a new complaint handling body – PIAOB.[4] The IOB's retail investment teams were relocated to the new body. The PIAOB differed from the IOB in that it was organisationally integral to the PIA.

The FOS was formed in 1999, by the merger of five separate ombudsmen schemes, including the IOB and the PIAOB. The ombudsmen and personnel of the previous separate schemes, some of whom previously worked together in the IOB, were transferred to the new scheme. The PIAOB was the largest of the amalgamated schemes. The former head of the IOB became the Chief Ombudsman of the FOS and the IOB's terms of reference were the model for the FOS's legal mandate. The FOS's mandate combined compulsory jurisdiction regarding FSA-regulated activities, and voluntary jurisdiction with regard to unregulated financial services activities. Hence, while general insurance and mortgage intermediaries were not initially regulated by the FSA, firms could nevertheless commit to have complaints regarding these issues handled by the FOS as part of its voluntary jurisdiction.[5] Like the IOB, and in contrast with the PIAOB, the FOS was organisationally separate from the regulator; i.e. the FSA.

2. Accountability

As described below, the involvement of firm and consumer representatives in the ombudsman operations shifted over time from active administration to a detached accountability and advising mechanism.

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[4] Professor Julian Farrand, the Insurance Ombudsman at the time, related this decision to the insurance industry's dissatisfaction with the IOB's pro-consumer decisions (IOB, annual report, 1994, pp. 56-62)
[5] The FSA's jurisdiction later changed. Since 2004 it regulated mortgage intermediaries and since 2005 it also regulated general insurance.

According to the IOB's mandate, the organisation's operations were supervised by a Council and a Board of Directors. Board members were chief (or deputy chief) executives of large insurance firms. The majority of Council members were appointed to represent consumers with a minority representation to firms. The Council was empowered to appoint the ombudsman, to make changes to the IOB's terms of reference and to provide advice to the ombudsman. The Council further made yearly budget proposals for authorisation by the Board. However, the Council's role became more dominant than its formal mandate envisaged. The Chairman of the Council was closely involved in the management of the IOB alongside the office manager, including "all aspects of staffing, i.e. new appointments, salaries, [wage] increases" (IOB, unpublished material, September 1991). In the scheme's early days, when the caseload was relatively low, the Council and its Chairman read all of the Ombudsman's decisions and discussed their content and phrasing with him. In later years, the Council was more likely to discuss individual cases when these were raised by firms' representatives within the Council (IOB, unpublished material, April 1992). Cosmo Graham and John Birds wrote, on the basis of contemporaneous interviews:

> "IOB's Council devotes much more time [in comparison to comparable schemes] to examining individual cases and discussing the effect of particular decisions after the final decision is taken by the Ombudsman…If a Council member thinks that a case is significant, then it is put on the agenda for the meeting and the principles underlying the case are debated. Both the Ombudsman and his Deputy are present in these meetings and participate in the debate. They also earmark cases for discussion and bring forward issues of general principle…there is extensive discussion of various issues and their implications between the Council and the Ombudsman although… the Council

> respects the Ombudsman's independence…The Ombudsman will… genuinely take Council's view into account and may alter the practice of the IOB in consequence" (Graham and Birds, 1992, pp. 11-12).

Graham and Birds concluded that "The relationship [between the Ombudsman and the Council] can perhaps be best characterised as a dialogue between equal partners" (*ibid,* p.12). The Board itself was less likely to get involved in individual decision making by the Ombudsman. Yet, the content of the ombudsman's public annual reports was open to negotiation between the Ombudsman, the Council and the Board (IOB, unpublished material, 22 November 1990). As described in chapter four, the concern of the Board (and its nominees on the IOB Council) was with the potential repercussion of ombudsman's decisions and annual reports for firms' handling of other complaints and transactions.

The institutional division between a board and a council was carried forward to the PIAOB with the modification that the PIA's board was also the PIAOB's board. Thus, the PIA elected the Chairman and members of the PIAOB's Council.

The PIAOB's accountability structure was replicated in the FOS, with the adjustment that the Council was now named the Board of Directors, since the FOS was a company and organisationally separated from the FSA. Consequently, at the apex of the FOS's formal structure was a board, nominated by the FSA. The Board nominated the Chief Ombudsman and its deputy Principal Ombudsmen and endorsed the nomination of regular ombudsmen. The Board further prepared an annual budget proposal (delineating the level of annual levies and case fees as explained below) for the FSA's authorisation, and its Chairman played a key role in representing the FOS

vis-à-vis the FSA's Board. As elaborated in chapter five, the FOS's Board was provided with quarterly reports regarding the organisation's productivity, its case handling backlogs and consumer satisfaction. Additionally, decisions regarding sensitive cases were raised by the Chief Ombudsman for discussion with the Board (E7). Other than the Chief Ombudsman, other ombudsmen had little (or no) contact with the members of the Board, while managers and adjudicators had none.

In terms of the complaint handling typology, the above suggests that the IOB approximated the amateur characteristics of the *independent referee* complaint handling model with active laypeople involvement. In contrast, the FOS came closer to the bureaucratic and professional complaint handling models.

3. Budget arrangements

The IOB's yearly budget was set by its Board and raised through levies in proportion to firms' market share and the number of cases concerning them, while being free for consumers (IOB, unpublished material, 28 January 1993). PIAOB's funding was based on a combination of membership fees and case fees.[6] The FOS, like PIAOB, was financed through a combination of firms' annual levies and case fees, the levels of which were set according to a budget plan, which was authorised yearly by the FSA Board. Hence, the PIAOB's and the FOS's budget structure differed from that of the IOB inasmuch as they were partially based on case fees, rather than a predetermined budget. Additionally, over time the FOS came to rely less upon annual levies and more upon case fees. A senior executive explained:

[6] PIAOB, annual reports.

> "We are now 70 [% case fees]-30 [% annual levies]…we are feeling happier about going to 75-25…it probably wouldn't be too risky if we went to 80-20." (E6)

The FOS's preference for case fees over annual levies was related to its inability to reliably forecast the number of complaints which it was going to receive during the year (E6, S2). Consequently, its executives found it safer to base the organisation's income on case fees, which enabled them to adjust their recruitment to actual trends in complaints. The above executive explained:

> "Our cash comes…largely from case fees and the more cases that come in, and the more cases we close, the more money we get…The number of new cases that we forecast doesn't do much to the budget. What actually does something to the budget is the additional number of cases that we close. So that generates case fee income which just means that we can recruit more people." (E6).

A logical implication of the above is that the FOS's dependence on case fees created an incentive for its executives to maximise the number of cases closed. In chapter five I suggest that the FOS's choice of control system, which set individual targets and incentives for adjudicators' closure of complaints, was related to the abovementioned shift from a predetermined budget to case fees.

4. Basic structure

The data below demonstrates that the IOB, in its early days, manifested an *independent referee* structure. Yet, as the volume of complaints grew, decision making was *de facto* delegated to the ombudsman's assistants. That is, to a cadre of

professional retail financial advisers and complaint handlers. Ombudsmen retained the power to make formally binding decisions in those cases wherein adjudicators failed to achieve closure of the case. The result was a multi-tier professional bureaucracy.

Between 1981 and 1987 all complaints filed to the IOB were personally adjudicated by one ombudsman, after giving the firm an opportunity to resolve the case by itself. In reaching his decisions the ombudsman was aided by a few assistants who provided him with professional advice on legal and insurance matters. Later a deputy ombudsman was appointed to share the ombudsman's decision making responsibilities.

The first insurance ombudsman, who was appointed by a committee of the founding three firms, was a solicitor with no background in insurance law. Prior to taking the post he was about to retire after serving in the Army Legal Corps. Tyldesley (2003) writes that the founding committee approached the Ministry of Defence in search of an applicant, because "The committee had in mind that someone with a forces background could well have the 'broad and common sense approach' which was being sought" (*ibid,* p. 39). Tyldesley, who was himself an ombudsman assistant at the IOB, proposes that "This [i.e. common sense approach] has continued to be the key criterion for the selection of ombudsmen – and is generally regarded as more important than any knowledge of the specific subject area involved." (*ibid,* p. 39) The second appointee to head the IOB was a law professor and a Law Commissioner, who specialised in insurance law. In a meeting between the IOB's Council and Board, prior to the nomination of this second ombudsman, the Chairman of the Council explained that "it had been generally agreed within the Council that the right candidate should be a lawyer…*with no recent insurance company involvement*, an

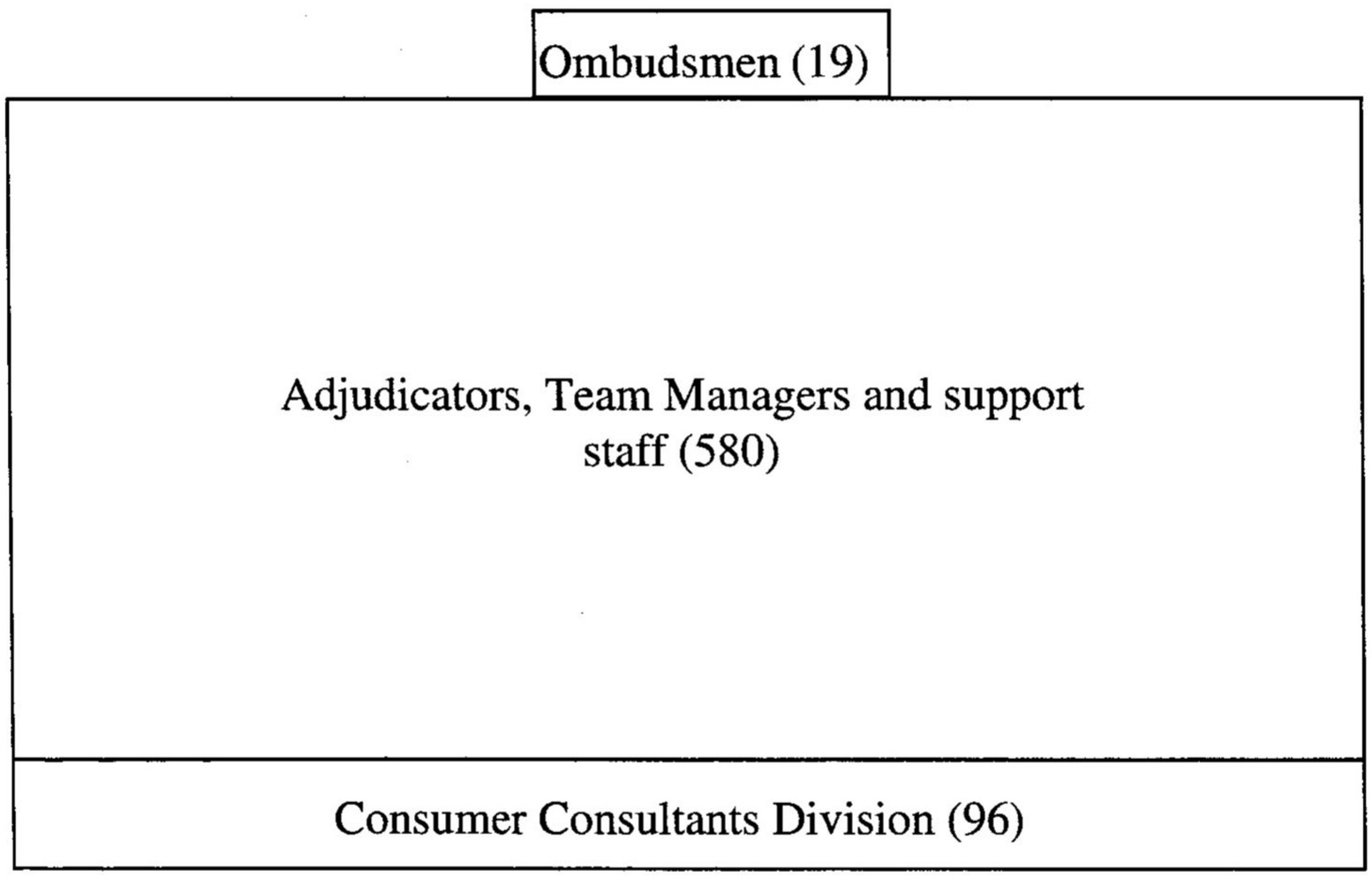
excellent communicator with good presentation skills, [an] analytical mind and *experience with ordinary people*" (my emphasis) (IOB, unpublished material, 7 June 1988). Hence, the first two appointees as IOB ombudsmen were deliberately recruited from outside the industry with the proclaimed intention that they perform as 'men of the people'. The first nominee came closer to the ideal type lay *independent referee*, with no insurance background. Thereafter the Law Commission came to be a key recruitment base for the highest ombudsman position.

With the expansion in the volume of complaints, a two-tier process was gradually adopted. Eventually, most complaints were handled by the ombudsmen's assistants, whereas the ombudsmen issued formal decisions in those cases that assistants did not manage to resolve informally. In 1992 the Ombudsman asserted in his annual report that an "increase in quantity…has inevitably meant that the original ombudsman concept, i.e. one man resolving all complaints personally, could not conceivably be sustained…Virtually complete delegation of case-handling… has become unavoidable" (*ibid*, p. 5). The ombudsmen, in addition to making decisions, became the head managers of the IOB to whom all adjudicators and their team managers reported.

The FOS operational structure resembled that of the IOB, but further included a third tier of Consumer Consultants. This low level third tier – the consumer consultants division (CCD) – dealt with consumers' initial enquiries and with the 'conversion' of some of these enquiries into 'complaints'. The meso-level consisted of adjudicators, their managers and assisting administrators, who mediated, investigated and made non-legally binding decisions on complaints. Functionally, *adjudicators* were the equivalent of what in the IOB were the 'ombudsman's assistants' and what in the

PIAOB were 'case officers'. But the label makeover is informative of both the internal perception of this role, and its representation to firms and consumers. The FOS's top operational level comprised a small number of ombudsmen, who dealt with cases in which firms or consumers challenged adjudicators' initial decisions. The FOS's meso-level (i.e. adjudicators, managers and their supporting administrators) was substantially larger than both the lower (consumer consultants) and top (ombudsmen) operational levels, as illustrated below:

Figure 3.1: the FOS's operational structure (April 2004)



Until December 2002, team managers reported to one of three Principal Ombudsmen, depending on whether they operated in the area of retail investment, banking or general insurance. Regular ombudsmen were involved in recruitment and promotion of adjudicators (O3a; O8). In December 2002, a new division of labour was introduced. The Principal Ombudsmen (and regular ombudsmen) were stripped of their managerial tasks and their role was restricted to the technical aspects of decision making. Adjudication teams were grouped into five business units, each headed by a

Service Manager to whom the unit's team managers now reported. All Service Managers reported to the Operations Director. Managers and Service Managers supervised the progression of casework and the recruitment, training and promotion of adjudicators. This reform resulted in a greater segregation of adjudicators and ombudsmen roles, and in the waning of ombudsmen's influence over adjudication (E4).

In 2004, towards the end of the research period, the FOS's operational core consisted of some 400 adjudicators, divided into 20 teams. Each team was headed by a team manager, a number of assistant team managers and supported by a few administrators, depending on the team's size and function. Each team was further associated with one or two ombudsmen, who handled the team's 'formal decisions', making an overall total of only 19 ombudsmen.

The big size disparities between the adjudication and ombudsmen levels entailed that the organisation could cope with only a small number of challenges to adjudicators' decisions and their review by the ombudsmen. In chapter seven I discuss the strategies, which adjudicators and the organisation as a whole applied to decrease the number of ombudsmen reviews. Equally, the Consumer Contact Division – given its relatively small size – was a crude tool for filtering out complaints that were unlikely to succeed. In effect, consumer consultants were expected to pass to investigation all complaints, unless these were unrelated to retail financial services. Consumer consultants further played an important public service and relations role in contacting firms on behalf of consumers and requesting them to investigate complaints before they were passed to investigation by the FOS.

The size disparities between the adjudication and ombudsmen levels augmented over time. Since its creation, the FOS grew rapidly, responding to the massive upsurge in complaints, from 360 staff in 2000 to 760 staff in 2004. Yet this increase was proportionately small on the ombudsmen level (from 11 to 19) when compared with the operational core as a whole (from 224 to 580).

Table 3.2: The size of the FOS's operational core in comparison to its support units (*)

Financial year	**4.1999-4.2000**	**4.2000-3.2001**	**4.2001-3.2002**	**4.2002-3.2003**	**4.2003-4.2004**	**Overall Growth**
Operation core(**)	224	267	305	408	580	159%
Ombudsmen	11	n/a	n/a	n/a	19	72%
CCD	73	77	90	93	96	31%
Support	63	70	75	83	87	38%
All staff	360	414	470	584	763	112%

Source: The FOS's budget plans
(*) the figures demonstrate planned numbers of workforce rather than actual workforce.
(**) the figures regarding the operational core include team managers and secretaries.

It is noteworthy that in both the IOB and the FOS increase in complaints volume and backlogs tended to result in the recruitment of ombudsman assistants or adjudicators rather than the appointment of additional ombudsmen. An IOB executive explained that while s/he was interested in recruiting more ombudsmen, the Board resisted such requests given the high costs in recruiting ombudsmen in comparison to assistants (T6). In contrast, an FOS executive suggested that s/he had no financial constraints on recruiting ombudsmen, but it was just that the FOS was slow to realise its need for more ombudsmen (E5). I propose a supplementary hypothesis, which is that ombudsmen had an incentive to recruit assistants to support them, rather than to dilute their status by increasing their numbers. Once the two-tier structure was institutionalised, expanding the number of assistants/adjudicators rather than ombudsmen became the taken-for-granted response to increasing caseload.

5. Recruitment, training, promotion and remuneration

In the IOB, the ombudsman's assistants were recruited from both the insurance and the legal professions. In contrast, the FOS's adjudicators were predominantly recruited from within the financial industry, and their background was in retail investment sales or complaint handling roles.[7] Most adjudicators were qualified financial advisers and those who were not could undertake an in-house training course to prepare them for the professional exam. Centralised training was very short (two days). It was then followed by a few months of team-based individual coaching by an assistant team manager or an experienced adjudicator. Since most new recruits were relatively familiar with retail investment products and the requirements of suitable advice, coaching tended to centre upon the 'FOS's approach' and the handling of communication with firms and complainants.[8] The rapid increase in complaints during 2002-2004 reinforced the tendency to recruit adjudicators from within the industry so as to shorten their training period to the minimum, and to integrate new recruits as soon as possible into the complaint handling operation. Chapters five and seven suggest that this shift in recruitment base, from the legal profession to the life insurance sales profession, was significant in facilitating the FOS's adoption of targets and its focus upon communication and consumer satisfaction (E4, M2).

As discussed above, the IOB ombudsmen were exclusively recruited from outside the industry. The FOS ombudsmen had a more varied background, drawn from private law practice, other ombudsman and complaint handling schemes and increasingly from the industry. As the FOS expanded, there was also a greater inclination to

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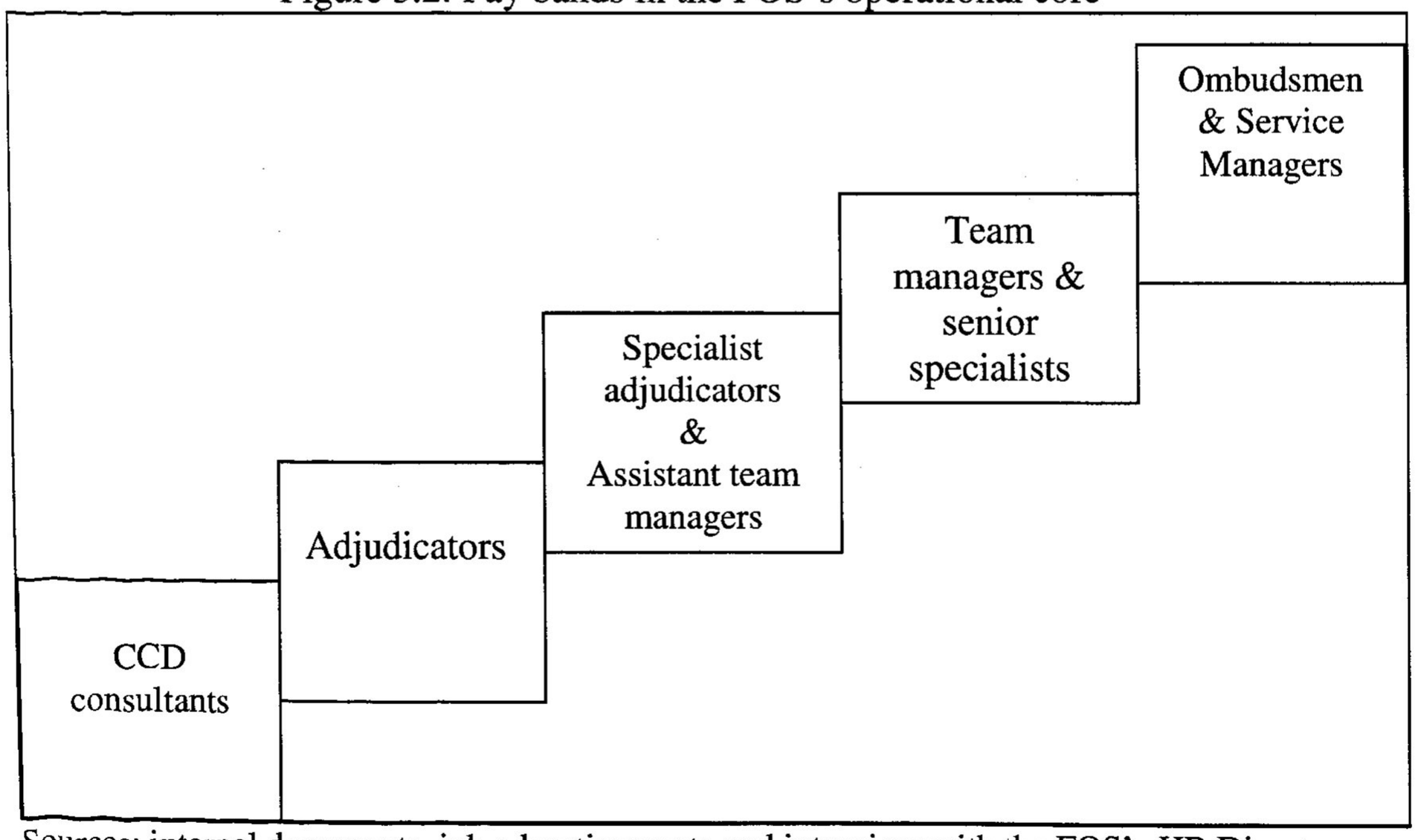
[7] In an internal staff satisfaction survey conducted in 2002, in the then investment division of the FOS, 79% of the respondents had previously worked in the financial services industry, and only 2.1% had a legal background. In comparison, these percentages were 55% and 13% respectively for the organisation as a whole.

[8] Towards the end of my research period, team-based coaching was substituted by centralised training in order to free more experienced staff to deal with complaints.

promote veteran adjudicators and assistant team managers to an ombudsman position. (Team managers were less likely to be promoted to an ombudsman position because their tasks were relatively removed from the technical side of complaint handling.) Consequently, the difference between adjudicators and ombudsmen's backgrounds and career paths diminished. However, as this chapter and chapter five demonstrate, the disparity in the conditions of their work augmented.

Salary levels at the FOS reflected the primacy of professionalism over managerialism and of ombudsmen over adjudicators. There was a substantial disparity between the salaries of ombudsmen and team managers. Ombudsmen's salaries were comparable to those of the five executive Service Managers, and nearly double the salaries of team managers. As further elaborated in chapter five, team managers and adjudicators' remuneration consisted of both fixed salaries and bonuses for closing cases. In contrast, bonuses were perceived as inadequate pay for ombudsmen, because they created an incentive to sacrifice quality for the sake of case closure quantity.

Figure 3.2: Pay bands in the FOS's operational core



Sources: internal documents, job advertisements and interview with the FOS's HR Director

6. Complaint handlers' discretion

The IOB and the FOS mandates endowed complaint handlers with broad and indeterminate discretion. Yet, the FOS's adjudicators, because of their uniform recruitment base, effectively translated this mandate into the professional discourse of 'advice suitability'. However, their interpretation of this discourse tended to be responsive to consumer grievances when compared with its application by the industry.

The IOB's terms of reference, which were largely adopted by the FOS, asserted that the ombudsman should assess "what would be a solution …which would be *fair and reasonable* in all the circumstances" (my emphasis) in light of the insurance contract, any applicable law or judicial decision, regulations and the general principles of good insurance and investment business practices. This stipulation, which enabled the ombudsman to transcend the law, reflected the scheme designers' acceptance of the Law Commission's allegation that insurance law was unfair to consumers (Tyldesley, 2003). The IOB's terms of reference further specified that the *ombudsman* "shall not be bound by any decision made by him or by any other ombudsman or by any predecessor in such office." The logic behind the IOB's terms of reference, and especially its ability to make decisions that go beyond the law, is further explored in chapter four. At this point it is sufficient to propose that this mandate apparently endowed the ombudsman with a broad and open-ended discretion. Such a broad mandate would suggest that the designers of the scheme had in mind an approximation of an *ad hoc* moral judgment task, i.e. a *fairness model* of complaint handling.

In contrast, the PIAOB's terms of reference did not enable it to make decisions according to what is "fair and reasonable in all the circumstances of the case"; i.e. unlike the IOB it was not empowered to go beyond rules and regulations. Hence, the PIAOB was more attuned with a bureaucratic model of complaint handling.

Finally, the FSMA 2000 set scant constraints on the FOS's judgment. It stated that "a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (sec. 228(2)). The FSA regulation handbook further prescribed that: "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice *at the relevant time*" (my emphasis) (DISP 3.82).[9]

In practice, FSA regulations rarely directly guided the FOS's judgments. Adjudicators and ombudsmen's decisions seldom referred to explicit rules and regulations. Moreover, both the FSA and the FOS maintained that the latter's judgement goes beyond the application of regulatory prescriptions. For example, in its 'clarifying mis-selling note' (FSA., 2003), the FSA asserted: "Quite apart from the regulatory framework and our supervisory approach…consumers may have other rights, where they believe they have bought a product that is not appropriate for them…Consumers can…approach the Financial Ombudsman Service…The FOS will exercise its own judgement as to whether the firm has acted fairly and reasonably, although it would take into account our rules and guidance which are relevant. The requirements of the

[9] It is noteworthy that the FOS's mandate differs from that of the IOB in the specification that the ombudsman's reliance upon industry best practice should reflect actual practice, rather than prescribe it.

FSA's regulatory framework are only one aspect of the firm's responsibilities to its customers".

While FSA regulation offered complaint handlers little guidance, the latter did not make their decisions in a conceptual and normative vacuum. While articulating their mandate in terms of 'fair and reasonable' judgment, complaint handlers' decisions were in actuality framed within the professional framework of 'advice suitability'. Yet, as discussed in chapter two, the notion of advice suitability was in itself a relatively new regulatory creation and its content little specified.

Analysis of complaint files, internal guidance and interviews suggests that the FOS had a liberal, pro-consumerist approach to advice suitability. Its complaint handlers tended to adopt a *best-practice* stance to the requirements of suitability. They were willing to conclude that a sale was unsuitable even if the 'right' forms were filled out and contained the required declarations by the adviser and the complainant. Interviewees at the FOS contended that firms' interpreted the notion of advice suitability in terms of a tick-box approach (E1, E1a and A7). For example, an adjudicator explained how the FOS's understanding of suitability differed from that of firms' compliance personnel:

> "Compliance work [at firms] is to make the file compliant in that all the right boxes are ticked and all the correct answers are given. What we do here [at the FOS] is slightly…beyond that…we have to decide whether… the…advice itself can be deemed to still be unsuitable even though… all the i's might have been dotted and all the t's crossed" (A7).

The basic assumption of the FOS's complaints handlers was that most consumers had limited understanding of financial products and that it was the professional duty of advisers to tailor products to clients' needs.

In addition to the professional discourse of advice suitability, in some areas of the FOS's work, notably in the Assessment and Endowment Mortgages units, standardised decision criteria were formulated to allow quick discharge of cases. Additionally, as further discussed in chapters five and eight, when handling complaints of a systemic nature, complaint handlers tended to coordinate and even standardise their approach in order to maximise internal consistency.

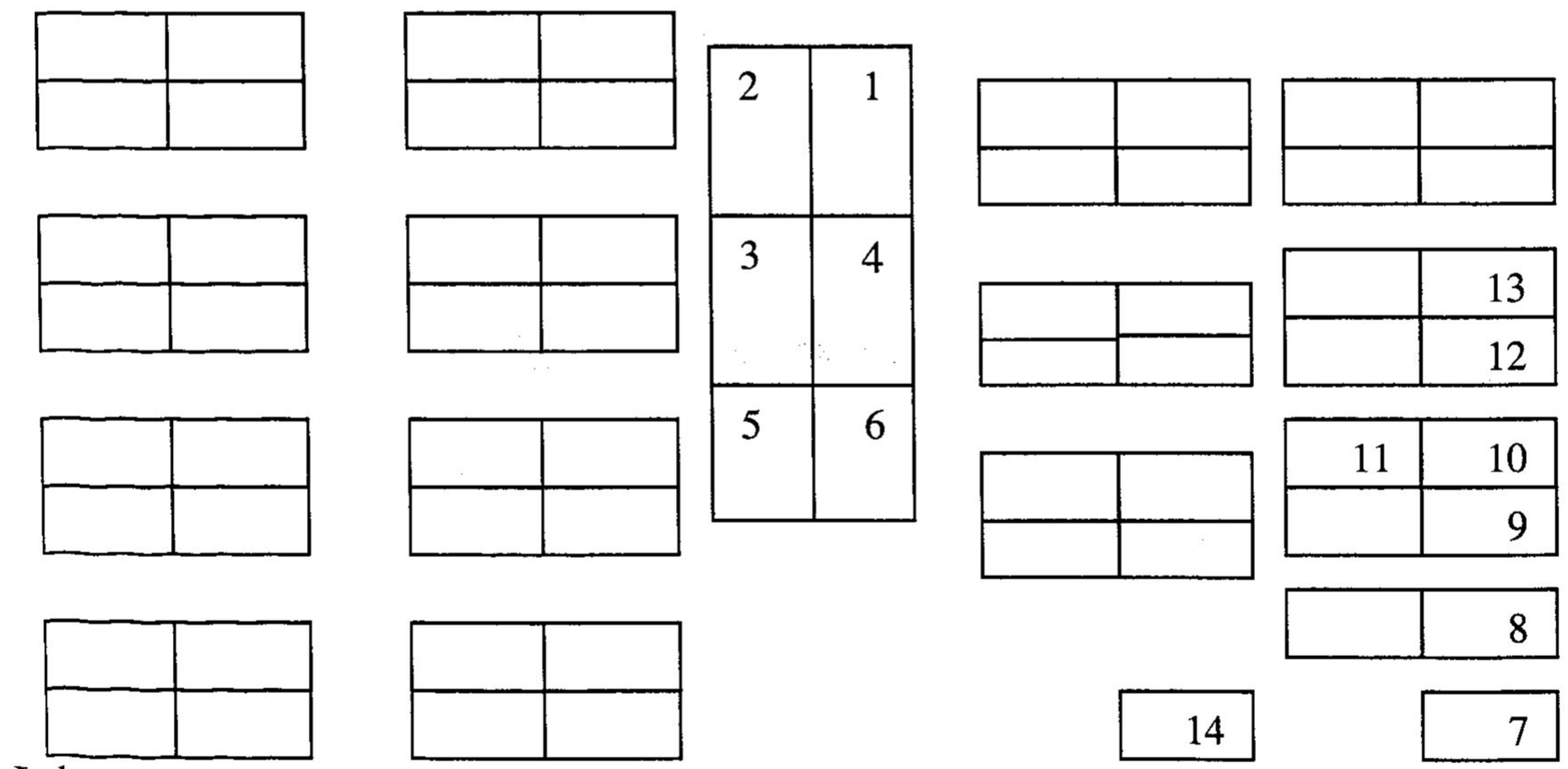
7. Physical space

The physical structure of the FOS and its usage of space further reflected a professional structure. The FOS was located in a seven-floor building in Docklands, London, just off the financial services centre in Canary Wharf. On each floor there were some 150 desks scattered in open space, in addition to a few meeting rooms with glass walls. The latter were used for coaching new staff and for meetings with occasional guests (mostly firms). Each team occupied a floor area of adjacent desks depending on its size. Every four desks were grouped together.

Team managers and assistant team managers sat among their adjudication teams. Ombudsmen sat in the same floor as the teams with which they worked, although not necessarily among the team members and usually next to one another. The Chief and Principal Ombudsmen's desks were slightly buffered by those of their personal assistants.

The open space structure of the office created a sense of equality between adjudicators, ombudsmen and executives, and facilitated informal interaction and consultation. Adjudicators often consulted with colleagues around them or chatted to release pressure after a long and irritating phone conversation, usually with an unhappy complainant. Adjudicators' conversations over the phone were audible to those who sat around them and to their team managers who frequently walked around their team desks, stopping for a short chat. In addition, some adjudicators crossed the floor to the 'ombudsmen side' to consult on a specific case. Equally, ombudsmen crossed the floor to the 'adjudicators side' when they wanted some further work done on a case before issuing a decision, rather than making a request through the computer system. In an internal training session an Ombudsman joked: 'If we had doors – they are open…all ombudsmen are available for consultation at all times' (field notes).

Figure 3.3: Approximate sitting arrangement on one side of a floor

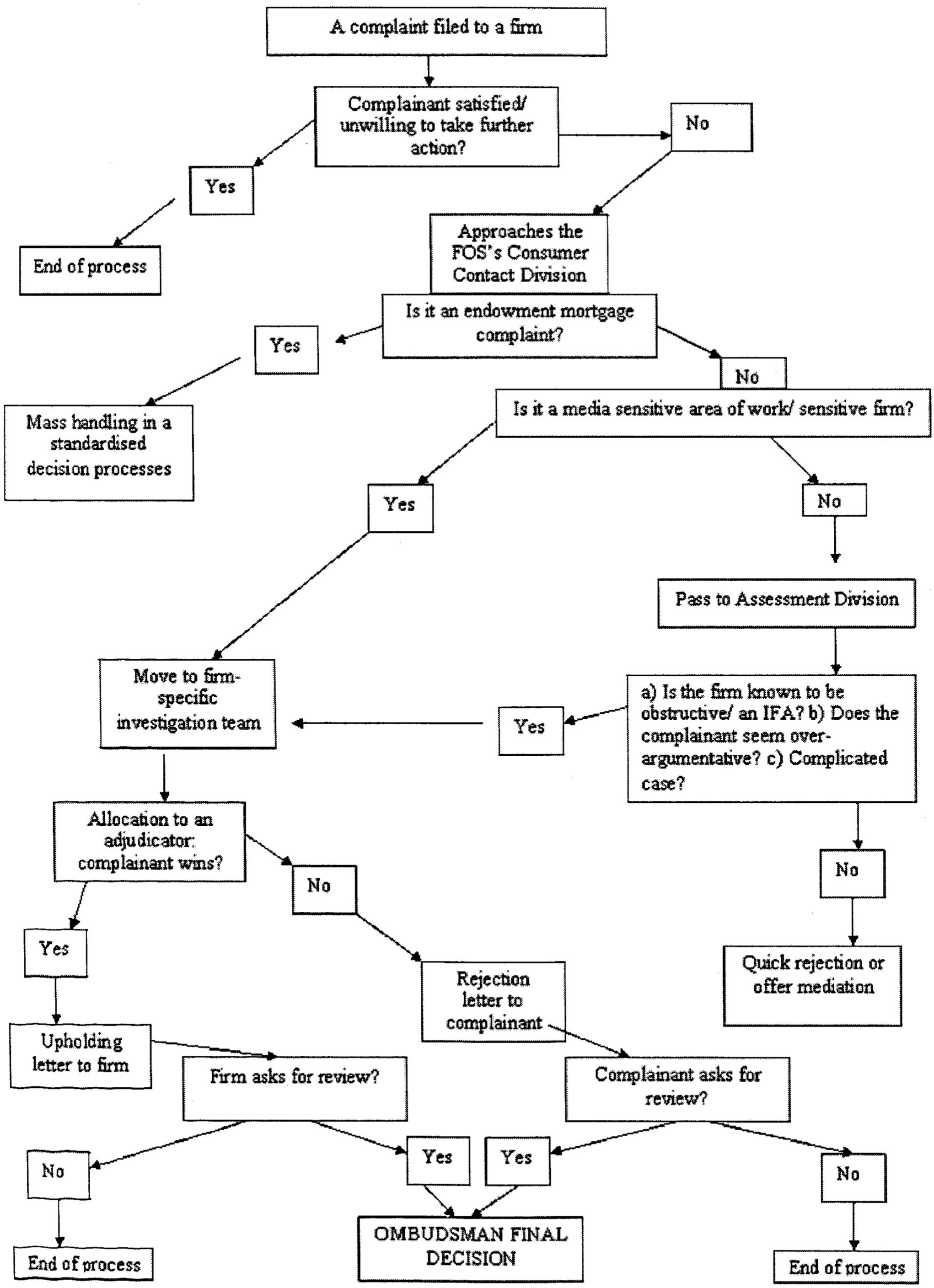


At the same time, as elaborated in chapter five, open space facilitated surveillance. Managers and ombudsmen could overhear adjudicators' talk with each other and over the phone with complainants and firms. In addition, all phone conversations were taped and retrievable. Consequently, adjudicators' loss of temper as a result of an annoying conversation with unhappy clients would have been exposed to their colleagues and managers.

B. **The FOS's complaint handling process**

As described below, complaints progressed, in decreasing numbers, from firms' complaint handling departments to the ombudsmen tier. The logic of complaints' allocation to divisions and teams within the FOS followed both perceptions of task complexity, and expectations regarding complainants' relative persistence in pursuing their case and firms' relative resistance to paying compensation. (See figure 3.4: flowchart of the complaint handling process.)

Figure 3.4: Flowchart of the complaint handling process (2004)



Sources: FOS internal guidance, complaint files, non-participant observation and interviews.

1. 'Go to the firm first'

The complaint handling process, as mandated by the FSMA 2000, required that complaints should be filed with the relevant firm (or its independent intermediary) first. When the FOS was approached by consumers before they complained to the firm, a consumer consultant noted the essence of their complaint and passed it to the firm requiring its response directly to the complainant. An ABI official asserted that on average firms upheld about 40% of their non-mortgage endowment related complaints, and 50% of endowment mortgage complaints (T7).[10] As already mentioned, approximately 10% of all complaints to firms and 20% of endowment mortgage complaints resulted in further complaints to the FOS. The sampled cases reveal that when writing to firms complainants often asserted that they have discussed their case with the FSA or the FOS, or that they intend to file a complaint with the FOS if the firm rejects it. Evidently, in these specific cases, these threats were not effective in obtaining redress since the complaints were nevertheless rejected and the complainants proceeded to the FOS. Yet, a review conducted by the FSA found – and pejoratively remarked on the fact – that firms were likely to alter their decision to reject a complaint when complainants approached the FOS (FSA, 2004), thus adapting their response to complainants' manifested persistence and avoiding FOS scrutiny of their decisions. A similar phenomenon was observed by Graham and Birds (1992) regarding firms' response to complainants' assertion of their intention to approach the IOB.

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[10] ABI's intelligence was based upon reports which it collected from firms as part of an industry internal assessment of firms' complaint handling. This was done in order to provide firms with information, which compared the number of complaints that they received and their uphold rate against the industry average. This information allowed firms to keep with the industry average and thereby to avoid excessive FSA scrutiny, which would have resulted from a substantial deviation from the norm.

2. Conversion of enquiries into complaint files

If complainants were dissatisfied with the firm's decision they could request its review by the FOS. The first point of contact for consumers at the FOS was the CCD. Complainants were aided in filing their complaint forms by consumer consultants. The consultant further summarised the essence of the complaint on the basis of phone conversations with the complainant. Provided that the process on the firm level was finalised, and that the complaint was indeed with regard to a financial product and a financial firm, the file was converted by the CCD into a complaint file. Consumer consultants were delegated little discretion to buffer complaints from entering into the FOS complaints handling process. Once an enquiry was transformed by the CCD into a 'complaint', a fee was chargeable to the firm, but payment was postponed until the case was closed.

3. Division into simple and complicated cases

Complaint files were transferred from the CCD to a generalist Assessment Division, which picked out those cases which were perceived as easy and quick to handle. The 'simple' cases were allocated to the assessment adjudicators for immediate handling, while 'complex' cases were passed to waiting queues in firm-specific investigation teams. The simplicity-complexity of a case was established according to the substance of the complaint, whether an offer was made by the firm and the FOS's expectations regarding the propensity of certain firms and/or their client base to challenge adverse decisions against them. Media sensitive complaints (e.g. Precipice Bonds, Split Caps or complaints against Equitable Life during the period of this research) were perceived as complex and inadequate for handling by the Assessment Division.

4. Endowment Mortgage complaints

As of April 2004, complaints with regard to the selling of endowment mortgages were transferred to a then new business unit that specialised in standardised, mass handling of these complaints. Before this date, mortgage endowment complaints were handled by either the Assessment Division or by firm-specific investigation teams, depending on their complexity as explained above.

5. Informal adjudication

All other files were then allocated to adjudicators, in firm-specific teams, for investigation. The files sampled for this research were drawn from the cases closed by two of these teams between 2001 and 2004. Once allocated a complaint file, an adjudicator conducted an investigation of the case and issued a decision to the losing side. The FOS's overall upholding rate in 2005-6 was 33% (excluding cases that were rejected due to lack of jurisdiction). The upholding rate was considerably higher for mortgage endowment complaints (40%), when compared with other types of complaints (26%).[11] Of the two teams studied, the upholding rate of team A was higher than this organisational average, while team B's was lower than the average.[12]

If the losing side – whether the firm or the complainant – contested the adjudicator's decision, asking for an ombudsman's review, the adjudicator passed the file to an ombudsman for a formal decision.[13] In 2003/4 about 92% of complaints to the FOS were resolved as a result of adjudicators' decisions and assessments, without further

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[11] Source: FOS, Annual Report (2005-6). This annual report was the first to provide full annual statistics regarding decision outputs. Previous annual reports omitted a large number of cases, which were labelled as 'mediated'.

[12] Team A's adjudicators had a 44% upholding rate in 2002 and 35.5% in 2003. Team's B adjudicators had a 27% upholding rate in 2002 and 26% in 2003-4. Source: all cases closed by 12 adjudicators.

[13] However, as explained in chapter seven, when the contestant was the complainant, adjudicators were delegated some discretion whether to refer the case to an ombudsman.

ombudsman review. However, the ratio of appeal for an ombudsman's review varied between teams and areas of work.

The data suggests that firms were more likely to challenge an adjudicator's decision when a complaint was decided in favour of the complainant than complainants were when a complaint was rejected. For example, a periodic report by the FOS's executive to its board maintained that of 22,000 files which were closed over a four month period, 6.4% of cases decided in favour of firms were challenged by complainants, while 14.9% of cases decided in favour of complainants were challenged by firms. In 2005/6 firms appealed for an ombudsman review in 21% of non-mortgage endowment cases that were decided in favour of complainants, but only in 5% of upheld mortgage endowment complaints. Complainants requested an ombudsman review in 10% of rejected non-mortgage endowment complaints, and in 2% of rejected mortgage endowment complaints.[14] Thus, as further discussed in chapter eight, despite the FOS's substantially higher uphold rates with regard to mortgage endowment complaints, firms were more amenable to adverse decisions.

My complaints sample and interviews with complaint handlers in teams A and B suggest that in those specific teams the above differences between firms and complainants' inclination to request an ombudsman's review were more acute, and this was especially the case with regard to team A.[15] As a result of firms' greater propensity to challenge decisions and their greater resistance (even when they

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[14] Source: analysis of the FOS's annual report, 2005-6, excluding cases that were found to be 'out of jurisdiction'. The analysis assumes zero reversal rates of adjudicators' decisions by ombudsmen. Since these reversal rates were typically very low (1-2%), this is a plausible assumption.

[15] Team A: In 2002, firms appealed 42% of upheld cases, while complainants appealed 15.2% of rejected cases. In 2003, firms appealed 41% upheld cases, while complainants appealed 4.3% of rejected complaints. Team B: In 2002 firms appealed 27% of cases while complainants appealed 12%. In 2003-4 firms appealed 29% of cases, while complainants appealed 9% of rejected cases. Source: all cases closed by 12 adjudicators.

eventually accepted an adjudicator's decision), complaints which were decided in favour of complainants took, on average, 1.6 times longer to resolve than those which were rejected.

6. Ombudsman formal decision

If an adjudicator's decision was challenged, the adjudicator had to prepare a draft decision for an ombudsman. While the case was awaiting an ombudsman's decision, adjudicators were further in charge of responding to any enquiries by the firm or the complainant. The ombudsman could accept the draft decision as it was, ask the adjudicator to revise it, reverse the decision or instruct the adjudicator to conduct further investigation of the case. Ombudsmen often asked adjudicators to carry out further investigation and wording amendments. In one of the cases sampled for my research the adjudicator ended up drafting four decisions for the ombudsman, in addition to further information gathering and correspondence with the complainant and the firm regarding the implementation of the ombudsman's final decision. However, in nearly all cases (98% being a safe estimate[16]) the *outcome* of the ombudsman's *final decision* (as these were termed) was similar to that of the adjudicator's original decision.

Given the small number of ombudsmen, complaints were likely to be pending an ombudsman decision for several months and therefore took much longer to resolve. According to the FOS report to its Board, those complaints which were closed by ombudsmen took, on average, 2.3 times longer to resolve than those closed as a result of adjudicators' decisions (FOS, *management report, for the period April to August*

[16] In an internal report to the FOS's board for the period April to August 2003, out of an overall 2,296 ombudsman decisions, in only 33 cases (i.e. 1.4%) ombudsmen's decisions reversed the outcome of adjudicators' decisions. In my sample, of the 30 cases that reached the ombudsmen the outcome was reversed in one case.

2003, October 2003). Similarly, in my sample the average time-to-closure for cases which were reviewed by an ombudsman (N=30) was 207 days, compared with an average of 66 days (N=110) when cases were closed by an adjudicator.

7. Service quality team

A support department within the FOS handled referrals of 'persistent complainants' by adjudication teams and MP queries on behalf of complainants. Referrals of persistent complainants were possible at every stage of the complaint handling process, but they were most likely to be conducted at a late stage of the process. Of the sampled complaints none was referred to this team.

8. Hearings

The FOS's investigation process, as described above, largely resembled the processes which were developed by the IOB. Yet one difference is worth noting: while the FOS rarely conducted oral hearings, these were more prevalent in the IOB, especially with regard to retail investment complaints. This was because the IOB considered the credibility of the complainant versus the testimony of the firm's adviser, rather than objective suitability, as the main issue to be ascertained with regard to these complaints (Graham and Birds, 1992, p. 50). For example, in 1991 the IOB conducted 45 such hearings, while handling a caseload of 4,334 cases (IOB, Annual report, 1991). In comparison, the FOS conducted some 20 hearings in 2004, while handling 100,000 complaints (E6a). The IOB's focus on complainants and advisers' individual credibility again suggests that it was more attuned towards a fairness type of adjudication model. In contrast, chapter seven will demonstrate how the FOS deliberately avoided any assertions regarding complainants and advisers' credibility.

9. Judicial review

Both firms and complainants could challenge an ombudsman's decision (but not an adjudicator's decision) by appeal for judicial review. During the research period the FOS was subjected to judicial reviews by a number of IFAs with regard to its decisions on Precipice Bonds, which entailed the liquidation of the relevant firms. None of the complaints in my sample reached judicial review. This is *a priori* surprising given the high ratio of cases wherein firms' requested an ombudsman review. To reiterate, despite these frequent challenges, the ombudsmen rarely reversed the adjudicators' decisions. The analysis in chapter eight suggests that large retail financial firms were unlikely to file a judicial review against the FOS because of the adverse publicity and financial risk inherent in losing a court case. It is further plausible that given the positive media profile of the FOS as explained in chapter two, challenging its decisions in court was in itself threatening to firms' reputation.

C. Conclusion

The above analysis, as summarised in Table 3.3, suggests a predominant shift in the ombudsman structure from an *independent referee* (fairness) to a *professional bureaucracy* (professionalism) configuration. Yet, as a result of this shift, the FOS differed from the ideal-type professional bureaucracy in its two-tier structure, comprising two complaint handling ranks: adjudicators and ombudsmen.

Table 3.3: Changes to the FOS basic structure, budget arrangements and discretion

	IOB	FOS
Basic structure	Independent referee	Two-tier professional bureaucracy
Ombudsmen recruitment base	Outsiders to the industry	Combination of insiders and outsiders
Adjudicators' recruitment base	Combination of legal and retail finance professionals	Retail finance professionals
Budget	Set budget funded by firms	Predominantly case fees
Discretion	Indeterminate	Advice suitability framework
Dominant model	Fairness	Professionalism

The main exception to the above change in the ombudsman's structure was the shift from reliance upon membership levies to case fees. The reliance upon case fees, together with the rapid increase in the volume of complaints, created an incentive for the FOS to focus on swift case closure rather than upon reaching the "correct" professional answer. In chapter five, I show how the FOS's focus upon case closure was institutionalised in the setting of targets and bonuses for closing cases. Chapters six and seven further examine the effect of the FOS's focus upon case closure upon adjudicators' decision making and their interpersonal communication with complainants.

Chapter 4: The FOS's domain perception

Introduction

The previous chapter analysed the evolution of the FOS's structure and process. Continuing to trace the origin of the FOS's intra-organisational institutions, this chapter explores the determinants of one facet of the FOS's interpretative scheme, namely its 'domain perception'. This term denotes complaint handlers' collective interpretation as to which goals and tasks fall within and which outside the scope of their mandate. The previous chapter demonstrated how the ombudsman's structure shifted from an *independent referee* (fairness) to a *two-tier professional bureaucracy* configuration. In contrast, this chapter shows that whereas the ombudsman's domain perception was initially articulated in terms of professional self-regulation, it was later institutionalised as individual, informal and confidential dispute resolution. In other words, a fairness model coupled with an emphasis on informality and confidentiality.

Section A below delineates three perspectives on the origin of public bureaucracies' domain perception: (a) rational or coercive exchange with local concentrated interests; (b) normative responsiveness to the expectations of diffused interests and professional networks, or mimicry of similar bodies, and (c) intra-organisational striving for autonomy and exclusive domain.

The empirical analysis of change over time of the ombudsman's domain perception in sections B and C is guided by the typology of complaint handling models, as elaborated in chapter one. The analysis demonstrates how the IOB, in its early days, demarcated its domain as a professional self-regulatory organisation – setting best

practice principles to guide firms' sales practices and the future handling of similar complaints. But thereafter both the IOB and the FOS were more inclined, especially when faced with external criticism, to articulate their role in terms of informal and confidential case-by-case dispute resolution (hereafter termed 'the individuality discourse'). I propose that the ombudsman's individuality discourse embodied an implicit exchange between complaint handlers' broad discretion to remedy consumers' grievances and the narrow implication of their decisions to individual cases. The individuality discourse further distinguished the FOS from both the courts and the FSA, allowing it an exclusive domain in a crowded institutional space. Hence, I suggest the ombudsman's domain perception is best explained by reference to a synthesis of the three theoretical perspectives that are delineated in section A.

As evident from chapter three, an exchange between the ombudsman's broad discretion and the limited scope of its decisions was already embodied in the IOB's mandate, which was largely adopted by the FOS. Yet, as this chapter will demonstrate, it was the ombudsman's interaction with consumers and firms that preserved the content of this mandate despite increasing professionalisation and bureaucratisation of complaint handling.

A. Theorising domain perception

This section derives from political science and organisational sociology three alternative general explanations to public bureaucracies' 'domain perception'. However, rather than discriminating between these explanations, the analysis of the data demonstrates that each, on its own, cannot adequately explain the patterns

observed in this case. A synthesis gives a superior explanation of the FOS's domain perception.

1. Defining bureaucratic domain perception

Studies in organisational sociology and public administration, whether with reference to organisations' 'interpretative scheme' (Greenwood and Hinings, 1988; Hinings and Greenwood, 1988) or 'identity' (Wilson, 1989), reveal that organisations tend to have a collective shared set of norms and beliefs delineating which activities are appropriate (and inappropriate) for them to engage in. 'Domain perception', as defined in this chapter, denotes bureaucrats' collective interpretation, explanation and justification of their role and its boundaries vis-à-vis other bureaucracies operating in the same regulatory regime.

2. The determinants of bureaucratic domain perception

Understanding the determinants of bureaucratic domain perception require analysis of (a) what do bureaucracies aim for? and (b) to what are bureaucracies responsive? The literature below suggests that bureaucracies aim for material resources, legitimacy and a combination of autonomy and exclusive domain, and that their domain perception is likely to embody these pursuits.

Public choice theory perceives regulation as a *voluntary* exchange between regulators and local concentrated interests, trading favourable policies against individual and organisational benefits (Stigler, 1971; Pelzman, 1976). The notion of 'domain perception' is superfluous to rational choice exchanges, which are rooted in individual preferences rather than collective identity. Sociological 'old-institutional' (Selznick,

1966) and resource dependence (Pfeffer and Salancik, 1978) analyses also view organisations' relationship with their environments as a pragmatic, instrumentalist exchange of resources and support. Yet, the sociological institutional approach differs from public choice capture theory in its emphasis on the *coercive* nature of the exchange between bureaucracies and concentrated interests, and its likely normative and cognitive internalisation. Consequently, an organisation's domain perception is expected to internalise this coercive exchange.

An alternative perspective, building on New Institutional analyses in sociology, expects bureaucracies' domain perception to be receptive to the normative (March and Olsen, 1989) and cognitive (Meyer and Rowan, 1991; Powell and DiMaggio, 1991) expectations of the agency's broader environment in pursuit of legitimacy. A normative institutional approach would expect bureaucrats' interpretation of their domain to reflect their internalisation of professional and societal norms. A cognitive institutional approach would expect organisational domain perception to be mimetic or isomorphic – adopting accepted models from similar organisations or associations beyond their immediate task environment.

Both of the above explanations emphasise organisations' responsiveness to their external environment in search of material resources or legitimacy. Political scientists have further highlighted the centrality of public bureaucracies' maximisation of their autonomy in terms of both discretion and exclusive domain vis-à-vis competing agencies (Carpenter, 2001; Wilson, 1989). In search of exclusive domain, a bureaucracy's interpretation of its mandate would aim at distinctiveness from other bureaucracies rather than being mimetic and isomorphic.

In light of the above theoretical perspectives, and the complaint handling typology as presented in chapter one, the analysis below aims to answer:

(a) How did complaint handlers interpret their domain?

(b) What explains complaint handlers' domain perception?

3. Methodology

The chapter traces the FOS's domain perception to its historical roots in the early days of its predecessor organisation – the IOB. Given the similarity between the FOS's and the IOB's formal mandates, as detailed in chapter three, the historical tracing allows studying of the organisations' domain perception, while holding their terms of mandate constant.

In addition to the major data sources, as described in chapter one, the data analysed in this chapter further includes conference reports of the British and Irish Ombudsman Association (BIOA), and interviews with two of its founders (T9; T10). These were analysed to gauge the degree of institutionalisation of the ombudsman models in the IOB's professional environment.

B. The development of the FOS's individuality discourse

As revealed below, the IOB, in its very early days, tended to articulate its domain in terms of professional self-regulation in which individual decisions were asserted as a contribution to an accumulating arsenal of principles of best practice. Over time, the IOB, and subsequently the FOS, were more inclined to convey their domain in terms of individual case-by-case dispute resolution. Coupled within this notion were three principles, according to which: (a) complaint handlers enjoyed broad discretion to

make decisions beyond legal requirements and cost-benefit constraints, (b) previous FOS decisions did not bind its handling of future cases, and (c) complaint handlers' decisions did not oblige firms in their handling of similar complaints and transactions. This domain perception resembled the fairness ideal-type model. Yet, as analysed below, in contrast with the fairness model, ombudsmen further emphasised the informality and confidentiality of their decisions. The data indicate that the individuality discourse was invoked by complaint handlers in instances of conflict to deflate industry criticism, to maintain their discretion to remedy consumers' grievances and to differentiate themselves from the civil courts and the regulatory role of the FSA.

1. From the professional to the fairness model of complaint handling

In the first few years of its existence the IOB asserted its capacity to discern trends in firms' complaints and to establish general principles and guidelines. The IOB's annual reports explicitly referred to the organisation as a self-regulatory mechanism, and included a summary of general principles, which were drawn out of the organisation's handling of similar cases. For instance, in 1982, the second year of the IOB's existence, the Insurance Ombudsman wrote in his annual report:

> "The fact that many previously uncommitted companies have decided to join the [Insurance Ombudsman] Bureau has widened the scope of work and provided more examples in each category of cases, so that patterns have begun to emerge. These patterns are not only helping us to build up a system of precedents in the personal policy field which will be of value to the industry and public alike, they are also revealing areas of misunderstanding and friction

between company and policyholder that might be eased." (IOB Annual Report, 1982, p. 3)

Three years later, in his annual reports of 1985 and 1986, the same Insurance Ombudsman invoked the individuality discourse when objecting to insurance firms' use of his assertion of general principles in previous annual reports as a basis for authoritative rejection of complaints. He wrote, distinguishing his role from that of the civil courts:

"There have been *complaints* that my annual reports are sometime used [by firms]...as authority for turning down claims... as if they were precedents in the law courts. Certainly I have expressed views on points of principle and on procedures and practice generally... *However...I am an ombudsman not a judge*: I operate in the area of discretion, not solely that of strict law. There is therefore no guarantee that I will apply any principle I have derived from earlier cases to any particular claim. There may be overwhelming reasons why I should not do so and that is why I am quite specifically not bound by my terms of reference to follow previous decisions. It is dangerous to cite a previous decision or annual report when dealing with a dissatisfied policyholder. He should always be allowed to put his case forward: it may prove to be an exception to a general rule, or perhaps even provide a new direction for principle itself" (IOB, Annual Report, 1985, p. 3) (my emphasis).

Hence, the ombudsman's appeal to the individuality discourse, in this instance, pertained to his concern with preserving his discretion in adjudication of future

complaints. It was motivated by the ombudsman's responsiveness to 'complaints' – criticism from the IOB's Council, which had a majority of non-industry representatives. Indeed, in an IOB Council meeting, held in August 1985, the following was noted with regard to firms' use of the ombudsman's bulletins:

> "A copy of another…decision had been set aside to discuss with the Board[1] as it indicated [insurance] loss adjusters turning down complaints on the basis of published summaries of the ombudsman's decisions. The Council expressed serious concerns about [ombudsman's] decisions and bulletins being misused in this way. *Previous decisions must not be used to influence new claims.*" (my emphasis) (IOB, unpublished material).

A few years later the individuality discourse was again invoked, this time by the IOB second ombudsman and in response to industry criticism. In contrast with its previous practice to assert general principles in its annual reports, as of 1991 the IOB resorted instead to anonymised summaries of individual cases (since 1994 the IOB, and subsequently the FOS, issued a separate publication, in which the anonymous summaries of cases were conveyed.). The Insurance Ombudsman's explanation for this change revealed a contention over the IOB's authority to draw general principles from individual cases:

> "In place of professorial pontificating, enshrining for the future legal and moral propositions of uncertain scope and arguable application, readers are permitted this year to draw their own conclusions as to the principles and practices from

[1] As explained in chapter three, the IOB Board was made up of firms' senior executives.

the digested details of particular decisions. An ombudsman must do what an ombudsman must do: adjudicate individual disputes on their own special merit. Previous decisions are not binding, so strictly each case can start from scratch" (IOB, Annual Report, 1991, p. 4).

It should be noted that the ombudsman explained his shunning of general principles as inherent to what it means to be an ombudsman ('an ombudsman must do what an ombudsman must do'). That is, appealing to a normative logic of appropriateness or even to an isomorphic notion of a taken-for-granted domain. Nevertheless, contemporaneous documents suggest that this normative conceptualisation of the ombudsman's role was invoked in pragmatic response to industry criticism stemming from the IOB Board of Directors. In a meeting between the IOB's Chairman of the Council and its Chairman of the Board, shortly before the publication of the above annual report, the latter expressed the Board's dissent to any publication of the ombudsman's decisions which may be understood as setting a precedent for firms' handling of other cases.

> "The Chairman of the Board reported that the Board had held strong views over a number of years that the publication of cases would create precedents with, for example, loss adjusters and companies settling issues on the ombudsman's dicta, and that had not been the intention behind the scheme" (IOB, unpublished material).

Firms' concern with ombudsman's decisions, which may have an impact beyond the individual case, is equally captured in a letter sent by an executive of a large firm

(who was an industry nominee on the IOB Council) to the IOB Chairman of the Council during this same period. This executive conveyed his concern that a few cases, which were decided against another large firm, could result in grave financial implications if applied beyond the individual complaints:

> "I become most concerned when a decision appears to be one which can be applied many times in the future in similar cases…one decision against a company will not break it but the prospect of many, running into thousands of decisions all going the same, might." (IOB, unpublished material)

Similarly, in minutes recording a meeting between the IOB's Chairman of the Council and Chairman of the Board in 1990, the former explained that "[a Board's nominee to the Council] had asked for the decision [on a case lost by a firm] to be raised again at the next Council meeting, from which circumstances she [i.e. the Chairman of the Council] had deduced that it would have wide-ranging adverse implications for the industry" (IOB, unpublished material).

That said, it should be emphasised that the IOB Board's objection to the ombudsman's declaration of general principles, and to the publication of his individual decisions, was attributed to the fact that firms perceived the Ombudsman at the time to be anti-industry. In fact, the Ombudsman's above assertion in his 1991 annual report followed three years of fierce dispute between this Ombudsman and the IOB's Board. Tensions with the Board were especially acute with regard to the Ombudsman's assertions in his annual reports, given their relative wide publicity in comparison to individual decisions. Thus, it was not consistency and precedents as

such which the Board (and the industry) resisted. Rather, it was *adverse* precedents which the industry was unwilling to accept. Hence, conceding to the individualised nature and limited scope of his decisions was the Ombudsman's attempt to alleviate this tension and to prevent firms from pulling out of what was then still a voluntary scheme.

The duality of the ombudsman's fairness and professional models was nonetheless maintained. During the legislation process leading to the enactment of FSMA (2000) the FOS's Chairman and Ombudsmen articulated their domain before the parliamentary select committee (Great Britain, Parliament, House of Commons, Joint Committee on Financial Services and Markets, 1999). The Ombudsmen emphasised the dispute resolution role of the scheme, explaining "We are … in the business of resolving complaints…promptly and fairly and informally".[2] In contrast, the FOS Chairman of the Board suggested, assuming a professional ombudsman model, "we do have a role… to play in helping the industry to improve its own procedures".[3]

Towards the end of the research period, in 2004, the formal manifestation of the FOS's domain, as stated in a consultation paper jointly issued by the FSA and the FOS as part of the Treasury's review of the 2000 legislation (FSA and FOS, 2004)[4], described it in terms of a "dispute-resolution mechanism for handling individual cases, which provides an alternative to the courts for consumers." It further explained, as elaborated in chapter three, that in deciding each case according to its own merit the FOS can exceed the requirements of the FSA's regulations. Similarly, in his

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[2] *Ibid*, paragraph 465.
[3] *Ibid*, paragraph 472
[4] The consultation paper was issued as part of the FSMA Two Year Review that was initiated by the Treasury. The review indicated firms' dissatisfaction with the FOS's handling of systemic complaints and with the lack of coordination between the FOS and the FSA.

Foreword to the FOS annual report (2005/6), the Chief Ombudsman asserted his vision of the ombudsman institution as a mechanism for informal and swift resolution of individual disputes, distinguishing it from the civil courts and the FSA:

> "Like the courts, ombudsmen are clearly in the business of delivering justice. But we perform our function in a different way to the courts, generally using quicker and more informal procedures. This is what is meant when we are sometimes described as an *alternative* to the courts…ours is a distinct role, separate from the FSA. We make decisions on one-off cases… we do not carry out regulatory functions" (*Ibid,* p. 7) (emphasis in the original).

Yet, it should be kept in mind that the above quoted consultation paper, which was issued by the FOS and the FSA, came in response to firms' contention that the FOS's decisions were in fact *having* a wide financial impact upon them. For example, an email from the same period, which was sent to all FOS employees, explained the grounds for the FOS Board's nomination of an internal review as emanating from industry allegations that the FOS violated its 'legitimate' domain:

> "[The FOS] has been subjected to unprecedented scrutiny…by industry bodies concerned about a drift away from individual dispute resolution to decisions of principle with potentially wide ranging application." (Email communication, November, 2003).

To summarise, the above suggests that the FOS's articulation of its domain in terms of individual dispute resolution was invoked in response to external criticism,

particularly by the industry. It was intended to allow the ombudsman wide discretion to respond to those complaints that reached it, while alleging to have no coercive impact upon firms' handling of similar complaints and transactions.

2. Distinguishing complaint handling from regulation

To further examine the determinants of the individuality discourse it is instructive to analyse a specific case where the FOS utilised this discourse to appease firms' contestation of its handling of systemic complaints. The case further demonstrates how the individuality discourse was employed to demarcate the boundaries between the roles of the FOS and the FSA.[5]

In 2002 the FOS identified a trend in complaints regarding the marketing of a number of single premium bonds, which according to normal practices, as interpreted by the FOS, should have been marketed as high risk products.[6] In order to achieve internal consistency, a few ombudsmen centrally analysed the products' investment structure and guided adjudicators as to what they perceived to be a correct risk rating. The result was consistent upholding of complaints and its justification on the basis of the FOS's risk rating of the relevant products. Firms responded by persistently requesting that adjudicators' decisions be reviewed by ombudsmen, and by protesting to the FOS's senior executives. The FOS, in a few instances, reported resisting firms to the FSA, requesting its assistance, but the latter did not intervene.

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[5] The discussion is based on analysis of seventeen complaint files in my sample and eight interviews (A1, M2, O1, O2, O3a and O3b, O6, E1).

[6] There was no uniform, authoritative, risk scale. Rather, each firm created its own scale (E1). The FOS had its own internal guidance regarding funds' risk ratings.

In response to firms' resistance, and following negotiations with firms, the FOS conceded that it could only judge whether the marketing of products was suitable to the needs of individual complainants, rather than assess their absolute risk. Thus, the wording of future decisions was adjusted. Rather than passing judgment on the risk rating of firms' funds, complaint handlers were guided to focus their analysis upon firms' assessment of the individual complainants' risk profiles and financial needs. However, the outcome of adjudicators' decisions still tended to favour complainants in these cases.

Internal guidance linked the importance of restricting decisions to the individual circumstances of the complainant to the appropriate domain of the FOS as opposed to the regulatory role of the FSA. At the same time, the guidance further acknowledged the adverse financial consequences for firms and the consequences for the reputation of firms of adverse FOS generalised decisions. The guidance asserted:

> "The role of FOS is to consider individual complaints and not to overrule product providers' [i.e. life assurance firms] risk rating of funds. We must not seek to determine cases on the basis that the fund was wrongly rated. If a fund has had the risk inappropriately assessed the consequence would be that potentially all sales made on the basis of this flawed assessment would be wrong and this would have serious reputational and financial consequences for a firm. We are required to determine individual complaints on their facts and circumstances. *It is not our responsibility to consider whether funds are correctly rated – that is for the regulator*" (my emphasis).

An ombudsman explained that assessing the risk of firms' funds was beyond the legitimate remit of complaint handling, which is why the FOS should avoid it.

> "As far as the [firm's] fund is concerned we can't say what kind of risk it is. That's not our job…If a firm says this is a low-risk product, even if I think it isn't, I will try not to say that. Just try to say it is too much risk for this person because we just have to bring it all back to the individual…[otherwise] *what firms will say is that we introduce regulation by the back door* because we say that a fund is a medium-risk fund when they say it's a low-risk fund…and that's not what we are there to do. So that's why we try to avoid it" (O1) (my emphasis).

As further elaborated in chapter eight, other interviewees explained the clash between the FOS and firms over this issue as a pragmatic concern of firms that an adverse FOS decision, which rests upon a logic which is applicable beyond the individual case, might result in the FSA requiring them to apply the decision to all relevant complaints, or even to all their past sales.

According to interviewees, and analysis of complaints, the compromise did not greatly change the outcome of complaint handlers' future decisions.[7] Rather it allowed them to reach the same consumer-responsive result in a way which was less threatening for firms, since it did not automatically apply to the latter's transactions and other complaints.

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[7] As discussed in chapter six, the change in rhetoric did have some impact upon decisions outcomes. While in 2002 *all* complaints of this kind were upheld, in 2003 *nearly* all were upheld. Hence, the change in rhetoric was accompanied by decreased standardisation.

3. The internalisation of the individuality discourse

Whereas the above analysis implies that the individuality discourse embodied the ombudsman's pragmatic (or coercive) exchange with firms, it was also normatively and cognitively internalised by complaint handlers, who perceived the task of complaint handling as inherently subjective. The following remark of a recently appointed ombudsman, who explained the *subjective* nature of complaint handling with regard to endowment mortgage cases, which at the time of the research constituted over one half of the FOS's workload, is typical:[8]

> "In mortgage endowment it's very much [that] you look at a set of circumstances and *you make a subjective judgment* of…whether you think the policy was mis-sold or not. And it is subjective because it is a set of circumstances and you are looking at them and thinking 'Right, well is this an appropriate product for that person?' There isn't really an objective test. There are things you can take into account, but it's very subjective" (O6) (my emphasis).

The following ombudsman linked the notion of subjective judgment to the FOS's legal mandate, stressing that there were no *right* decisions, only *reasonable* ones:

> "it becomes…a question of *where you stand, what you regard as fair and reasonable, what I regard as fair and reasonable*…it is not whether the decision is *right* as whether it's *reasonable*" (O2) (my emphasis).

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[8] One out of thirteen similar remarks by interviewees.

The perception of compliant handling as discretionary is compatible with both the fairness and professional models of compliant handling. Consequently, it may be reasoned that the individuality discourse was rooted in complaint handlers' aim for professional autonomy vis-à-vis *their managers*, rather than in an exchange with their external environment. Yet, professionals – e.g. doctors or lawyers – are unlikely to articulate their judgment as 'subjective' and to insist that 'there are no right or wrong decisions'. Moreover, what was distinct about the FOS's individuality discourse was complaint handlers' (especially adjudicators), conviction that their decisions do not bind firms even when handling identical complaints.[9] Most important, as evident from my discussion above of the FOS's risk rating of firms' funds, complaint handlers perceived the individuality of their decisions as a constraint, rather than merely as a demand for professional autonomy.

The taken-for-granted status of complaints' individuality was challenged by adjudicators' daily experience. This presented them with increasing numbers of complaints of a systemic nature and *de facto* bureaucratisation of their work. As mentioned in chapter three, in search of efficient handling of an influx of over 50,000 endowment mortgage complaints during 2004, the FOS established a standardised method for handling these complaints. A separate mortgage endowment unit was created, wherein cases were assessed according to standardised criteria, with each case summarised on one row of an Excel file. Similarly, with regard to a few other areas of high profile complaints – Split Caps, Dual Variable Rate mortgages and Equitable Life complaints – a procedure of 'Lead Cases' (*de facto* precedents) was

[9] Complaint handlers' interaction with firms and the nuances in adjudicators' vs. ombudsmen's perceptions of firms' obligations is further discussed in chapter eight.

introduced. However, the individuality discourse nevertheless prevailed. A manager in the endowment mortgage unit explained apologetically:

> "The reason, really, for [using] the [Excel] spreadsheets…it's not a tick box type thing. You still have to make the individual judgement in each case. It's just... a more efficient way of expressing a view [on the case]" (M6).

Similarly, a review procured by the FOS's Board, conducted by an external team, reflected internal uneasiness regarding the use of Lead Cases:

> "There is a recognised *danger* that when adjudicators deal with follow-on cases they may be inclined to look at the evidence from the perspective of the lead case, rather than approaching the case on its individual merits. *Staff are on their guard against this"* (my emphasis) (Kempson *et al.*, 2004).

4. The complementarity of individuality and confidentiality

Coupled with the IOB's and the FOS's discourse of individuality was their emphasis on confidentiality. Indeed, as chapter eight will demonstrate, for complaint handling to be confined to the individual case, decisions had to be confidential. In this sense, the financial ombudsmen's domain perception departed from the fairness model.

An FOS executive explained the association between the individuality of the ombudsman's decisions and their resolution outside the public sphere as intertwined.

'We are more likely to be able to achieve what we want [a cooperative attitude from the firm] through it [the decision] being anonymous, through being able to persuade a firm that if they do what we're suggesting they are not going to set an unfortunate precedent for themselves [be]cause no-one will know about it. The whole environment is one of confidentiality, which we believe is the best environment to resolve complaints. It is a little bit like any forum of dispute resolution – it's always better behind closed doors.' (E2).

A key manifestation of the IOB's and the FOS's preference for confidentiality was their reluctance to name and shame firms in the public domain. Consequently, both organisations resisted consumer organisations' request that they publish comparative information regarding firms' individual reversal rates (i.e. the ratio of disputes that they adjudicated in favour of complainants), and the naming and shaming of uncooperative firms. An IOB executive explained that the organisation did not "publish the results [of decisions] by company…because the industry didn't want them to be….They were afraid not of what [the ombudsman]…would say, but what the press would pick out of it" (T6).

The following FOS ombudsman equally suggested that the FOS's reluctance to name and shame uncooperative firms was rooted in a pragmatic, rather than a normative, stance:

"I don't think we see it [naming and shaming] as a helpful way of dealing with complaints, because if firms and/or complainants thought that they were going to be spread all over the press every time something happened, then we

wouldn't be able to deal as effectively with complaints as we can. Part of the way that we can be effective is by doing things in an informal way, and as soon as you start to threaten people with publicity then you start to be much more careful and formal." (O5)

The following two executives, however, perceived the FOS's policy to avoid naming and shaming those firms whose complaints revealed poor selling and complaint handling practices, as inherent to the ombudsman's domain as distinctive from regulation. For example:

> "We are always keen to point out that all we do is organise redress for consumers, we don't punish firms… [Punishment] is not what the ombudsman is here for…That's what the regulator is here for… [Naming and shaming] could be creating all sorts of problems as to 'what exactly does the ombudsman do? Why have you been telling us for the last 10 years we are not a regulator, we provide redress not regulation when you suddenly do something which is quintessentially regulatory?'" (E2)

A member of the FOS's board of directors similarly explained:

> "The Board was very reluctant to [name and shame firms]…because the whole premise of the Ombudsman Service is that ombudsmen do not make public the … trends [in the outcome of the ombudsman's decisions] against individual companies…We make general information available but not specifically around companies." (E7)

5. Preliminary conclusion

The above suggests that complaint handlers' domain perception, as developed over time, was aligned with the fairness model, but differed from it in its emphasis on informality and confidentiality. The individuality discourse reflected an implicit trade-off between complaint handlers' broad discretion to make pro-consumerist decisions and the limited intended impact of their decisions upon firms' selling practices and handling of similar complaints. This emphasis equally differentiated the role of the FOS from that of the FSA. The ombudsman's stress on informality further distinguished its domain from that of the civil courts. However, the individuality discourse was threatened by the rapidly increasing number of systemic complaints. Internally both the IOB and the FOS aimed to respond to wide scale complaints in a consistent and efficient manner. Increasing professionalisation and the common background of adjudicators (as described in chapter three) supported such consistency. Moreover, complaint handlers' decisions on high volume complaints were increasingly standardised. Despite these changes, complaint handlers' perception of complaints and of complaint handling as inherently individual remained intact. This perception and articulation of the ombudsman's domain was reinforced in response to industry criticism.

C. The Ombudsmen's professional environment

The above discussion rooted the ombudsman's domain perception in pressures from its local task environment, in its pursuit of broad discretion to respond to consumer grievance and in its aim for distinctive domain from that of the FSA and the civil courts. A competing explanation would suggest that the IOB's and the FOS's domain perception were simply carbon-copies of a universal ombudsman model.

This competing explanation is supported by the fact that the individual ombudsmen of the IOB, and subsequently of the FOS, were members of the British and Irish Ombudsman Association (BIOA). The BIOA encompassed public and private sector ombudsmen. Analysis of the BIOA's early conference reports (1991, 1993 and 1995) suggests that the IOB and the FOS's domain perception indeed borrowed from a broader accepted model. First, ombudsmen generally perceived their decisions as creating no precedent for their *own* future decisions. Second, other ombudsmen similarly perceived their jurisdiction as transcending beyond regulations and legal requirements. Third, other ombudsmen similarly boasted about the informality of their handling of disputes. These three principles were perceived by the ombudsman professional community as distinguishing the ombudsman institution from the civil courts. In fact, just as much as the FOS was seeking exclusive domain vis-à-vis the FSA, the ombudsman community more broadly aimed to distinguish its domain from that of the civil court system (E6b).

Yet, the idea that the ombudsman's role is confined to individual dispute resolution was not generally accepted by BIOA members. Rather, analysis of the BIOA's early conference reports suggests that most UK ombudsmen perceived transcending individual dispute resolution as part of their role. An extract from a workshop, which took place during a conference that led to the creation of the BIOA, reflects a vigorous version of this perception:

"The question of redress is a wider issue than just what is appropriate for the particular complainant. There may be other people in a similar position who have not complained…and it may be necessary to identify and compensate them

also. It may often be that a significant outcome of an investigation is the identification of faults in procedures or practices, and the introduction of better systems in the organisation in order to prevent a recurrence of the problem is required… if the fault identified was consistent with the common practice in the business …then the resolution needed would be a change in general practice" (BIOA, Conference Report, 1991, p. 47).

In practice, however, BIOA members diverged in their perception of the appropriate means for making an impact upon their respective industries and public sectors. Some perceived their broader function as limited to education. Others saw it as within their domain to formulate general principles, audit organisations' internal complaint handling, propose changes to procedures, follow up on the implementation of their previous recommendations and to name and shame those organisations whose standards fail behind. A summary of a discussion, conducted during a BIOA workshop in 1995, reflects some of this diversity:

> "All ombudsmen see it as their task to rectify systemic mistakes… Some ombudsmen recommend: changes in procedure...; improvements to documents or leaflets; management action such as a review; some help to draft codes of practice, or guidance notes. Some ombudsmen schemes request the organisation complained about to seek out others who have suffered the same maladministration. However, others do not. Similarly, some schemes…take follow up action to see if their recommendations have been implemented. The emphasis on these matters is still under discussion and varies from scheme to scheme" (BIOA, Conference Report, 1995, pp. 53-4).

The question of confidentiality was also in contention within the BIOA. For example, a member of the PIAOB contended during a BIOA conference:

> "In most private sector [ombudsman] schemes…adjudications are not published at all, although anonymous examples may be given in annual reports…Schemes which do not publish individual adjudications are offering a level of justice appreciably lower than the judicial system itself…non-publication may conceal persistent malpractice or unfair behaviour by individual companies or public bodies….It is…argued that private sector ombudsman schemes operate within a contractual framework between the member companies and the scheme, and publication does not form part of the contract…I do not believe that the kind of secret justice which characterises all private sector and some public sector schemes is acceptable" (BIOA, Conference Report, 1995, pp. 37-8).

While some ombudsmen advocated a proactive approach, others specifically resisted transcending the resolution of individual disputes. However, their opposition was pragmatic, more than normative, suggesting similar constraints to those faced by the IOB and the FOS. For example, in the BIOA's pre-formation conference, held in 1991, the following was asserted in opposition to the suggestion that public sector ombudsmen should be more proactive in delineating general principles of administrative best practice:

> "The arguments raised against dissemination of guidance on good practice were principally:
>
> - This could provoke adverse reaction from the service providers

- It would fetter the discretion of ombudsmen in respect of how future cases should be viewed…
- The ombudsmen offices were not set up with the purpose of formulating and issuing advice." (BIOA, Conference Report, 1991, p. 30).

D. Discussion

In this section I analyse the determinants of complaint handlers' domain perception as revealed in the case study. I suggest that complaint handlers' domain perception developed to simultaneously address local pressures from concentrated interests, to enhance the ombudsman's autonomy to respond to consumers and in pursuit of exclusive domain vis-à-vis the courts and the FSA. While the IOB and the FOS's domain perception borrowed ideas from their professional community, the tension between the professional and fairness models of complaint handling were prevalent in other similar organisations. Thus, in this case, a synthesis of the three theoretical perspectives derived from the literature is found to be a superior explanation to each of these explanations on its own.

1. The subject matter of complaints

Interviewees' common explanation for the FOS's individuality discourse was that standardisation of complaint handling was impossible or meaningless. That is, they claimed that complaint handling was inherently particular, since it entailed the matching of an investment product to the risk profile of an individual complainant. However, this explanation is unconvincing. First, most of the complaints that reached the FOS were part of some firm- or industry-wide trend, rather than individual, one-off, cases. Therefore, complaints were hardly inherently individual. Second, it was the

disinclination of the FOS, the FSA and their predecessors to develop public case law and precedents, which reinforced the uniqueness of advice suitability complaints. Thus, decision making regarding investment complaints was particular because it was never explicitly standardised. Third, in practice the FOS, as elaborated in chapter eight, managed systemic complaints in a consistent and increasingly standardised manner. Thus, while articulating their domain in terms of subjective and individual judgment, complaint handlers in fact handled certain types of complaints according to internally set general guidance. Fourth, the subject matter of complaints was no more individual than that of judicial decisions; both are contextual. However, while judges legitimise their decisions as derivatives of general rules and previous precedents, complaint handlers legitimised theirs on the basis of their sole application to the merits of the individual case. Hence, it was not the inherent nature of the subject matter which distinguished complaint handling from judicial decision making, but the different domain perceptions of judges and complaint handlers.

2. Professional networks and isomorphism

New institutional theory draws attention to the possibility that the individuality discourse was adopted given its binding status within the ombudsmen's professional community. However, the above analysis of the BIOA's early conference reports suggests that the tensions between the professional and fairness complaint handling models and the publicity vs. confidentiality of ombudsmen's decisions were prevalent in other similar organisations. There was no one fixed ombudsman model, but rather a malleable mixture of ideas, which were negotiated both locally and within the ombudsmen's professional community.

3. Responsiveness to concentrated interests

There is ample evidence to show that the IOB and the FOS invoked the individuality discourse in response to firms' resistance to pro-consumer ombudsman decisions. Construing decisions in individual terms was intended to mitigate firms' criticism that the ombudsmen were transcending their 'legitimate' role. Responding to firms' pressures was crucial for the IOB given its reliance upon firms' voluntary participation in the scheme and the Board's authorisation of its budget proposals. Additionally, despite the FOS's mandatory status, the individuality discourse was sustained and reinforced in response to firms' challenge of adjudicators' and ombudsmen's pro-consumer decisions regarding systemic problems.

4. Responsiveness to consumer expectations

While the FOS's individuality discourse was invoked in response to firms' resistance, capture and resource dependence theory cannot, on their own, explain its formulation. The ombudsman's implicit exchange with the industry was not simply that of material resources in exchange for favourable decisions. Rather, the individuality discourse was intended to enable the ombudsman broad discretion to redress the financial loss and dissatisfaction suffered by individual complainants, while limiting the scope of those decisions.

Additionally, had the FOS (and its predecessors) established case law, this would have been used by firms to authoritatively reject complaints in similar cases. In contrast, consumers, as individuals, would have been less effective in using favourable past decisions to their advantage. Therefore, avoiding the development of case law and conveying decisions in individual terms supported complaint handlers'

flexibility to respond to those consumers who filed a complaint with the FOS. In other words, by emphasising the individuality of its decisions, the ombudsman aimed to secure its own autonomy and discretion on behalf of complainants.

Moreover, chapters six and eight will show that the individuality discourse did not preclude complaint handlers' adopting a *de facto* consistent (and even standardised) approach to complaints of a systemic nature. Hence, while formulating their decisions in individual language, complaint handlers nevertheless responded consistently to large-scale complaints according to ombudsmen's internal guidance.

5. Demarcating exclusive domain

Finally, the individuality, confidentiality and informality discourses were further related to the FOS's aim to demarcate for itself an exclusive domain vis-à-vis the courts and the FSA. When comparing its role with that of the FSA, the FOS emphasised the individuality and confidentiality of its decisions. In a crowded regulatory space the FOS and FSA, every now and then, faced the need to make a decision upon which the other body had previously taken a position. Contradictory standpoints by the two agencies generated industry dissatisfaction and conflict between them. Construing the FOS's decisions in terms of a product's suitability to the needs of an individual complainant mitigated the scope for conflict between the FOS and the FSA and the need for coordination between them. When comparing itself with the civil courts, the FOS accentuated the informality of its dispute resolution. More broadly, by limiting its declared role to the individual judgement of complaints, and by distinguishing this role from that of the FSA and the courts, the FOS carved

for itself a legitimate, albeit restricted, independent domain within the retail investment regulatory regime.

E. Conclusion

The theoretical perspectives, which emphasise pragmatic exchange with concentrated interests, responsiveness to normative and cognitive expectations, and bureaucratic striving for autonomy and exclusive domain, all contribute to the analysis of the FOS's domain perception. But none can independently explain it.

In accordance with the expectations of capture and resource dependence theories, the FOS's individuality discourse was invoked in response to firms' criticism of ombudsmen's pro-consumerist decisions. However, in contrast with capture theory accounts, the ombudsman's emphasis upon the individuality and confidentiality of its decisions was intended to allow it greater autonomy to respond to consumers' grievances, albeit only to those who filed a complaint with the organisation.

Finally, the above account is further compatible with Wilson's expectation that public organisations aim to differentiate themselves from (rather than mimic) other similar bureaucracies in their environment. The notions of individuality, confidentiality and informality, which loomed high in complaint handlers' rationalisation of their role, were constructs that differentiated the ombudsman from the civil courts, on the one hand, and the FSA, on the other.

Chapter 5: The FOS's heterogeneous goals and controls

Introduction

In the previous chapter I analysed the institutionalisation and stability of the ombudsman's articulation of its domain in terms of individual, confidential and informal dispute resolution. In contrast, the ombudsman's structure, when analysed against the complaint handling typology as delineated in chapter one, underwent profound change between 1981 and 2004. To recapitulate, as described in chapter three, complaint handling was delegated from the ombudsmen to a cadre of retail financial professionals. The ombudsman's recruitment base was altered. Additionally, towards the end of 2002, professional managers – i.e. the Service and Operation executive managers – took over the managerial role of the Principal Ombudsmen, limiting the latter's domain to a technical policy role. Regular ombudsmen were cut off from their previous influence upon the recruitment and promotion of adjudicators and managers. Additionally, in some casework areas, procedures for the negotiation of bulk cases were introduced.

Below I describe and analyse further changes to the ombudsman interpretative scheme and structure, which resulted in its heterogeneous goals and control system. The FOS's control system came to comprise quantitative targets, quality assurance and measurement of consumer satisfaction as well as monitoring of adjudicators' interpersonal interaction with complainants. As elaborated below, adjudicators' processing of complaints was subjected to targets (for the number of cases closed and the time to case closure) and bonuses for above target performance. In addition, the

technical quality of adjudicators' decisions and their communication with complainants were monitored by the ombudsmen (when cases were challenged), by team managers (who randomly sampled cases for review) and by means of consumer satisfaction surveys. Overall, as further depicted in chapters seven and eight, the FOS underwent greater bureaucratisation of the quantity and quality of adjudicators' decision making and tightened its control over their communication with complainants. In terms of the typology that was delineated in chapter one, the FOS's configuration shifted towards a combination of bureaucratic and therapeutic complaint handling models.

I argue that the FOS's introduction of a target and bonus scheme was prompted by the sheer increase in its caseload as well as its reliance upon case fee income. It was facilitated by the changes to the ombudsman's recruitment base, since the employment of targets and bonuses as means of control was established within the industry.

Yet, what was striking about the above transformation was the buffering of the ombudsmen (and to a lesser extent veteran adjudicators) from these changes. As explained below, ombudsmen were not subjected to targets. Additionally, the increase in targets was mainly borne by the new Assessment and Endowment Mortgage units, whose personnel were typically recruited from outside the FOS and internally from among administrators and consumer consultants. In contrast, the targets of veteran adjudicators remained relatively stable. I propose that the buffering of the ombudsmen (and veteran adjudicators) not only enabled change by mitigating their likely resistance. It also institutionalised an intra-organisational conflict between managers'

concern with case closure targets and ombudsmen's focus upon decision quality. This internal competition, coupled with external criticism and the increasingly adversarial relationship between the FOS and the industry, resulted in greater formalisation of the FOS's quality assurance procedures.

I further suggest that the FOS's focus upon the attainment of consumer satisfaction was related to complaint handlers' perception of excessive consumer expectations for redress. This perception was linked to complaint handlers' view that the media was unduly constructing unrealistic consumer expectations, as well as to their concern with a general British 'compensation culture'. This latter anxiety was not unique to the FOS or to retail financial services. Rather it was high on the media and the political agenda during the research period.

The discussion below is based on analysis of the FOS's computer-based controls, internal documents and interviews with complaint handlers. Section A below thoroughly describes the ombudsman's target and bonus scheme and its origin. This account further sets the scene for my analysis of the *effect* of the target system upon adjudicators' micro-level responsiveness to complaints, which is the focus of the next chapter. Section B thereafter analyses the development and formalisation of the ombudsman's monitoring of quality assurance and consumer satisfaction. This again is also a setting for my analysis of adjudicators' interaction with complainants and firms, respectively, in chapters seven and eight.

A. **The FOS's targets and bonus scheme and its origin**

This section seeks to describe and explain the emergence of the FOS's performance management and incentive scheme. Performance management is frequently linked with performance-related compensation. The two main types of incentive schemes are piece-rate bonuses and merit plans. In piece-rate compensation schemes employees receive a base salary for standard performance and a bonus for their performance above standard. The bonus is not integrated into employees' basic salary. In contrast, merit plans are tied to employees' appraisal ratings by their superiors. Supervisors' ranking of employees is integrated into employees' salary base and used along with pay grades (Wigdor & Milkovich, 1991).

The FOS's performance management scheme comprised targets and both merit pay and piece-rate bonuses. The FOS set targets for the number of cases closed per adjudicator and piece-rate bonuses for adjudicators' performance above their target. Additionally, productivity (i.e. the number of cases closed in relation to the target) was taken into account in adjudicators' appraisal for progression along salary scales.

Adjudicators' individual performance was closely monitored. There was little they could do to conceal their actual level of performance. Adjudicators' failure to meet their targets resulted in tighter supervision and in extreme instances in dismissal. All this suggests that targets were likely to have a strong impact upon adjudicators' behaviour. (The actual impact of the targets and bonus scheme upon adjudicators' decision making is analysed in the next chapter.)

The analysis below demonstrates how the adoption of performance management was stimulated by the ombudsman's escalating caseload and change to its budget structure. I argue that the adoption of performance management was facilitated by the FOS's reliance upon the industry as its recruitment base and by the buffering of privileged groups – the ombudsmen and veteran adjudicators – from the scheme's full impact.

1. The origin of the FOS's target and bonus scheme

The constant increase in the number of complaints was a major challenge for the financial ombudsmen schemes from their inception in 1981. Internal correspondence of the IOB shows that its Board of directors exerted continuous pressure on the Ombudsman to reduce costs by increasing the case closure productivity of his assistants and introducing performance-related-pay. The IOB's Ombudsman resisted the Board's intervention in the productivity of his assistants (although the organisation did use individual productivity as one criterion for merit-based wages).[1] PIAOB introduced explicit targets for cases closed per adjudicator. These had implications for employees' merit pay (T11), which was later supplemented by a piece-rate bonus system (A7). The FOS's adoption of targets and an incentive scheme can be explained as a combination of internal and external pressures. Its focus upon the number of cases closed was related to the sheer number of complaints (see chapter two) and to the FOS Board's concern with complaint handling backlogs (E7). Yet, the FOS's attention to the quantity of cases closed and its amenability to the introduction of targets and piece-rate bonuses was further related to three intra-organisational factors. First, as described in chapter three, the finance structure of the PIAOB and the

[1] This information is relevant for the years 1981 to 1994.

FOS differed from that of the IOB in their reliance upon a combination of case fees paid upon the conclusion of the complaint handling process and annual industry levies. Moreover, as explained in chapter three, due to the unpredictable yearly volume of complaints, the FOS shifted towards predominant reliance on case fee income. Consequently, only by maximising the volume of cases closed could the FOS expand so as to keep up with its rapidly increasing caseload and to avoid backlogs. Second, the FOS's focus on swift closure of cases was self-reinforcing due to complaint handlers' belief that longer time from case conversion to closure resulted in greater consumer resistance to rejection of complaints. Therefore, timely handling of complaints was perceived as essential for swift conciliation.[2] A team manager asserted:[3] "They [the complainants] have been waiting 6-7-8 months. They may become more difficult to deal with because …if it's rejected then the complainant is far more likely to be dissatisfied because 'God, I have had to wait 7 months for you to tell me to piss off', *so that could in turn produce more work*" (M2) (my emphasis). Finally, the shift in the FOS's recruitment base from the legal profession towards retail financial sales and complaint handling seems to have rendered performance management easily accepted as a result of its prevalence in the industry.[4] A team manager proposed: "Traditionally…we tended to employ lawyers…and they were very resistant to targets…But, the…people we've employed now…tend to be …from a sales background, [they are] very comfortable with targets" (M1). The Chief Ombudsman similarly remarked when interviewed for the BBC Radio 4 *Money Box*

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[2] However, the actual conclusions from the FOS's consumer satisfaction surveys were ambiguous with regard to the effect of time to closure upon consumer satisfaction. The surveys suggested that some consumers were more satisfied if their case took longer to resolve, because this information was interpreted by them as a sign that their case was investigated thoroughly.

[3] One out of four similar responses.

[4] At the same time, the similarity of bonuses to sales commissions, which were perceived by complaint handlers as the cause of badly sold financial products and essentially for complaints, rendered some complaint handlers critical towards the use of incentives.

programme (2004): "Many of the staff we have come from a background working in a financial services firm …they're entirely used to the idea that they should have some targets and that if they achieve those targets, and achieve a lot on top of them, they do feel that it's not unreasonable to expect that the organisation rewards them for that."

2. The operation of the targets and bonus system

Below I offer a detailed description of the operation of the FOS's target and bonus scheme. This account, in addition to its relevance to the current chapter, provides the setting for my analysis of the impact of the target system upon adjudicators' responsiveness to complaints in the next chapter.

Setting case closure targets: The FOS executive management set the organisation's overall case closure targets once a year (in January) for the purpose of budget consultation and authorisation by the FSA, and every six months (in March and September) for internal needs.[5] The Operational Manager, who was in charge of the organisation's non-technical aspects of complaint handling, negotiated with each of the Service Managers the case closure targets of their Business Units. Service managers further negotiated with team managers six-month targets of their teams, measured in terms of average weekly case closures per adjudicator. Adjudicators' targets, within each team, were normally uniform, reflecting these average weekly

[5] Complaints annual forecast tended to be of poor match to the actual volume of complaints. Thus, the six-month periodic targets tended to be substantially higher than the initial annual prediction. This discrepancy was mainly due to the unpredictability of endowment mortgage complaints volumes, which were highly dependent on the public's response to media coverage and the regulatory mandated information provided by firms. Information from firms as to their own predictions of endowment mortgage complaints volumes was of little help to the FOS, since these were equally unreliable (E6). However, in other areas, a close relationship with firms enabled the FOS to improve its prediction of volumes and types of future complaints.

targets. The fulfilment of targets and individuals' eligibility to a bonus was assessed according to the number of cases which they closed over a six-month period.[6]

Targets variability: Targets were much higher for adjudication teams in the then newly-established Assessment and Endowment Mortgage business units than for the older 'investigation' units, on the assumption that the former units' tasks were simpler, more standardised and therefore less time-consuming. Veteran adjudicators were typically members of investigation units. In contrast, adjudicators in the Assessment and Endowment Mortgage units tended to be either new recruits from the industry or from former FOS administrators and consumer consultants. Consequently, despite rapid increase in caseload, adjudicators' targets outside the Assessment and Endowment mortgage units remained fairly stable.[7] Within each business unit, the variation in teams' targets was tailored to managerial expectations regarding firms' and complainants' cooperation in providing information, accepting a decision against them and the amount of attention and explanation required from adjudicators.[8]

Bonuses: Adjudicators were paid a bonus for every percentage of cases closed above their target as measured every six months, up to a cap of X% of closures above

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[6] As long as a team as a whole achieved its target, the team manager could adjust the average team target to match the nature of an individual's specific caseload or duties. For instance, adjudicators who coached new staff members had lower targets.

[7] Adjudicators in team B, who previously worked in PIAOB, explained that their individual targets were similar to those they had in the predecessor organisation.

[8] Teams handling complaints against IFAs had relatively low targets per adjudicator since IFAs were expected to challenge adjudicators' decisions against them more often than larger firms. Similarly, teams handling complaints against firms who were perceived to be uncooperative or incompetent, or against firms that were disputing a specific FOS approach regarding a large set of similar complaints, had lower targets. Finally, teams dealing with markets that were associated with well-off and educated consumers (e.g. portfolio management complaints) had lower targets since these consumers were expected to be more persistent in pursuing their complaints.

target.[9] Team managers and service managers were paid a bonus linked to the percentage of cases closed above their team's or business unit's target respectively. Fulfilling the minimal closure target was also a condition for individual progression along salary levels.

The ratio of the maximal bonus out of adjudicators' overall earnings diminished as they progressed up the salary scale. For a starting adjudicator at the Endowment or Assessment units the maximal bonus was about 19% of total annual income. For more experienced adjudicators (as those that comprised my sample), or those who started on a higher salary level given their professional expertise, the bonus was about 13% of annual income. For a specialist, the bonus was less than 10% of his/her annual earnings. Thus, the more professionally valued an adjudicator's work, the more compensation was based on secured salary.[10]

No targets for ombudsmen: Ombudsmen were excluded from the target and bonus system. Although some of the ombudsmen did agree an informal target with their Principal Ombudsman, they perceived it as a flexible goal. An ombudsman explained the logic for this exclusion:[11]

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[9] Capping of the bonus was introduced as a result of internal dissatisfaction with bonus disparities across teams, and concern that allocation of large bonuses may draw external criticism from both firms and consumer bodies. A few months after its introduction the bonus cap was further reduced as a response to adverse media coverage of the FOS's remuneration system by the BBC 4 *Money Box* programme (E5; O6). It should be noted that most of the cases in my sample were closed before the introduction of a bonus cap.

[10] Source: internal documents regarding salary levels and changes to targets and incentives.

[11] One of two similar quotations.

> "I don't think that it's very formalised [the ombudsmen's targets] because I don't think ombudsmen are formally targeted or should be actually formally targeted…I think it's the wrong message to send, targeting ombudsmen" (O2).

An executive's remark exposed a contention over this issue:

> "Q: Why is it that ombudsmen don't have any targets?
>
> A: Good question. It's not a question for me though. Ombudsmen should have targets. But there is an argument which goes on the lines of 'it impacts on their independence to have targets'. So we can't sit there and say to an ombudsman 'you have taken too long on this case' because he could argue that 'you are impacting on my ability to be independent on this case' " (E5).

Plausibly, the seclusion of ombudsmen (and veteran adjudicators to a lesser extent) from the impact of the target and bonus scheme was necessary in order to mitigate their resistance to the overall increase in targets and the focus upon case closure over decision making quality. Below I suggest that the buffering of the ombudsmen from the target and bonus scheme institutionalised their position as the FOS's quality guardians and resulted in their enduring pressure to shift the organisation's focus from case closure quantity towards decision quality.

Targets achievement and individual autonomy: As long as adjudicators progressed adequately towards achievement of their targets, they were given substantial autonomy in managing their caseload and time. Experienced and trusted adjudicators could choose to work part of the week from home. Conversely, those who appeared not to be progressing were under scrutiny and pressure to change their working habits.

Individuals' and teams' progression towards their periodic target was measured on a weekly basis. Every team manager received a weekly report listing the performance of every adjudicator in all teams. Managers conventionally emailed this information to their team members, who could then assess their own performance in comparison to other team members, and their team's performance in comparison to other teams. An executive explained:

> "We have reports that come out every week as to the performance of every single person…You look at the numbers and you know what somebody's target is per week …we [the executive and team managers] look at the performance…and we'll say, 'Oh, so-and-so's not looking [good] – what's going on here?' …If…somebody is not performing, they've got a bad attitude, and there's no reason why, the manager will sit them down …as to what we need to do to help them improve, because…they're a drain on our time. And sometimes it could be they've just got into bad habits of doing things, or they're just disaffected, so you have to do something to cure that. We had one person…who really just can't do the job…it's getting to the point now that he will go on a full disciplinary [procedure], and …he'll probably end up not being with us for much longer" (E3).

The following adjudicator asserted that attaining targets entailed greater autonomy.[12] S/he explained that 'The target system results in pressure only if you are below target. You'll be under a microscope, [they will] put you on an action plan and eventually

[12] One out of three similar adjudicators' remarks.

there may be a disciplinary action against you. If you are on-target – nobody interferes with your work' (paraphrase, A5a).

2. Time-to-closure targets.

In addition to case closure targets, the FOS aimed to resolve all cases within 12 months. As detailed below, the attainment of this target was monitored on a case basis, to guide complaint handling, and on an adjudicator basis to inform managers of individual performance.

Once allocated for investigation, cases' timely progression was monitored by the computer system, which set a new task on the adjudicator's 'task bar' when its time was due. The computer system further monitored the passage of time from the moment an enquiry was converted into a case. Once a case was open for over 9 months the adjudicator received monthly automatic reminders from the computer system. After 12 months an adjudicator was required to respond to such reminders with a written note, explaining why the case was still open. Cases which were not closed within 12 months were reported to the FOS's Board in its quarterly meeting. In addition, each adjudicator had a personal 'open cases report' listing all their cases, which was accessible to everyone else in the organisation coloured white, green, amber and red according to the time passed. This individual report further listed the number of files which were not progressed for over one, two and three months. Managers could decide to deduct a case that had been in the system for over 12 months without progression from an adjudicator's bonus once closed.

In summary, the above discussion traced the triggers for the FOS's introduction of a performance management regime. It also showed how the ombudsmen, and veteran adjudicators, were buffered from the full impact of these changes. The above description elucidates that the achievement (and surpassing) of targets had substantial implications for adjudicators' remuneration and autonomy. The extent to which this had ramifications for adjudicators' responsiveness to complaints is assessed in the next chapter. Yet it should be stressed that the likely effect of targets upon adjudicators' behaviour was mitigated by tailoring teams' targets to the variance in firms and complainants' amenability to adverse decisions and by capping the maximal bonus. The section below, moreover, shows how the quantitative monitoring of case closure instigated counter-formalisation of quality controls.

B. **Competing controls – decision quality and consumer satisfaction**

Below I demonstrate how, in reaction to the focus on case closure, the FOS went towards a simultaneous bureaucratisation of adjudicators' decision quality assessment and closer monitoring of their interpersonal interaction with consumers.[13] Standardisation of decision quality assessment intensified in the face of adverse publicity, the risks of judicial review and internal concerns that the target system was having adverse effects. The focus on assessing quality was complemented by attentiveness to consumer satisfaction and the management of consumer expectations. I suggest that the latter was motivated by complaint handlers' perceptions of rising consumer expectations for risk mitigation and redress. These perceptions were entangled with complaint handlers' belief that the media was fuelling unrealistic

[13] The practices of interpersonal interaction are analysed in chapter seven. In this chapter I only discuss the statistical monitoring of consumer satisfaction.

consumer expectations and concerns (within and outside the FOS) that a 'compensation culture' was developing in Britain.

1. Heterogeneous goals.

The FOS's executives aimed to find a balance between a focus on quantity (case closure and time-to-closure) as described above, decision quality and consumer satisfaction. A senior executive's email to all employees, which summarised the organisation's achievements, reflected his/her perception of these heterogeneous goals:

> "Today is…our 4th birthday…In 4 years we have tripled the number of cases dealt with, our efficiency has gone up and the unit cost of dealing with cases has gone down. Despite very considerable pressures on every aspect of the organisation, our service standards have been maintained, and customer satisfaction remains high. More importantly our knowledge has deepened, the quality of our dispute resolution has improved and the service we offer to our stakeholders has been transformed."

On a different occasion, another executive emailed all employees:

> "Last week was a double – the best week ever in terms of both case closures, a tremendous 1,890, and in customer satisfaction, with an overall satisfaction level of 88%."

As elaborated below, the FOS's heterogeneity of goals was further embodied in a tension between managers' focus on the attainment of targets and ombudsmen's concern with sustaining quality. In contrast, the focus on consumer satisfaction was jointly endorsed by managers and ombudsmen. Indeed, consumer satisfaction could be described as the FOS's end goal and meta-measure for the adequacy of its overall operation, including the balance between quality and quantity. The manager of a support area explained that the FOS achieved its consumer satisfaction goals, despite its workload and the rejection of most complaints, due to its investment in interpersonal communication with complainants:

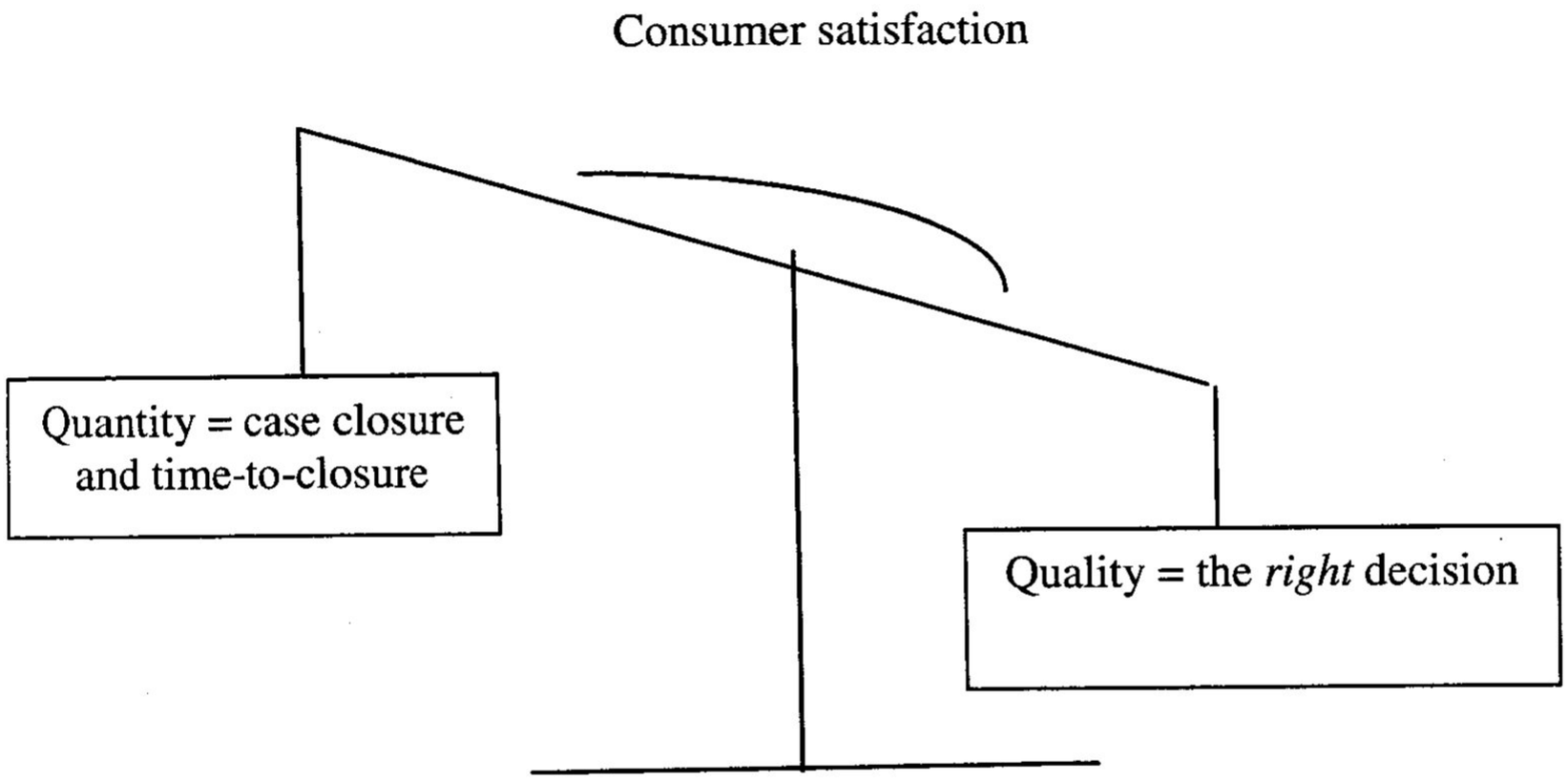
> "Given the workload that we've got, our consumers are generally quite happy. Our consumer scores are not too bad considering the kind of work that we do, where we reject…60% of cases…Yet, our consumers, *because of the time and effort we put into explaining to them why, the type of letters, and the process and the clarity of the whole thing*, we get very high customer satisfaction scores, which we benchmark….against external organisations…and we compare quite favourably" (S4) (my emphasis).

A senior executive distinguished the FOS's attentiveness to the quality of interpersonal communication with consumers from the judiciary's 'outdated' focus on solely 'getting the *right* decisions'. Thus, going beyond the notions of individuality, confidentiality and informality, this executive suggested that the attainment of consumer satisfaction was central to the FOS's exclusive domain vis-à-vis the courts, thus, suggesting a therapeutic model of complaint handling.

"When we are running with… such delays in some areas of the business, we have to know whether or not this is causing our customers to be really upset and angry with us, in which case we [have] got to do something about it…. Such as, can you get through [to us] on the phone? Are our letters clear and sensible? When you get a letter from us…is it understandable?…The only thing we cannot do, we can't just uphold everybody's complaint and give everyone what they want. So at least…*If we are going to reject someone's complaint, can we let them down gently? Can we make sure they feel as good as they can possibly be made to feel about the way that we have handled that?…we don't just sit back and say 'we don't care what people think, we just do what is right'*…That seems to me a model which is very outdated in this day. When I compare ourselves with the courts and the tribunals, they don't seem to be following our model" (E6) (my emphasis).

A figurative form of the above interview extracts may take the following form, wherein the FOS balanced its focus of quality and quantity according to the implications of this balance for consumer satisfaction:

Figure 5.1: Setting the balance between quality and quantity



In what follows I describe the FOS's measurement of quality and consumer satisfaction and the origin of these practices and their development in more detail.

2. Getting the 'right' decision

The quality of adjudicators' decisions was monitored by two means. One was ombudsmen's review of those decisions that were challenged by either firms or complainants. The other was managers' random sampling of cases for quality assurance checks. As described below, during the research period, in response to adverse publicity and internal concerns with the unintended consequences of targets, the quality assurance system was reformed. The reform resulted in greater elaboration of the quality assurance criteria and in closer involvement of the ombudsmen in review of adjudicators' decisions.

Ombudsmen as quality guardians

As mentioned above, ombudsmen's concern with the quality of adjudicators' decisions was perceived as competing with managers' emphasis upon achievement of case closure targets. The following remark of an ombudsman to complaint handlers, during an internal training session reflected this dichotomy between managers-quantity and ombudsmen-quality focuses:

> In March [the end of the previous target period] you may have thought that it's all about numbers and targets. Indeed that's what managers want. But ombudsmen want quality (paraphrase, field notes).

Another ombudsman remarked on my paraphrase to the above quote, linking ombudsmen's insistence on quality to the risk of damage to their personal reputation as a result of judicial review[14] or adverse media publicity:

> "I wouldn't say that ombudsmen…are unconcerned with figures…we don't like things hanging around in cupboards, we want to get as many cases out as possible, but will only do it if they're to a certain quality. *Because, our names are on the bottom and if it all goes wrong, we're the ones who are going to end up in court or in the national press*…So, we have a certain level, which seems to be higher than other people's, and therefore I think we get tarred with the brush of…we're all quality and sticks-in-the-mud and stopping cases from going out, when we're actually, most of us, aren't that way inclined at all. But we won't

[14] One out of three similar remarks.

put our names to things that haven't been worked out properly." (O2) (my emphasis).

Similarly, in the above-mentioned training session, a senior executive explained to complaint handlers that 'judicial reviews are against ombudsmen personally rather than against the FOS, which is why the ombudsmen are so anxious about them'. The ombudsman, who led the training session, told complaint handlers that when writing decisions they should also 'think…about the high court judge' (Paraphrases, field-notes).

While ombudsmen were concerned with the quality of adjudication in general, their direct intervention was limited to those cases that reached them for review. These were also the cases that had the potential of being judicially reviewed. As explained in chapter three, while ombudsmen seldom reversed the outcome of adjudicators' decisions, they frequently requested the adjudicators to conduct further investigation and/or to rephrase their draft decisions. The following ombudsman explained that s/he would require an adjudicator to reinvestigate a case, even if s/he agreed with the outcome, to ensure a juridical-proof decision.

"An awful lot of [times] the reason why you issue PDs [provisional decisions – i.e. altering an adjudicator's initial decision] is process. It's not because you disagree with the adjudicator. [It is because] something wasn't sent to someone, a breach of natural justice…it's not a case of the decision ever changing, it's never going to change, it's just a case of, 'Well, they [the complainant or the

firm] haven't seen that and they should have done, *so how can we get round that*?'" (O2) (my emphasis).

The following internal correspondence between an ombudsman and a team manager, regarding a decision drafted by an adjudicator for the Ombudsman's review demonstrates an extreme instance of ombudsmen-quality and managers-quantity tension. This is not to say that this instance was representative. In fact, as described below, the relevant team manager later left the organisation after the exposure of a systemic rejection of complaints by his/her team members in pursuit of maximising case closure.

The Ombudsman, in this instance, was dissatisfied with the shortness of the adjudicator's draft decision and cynically remarked that the adjudicator's explanatory note to the ombudsman was longer than the draft decision. The Ombudsman's note to the adjudicator's team manager alleged:

> "This memo [to me] is longer than the decision to a complainant who appears to have only a limited relevant knowledge"

The team manager replied to the Ombudsman that the adjudicator's short draft decision should be seen in the context of his/her increasing efficiency:

> "At the time [the relevant adjudicator] took over [handling this case, which was previously handled by another adjudicator] I had been encouraging him to be more brief in his composition. He is a born essayist. This decision may have been too far in the right direction but it was probably my fault and not [the adjudicator's] (96% of target then. 122% of target now). I have added a

bit more meat to the bones [of the draft decision]. You will probably now skin them."

To this the Ombudsman replied in pencil on the team manager's above note, next to the comment that the 'essayist' adjudicator's productivity improved from 4% below target to 22% above target: 'But quality matters too'.

Managers' quality assurance checks

In addition to ombudsmen's review of those decisions that reached them, adjudicators' decisions were systematically quality monitored by their team managers.

i. Reform of the quality criteria

During the research period the quality assurance system underwent rapid change. The criteria for 'quality' were elaborated. Additionally, all complaint handlers, including managers, were required to participate in a two-hour decision training led by the ombudsmen. This was followed by an individual meeting between an ombudsman and each adjudicator. A few weeks later, further internal consultation and reforms were introduced, which entailed ombudsmen's direct involvement in reviewing adjudicators' decisions.[15] Thereafter, a tender for a new position of Principal Ombudsman for Quality was advertised and the FOS's executives deliberated the introduction of a specialised quality audit unit.[16] An internal executive's communication to employees explained that the aim of the reform was that "the ombudsmen will be involved in 'getting it *right*'"(my emphasis). This stress on achieving the *right* decision was rhetorically opposed to the FOS's traditional

[15] Source: internal email and document sent to all employees.
[16] Source: E1b and internal email to employees.

insistence, as discussed in chapter four, that complaint handling entailed *subjective* judgment of what is *fair and reasonable* in the circumstances.

The above reforms, which initially came into force in May 2004, seem to have been hastened by two events, which immediately preceded them. One was a critical BBC Radio 4 *Money Box* programme (broadcast on 13th April, 2004), which aroused public awareness to the FOS's employment of case closure targets and bonuses. The other was an internal investigation of an abnormally high rejection rate in one team (announced on mid April 2004).[17] The internal investigation eventually concluded that the relevant team engaged in systematic rejection of complaints so as to attain higher case closure achievement.[18] The team manager had to leave the organisation and the team was dismantled. An executive linked the reforms of the quality assurance system to both the ongoing internal debate between ombudsmen and the 'business units' and to organisational concerns with adverse publicity:

> "The organisation is under enormous pressure to keep on top of the volume of cases it's dealing with, which means you have to be obsessed a bit with the numbers, but by the same token *we have to be very mindful that if we let the standards drop it will be all over the press as well*, so it's been a difficult time." (E4)

It should be stressed that I do not claim that the quality assurance reforms were simply a *result* of adverse publicity and concerns with reputation. Rather, my proposal is that the critical radio programme and the internal incident empowered and rendered

[17] Source: internal email that was sent to all employees.
[18] The relationship between rejecting complaints and high case closure attainment is discussed in chapter six.

salient the ombudsmen's stress on quality and professionalism versus the operational management focus on case-closure quantity. This therefore allowed the ombudsmen to regain some of the control over adjudicators' work, which they previously lost as a result of the appointment of the Service and Operational managers as recounted in chapter three.

ii. The quality assurance process

Adjudicators' decisions were extensively random sampled by a computer system for standardised quality assurance checks by team managers.[19] Managers often delegated this responsibility to their assistants, who tended to be more technically skilled, while they focused on case allocation, cases' timely progression and closure. The number of cases sampled for review per adjudicator was a function of teams' targets.[20]

In addition to random sampling of cases, managers selected additional cases for checking, on a non-random basis. A team manager explained his/her criteria for non-random selection of cases, mentioning consumers' expression of dissatisfaction as one indicator:

> S/he will know of a problem by overhearing a conversation, reading incoming mail…or information from her administrators who would tell her of anything which seems like a complaint against an adjudicator (paraphrase, M4).

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[19] Samples included both recently closed cases and cases where a decision was about to be sent out, with preference for the latter, since once a case was closed there was strong resistance to change its outcome.

[20] In a team where the target was relatively low (2.5 closed cases a week), the number of checks was 3 cases per month for each adjudicator (M4). In another team, with a target of 3 cases a week, the number of checks was 4 cases per month for each adjudicator (A4).

Another manager similarly referred to external dissatisfaction as a cause for alert:[21]

> "One of my main ways of monitoring is looking at the post that's coming in to see if there is any dissatisfaction…you can tell a lot from that" (M2).

Finally, managers scrutinised all cases that were referred to an ombudsman's review.

The formalised quality assurance criteria, as shown in figure 5.2, internalised the organisation's competing goals – professional judgment (i.e. getting the *right* decision), efficiency (i.e. case closure and time-to-closure) and consumer satisfaction. It is noticeable from the figure below that the designer of the quality assurance assessment form aimed to measure three aspects: (a) the extent to which a case was professionally processed (i.e. appropriate investigation and reasonable outcome); (b) the adequacy of the adjudicator's interaction with complainants and, (c) the adjudicator's responsibility for delays in case closure. While the first of these parameters aimed to measure strict decision quality, the two latter parameters aimed at assuring consumer satisfaction and closure targets. It is also noteworthy that the section which referred directly to decision content (section 3), offered managers little practical guidance.

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[21] The use of clients' expressions of dissatisfaction as means of feedback and control by the FOS's team managers is at odds with Kaufman's (1973) finding in his study of nine bureaucracies in the US that clients were not seen by executives as a significant source of information regarding subordinates' behaviour. This again demonstrates the centrality of consumer satisfaction in the FOS's discourse and practices as discussed here and in chapter seven.

Figure 5.2: Quality assurance guidance to managers[22]

1. Have the correct processes/procedures been used since case conversion? • Was [the computer system] updated correctly? e.g. telephone notes, changes of address, 3rd party details. • Has the adjudicator used the correct [computer system] processes for mediation, dismissal, view or adjudication? • If dismissal letter used, was it appropriate? • Closed cases, has a letter been sent to the Firm, if appropriate? • Was the file neat, tidy and tagged in chronological order?
2. Appropriate Investigation carried out? • Has all the relevant information been gathered from, and shared where appropriate, with all the parties? • Were all the right questions asked first time? • Was the correct level of investigation carried out? • Has the complaint been correctly and fully identified? • Were any additional points made by the parties dealt with? • Have the fundamental reasons for win/lose been identified? • Escalation – did the adjudicator seek assistance (if necessary) at an early enough stage or was there a delay? e.g. should the ombudsman have been involved to give guidance on his / her view? • Have all the issues raised by all the parties been addressed? • Was jurisdiction established during the working of this case?
3. Outcome reasonable? • Is the outcome fair, reasonable and impartial? • If law/guidance/practice/policy has been used, is it correct? • If redress has been suggested is it correct for the case?
4. Were all communications accurate and appropriate? • Has the adjudicator used the most expedient or appropriate methods of communication during the investigation? • Were written communications accurate, complete, clear, concise and free of jargon? • Has the communication with the complainant been pitched at the correct level? • Were all the facts in the communications accurate? e.g. dates, times, references to documents, etc. • Was it appropriate to resolve the case by the method used (mediation, dismissal, view, adjudication)? • Does it conform to house style?
5. Were there any delays in the case handling process? • Were there avoidable delays? • If there were delays, you can now choose to categorise the cause of the delay, you may choose more than one reason if appropriate. • If there were no delays you can choose that option.
6. Were all parties kept updated during the investigation? • Please refer to the high-level service standards • Were all parties aware of how the case was progressing and the timescales within which they could expect contact?

Once the quality assurance assessment was completed, adjudicators got a copy of their managers' reports. If an assessment was negative, it was discussed during the adjudicator's monthly meeting with the manager or the assistant team manager.

[22] Source: the FOS intranet, 2004.

Recurring negative reports affected adjudicators' appraisals, their progression along salary levels and were likely to result in closer monitoring. Yet, managers' criticism was more likely to be directed at delays in progressing a case and adjudicators' interpersonal communication with complainants, than at the content of the decision. This was because of managers' concern with targets, their relatively less technical profile and because of the ambiguity of decision-content quality. Note for example the following adjudicator's suggestion that s/he was likely to be criticised for the long time spend on handling a case and for inadequate communication, despite its high quality in terms of decision content:

> "We are being checked all the time. Once a week we have a random sample case taken out of our cabinet....And you look at them...and you think, 'Well, I didn't do anything for two months with this case, I was busy working with somebody else. *That would be a, 'You should have...written to somebody,'...I've submitted one today, which I've done a blinding piece of work on, but it took me four or five months to get there* and...I didn't do an awful lot in between, and my manager will turn around and say to me, hopefully, 'I like your letter, but why did it take so long?' " (A4) (my emphasis).

Hence, despite the increasing formalisation of the quality assurance criteria and its extensive monitoring, adjudicators enjoyed considerable discretion in the formulation of their decisions. (However, as further explained in chapters six and eight, this was not the case with regard to systemic complaints, which were high on the media's agenda.)

3. Measuring consumer satisfaction

In this section, I analyse the FOS's motivation to measure consumer satisfaction, describe the measurement process and assess its potential impact on complaint handlers.

Perceptions of rising consumer expectations for redress

The FOS's attempt to study the drivers of consumer satisfaction, as described below, was related to complaint handlers' perception that consumer expectations for redress were rising. Complaint handlers asserted that high expectations were driven by adverse media publicity to the retail investment sector and positive coverage of the FOS.[23] Some complaint handlers linked consumer expectations to a general 'compensation culture'.[24] Complaint handlers associated rising consumer expectations for redress with complainants' increasing persistence in their interaction with the FOS. An executive asserted:

> "[Once] if you said to the complainant, 'Well, I've managed to negotiate you a hundred pounds from the firm to settle your complaint,' they'd go, 'Thank you very much,' and that was it. Whereas, now, there's definitely more of compensation culture…a greed factor. And because…we've had the pension review, mortgage endowment, I think the complainant can be …very distrusting of the industry. And …because they read these articles in the paper about, 'Mr and Mrs…now have their mortgage paid off.'…people also are very tempted to

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[23] Seven interviewees related complainants' excessive expectations and persistence to media construction of expectations.

[24] Four interviewees suggested that complainants' persistence was related to a general 'compensation culture'. A fifth interviewee asked me at the end of our interview whether I believe that there exists a 'compensation culture' in the UK and said that s/he does not believe so (S4).

jump onto that bandwagon. *And they do not go away. They persist and persist and persist*" [25] (E3) (my emphasis).

A team manager suggested:

'Customers are more persistent, knowledgeable of their rights and the papers stir them, sadly' (paraphrase, M4).

An ombudsman asserted:

"People are more reluctant [to accept] an offer [for compensation], unless they are satisfied that it is their maximum entitlement…the whole attitude in this country to complaints has changed dramatically over the last ten years. Twenty years ago most people were very reluctant to complain and ashamed for having a complaint but I think nowadays people see it much more as a right" (O8).

In light of complaint handlers' perception of complainants' media-driven excessive expectations for redress, they believed that consumer expectations should be studied, satisfied and managed. A manager at a support area explained:

"If you're providing a service where the…media…is constantly informing customers of something else then what happens is that the…media sets the expectations for the customer, and then you get the impact of that. So, we get a lot of things written about this organisation, which…give the customer the impression that they're going to get lots of money by coming to us… And then

[25] The distinction between complainants' "persistence" vs. "going away" was one that consistently came up in interviews and observations.

you get 60% of them rejected and the 40% that win don't even get as much money as they thought. So, what we try to do…is to correct those misinterpretations from the press" (S4).

The above concerns that a compensation culture was developing in Britain, and/or that citizens-consumers were developing excessive expectations for risk mitigation and redress, were not confined to the FOS. They were widespread during the research period in the British media, political arena and the public sector. [26] These concerns were manifested, *inter alia*, in a report by the Better Regulation Task Force, titled *Better Routes to Redress* (2004), which assessed the existence of a compensation culture and the consequences of the perceptions of its incidence, and in the debates surrounding this report. For example, Prime Minister Tony Blair, in a speech given at University College London, criticised unreasonable public expectations for risk mitigation (Blair, 2005):

"Something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued; when the Financial Services Authority…is seen as hugely inhibiting of efficient business by perfectly respectable companies…when pensions protection inflates dramatically the cost of selling pensions to middle-income people; where health and safety rules…[are] taken to extremes"

[26] Mulcahy (2003) encountered similar suggestions regarding cultural and attitudinal shifts in society when interviewing NHS consultants about the causes for clients' complaints. Dunleavy and his colleagues, when conducting research on behalf of the National Audit Office (2005), found that one third of departments perceived "dealing with unreasonable and or serial complainants" (*ibid,* p. 55) as a key challenge.

It should be emphasised that both across government and in the FOS the allegation of a compensation culture was perceived as contentious. For example, the Better Regulation Task Force report, while rejecting the existence of a UK compensation culture as an 'urban myth', asserted:

> "We recognise that the 'compensation culture' is a very controversial issue…Those with grievances need a system of redress that provides them with effective remedies; whilst those without [legitimate grievance] should be kept out of the system. It is important for us to realise that we have to take responsibility for our own actions – and not seek someone else to blame when things go wrong." (Better Regulation Task force. 2004. p. 7).

The FOS's Chief Ombudsman in a lecture to the 'FSA summer school' (Merricks, 2005), while rejecting the existence of a British compensation culture, acknowledged public concerns over its incidence.

> "The success of the [financial] ombudsman begs a large question in the minds of some [people]: is the mere existence of an ombudsman scheme encouraging an unhealthy propensity amongst consumers to demand redress for every perceived loss…? *You will note that I have a policy of not using the words 'culture' and 'compensation' in the same sentence*. Even though a Better Regulation task force …tried to explode as an urban myth the idea of a galloping compensation frenzy, the question continues to be asked. And the answer is fairly clear…from my perspective. I don't see an unhealthy situation

has developed – yet. But there are some warning clouds on the horizon." (my emphasis).

The ironic remark "You will note that I have a policy of not using the words 'culture' and 'compensation' in the same sentence" attests to the Chief Ombudsman's appreciation for the contentious nature of this issue. In the above lecture and when interviewed for a Radio 4 *Money Box* programme (2004) he similarly remarked that the main problem is firms' failure to fulfil the unrealistic expectations that they fuel: "I don't see a compensation culture…Yes, there are some cases where people have unreasonable expectations…consumers rightly have expectations of fair treatment by financial firms. Financial firms are advertising and making great claims for the service they provide…and if the products and services don't live up to the kind of claims that are being made by that advertising it's not entirely surprising that people should complain. And they're entitled to."

Measuring consumer satisfaction and press coverage

Consumer satisfaction survey forms were sent to a random sample of consumers after case closure.[27] The surveyed consumers were asked about their overall satisfaction with the FOS's service and with different characteristics of the service.[28] They were further asked for details regarding their sex, age, occupation and ethnicity. Data from questionnaires was merged with the FOS's internal case statistics: decision outcome, time to case allocation to an adjudicator and to closure, and the level on which the

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[27] Every month 1200 to 1400 surveys were sent out to consumers, in proportion to the number of cases closed by each team, of which about 50% of questionnaires were returned. In addition, once a year a special survey was generated to consumers of teams with relatively low closure targets to allow a more substantial sample for these teams.

[28] The questions refer to: time to case closure, the consumer's assessment of the reasonableness of the decision, the clarity of explanation of the process and outcome, the extent to which they were kept informed during the process and the staff's politeness.

case was closed. Subsequently, a statistician analysed the correlation between the case's statistics, individual demographics and consumer satisfaction. In addition, the FOS experimented with the effect of alternative modes of communication (e.g. letters' wording) upon complainants' satisfaction.

On top of direct surveying of consumer satisfaction, the FOS monitored and aimed to influence media coverage regarding itself. The FOS (together with the FSA) contracted a daily press coverage monitoring service. A collection of press cuttings regarding the organisation was distributed on every floor and in the cafeteria for employees' reference. Press highlights were further posted on the FOS's intranet. Additionally, the FOS's communication department monitored the quality of media coverage surrounding the FOS and actively communicated with journalists (E2).

The implications of the consumer satisfaction survey

The consumer satisfaction reports were externally conveyed to the FOS's Board, the FSA and the Treasury and they were partly published in the Ombudsman's annual reports. Quantitative measures of change in consumer satisfaction for the organisation as a whole were widely displayed across the organisation. These reflected to complaint handlers a steady level of nearly 80% complainant overall satisfaction with their operation. The conclusions of internal research of the drivers behind complainants' satisfaction were published on the FOS's intranet. A breakdown of the results, by business unit and team, was distributed to managers. The statisticians further met with teams to discuss their specific consumer satisfaction scores and advised them as to how these may be improved.

Given sample constraints, consumer satisfaction was not analysed per individual adjudicator. Therefore, the practical impact of consumer satisfaction scores upon individual adjudicators was limited. Yet, the consumer satisfaction survey had significance for group norms and internal legitimacy, beyond its practical bearing upon individuals. It reflected to complaint handlers, at all levels, that they were there to satisfy consumers and gain their confidence, rather than just to fulfil their closure target and reach the *right* professional conclusion. It further informed them that, as an organisation, they were successful in satisfying consumers. Thus, high consumer satisfaction scores reflected to complaint handlers a positive image of the organisation and their individual role within it. Chapter seven explores the practical implications of this perception that put consumer satisfaction at the core of the organisation's aims for adjudicators' interpersonal interaction with complainants.

C. **Conclusion**

The analysis above described the evolution of the FOS's competing goals and controls. The result of the above developments was an environment wherein the quality and quantity of adjudicators' decision making and their interaction with complainants were all extensively monitored. The ombudsman's control processes (and the internal articulation of its domain) shifted from *ad hoc* fairness towards attainment of the *right* decision and consumer satisfaction. In terms of the typology presented in chapter one, the FOS's configuration shifted from a hybrid of the fairness and professional models towards a hybrid of increasingly bureaucratic and therapeutic complaint handling.

I suggested that the FOS's concern with the number of case closures and its introduction of a target and bonus scheme was instigated by the increase in its caseload and its reliance upon case fee income. Performance management was facilitated by the FOS's recruitment of personnel from the retail financial sector rather than from the legal profession. I proposed that the isolation of privileged groups – the ombudsmen and veteran adjudicators – from the full implications of the target system probably moderated internal resistance to the increase in targets.

It is further plausible that the buffering of the ombudsmen from the performance management scheme allowed them to maintain their distinct preference for quality over quantity. Additionally, the ombudsmen's concern with getting the *right* decision was related to the risk that judicial reviews posed to their individual reputation. Increasingly, the adversarial relationship between the FOS and retail financial firms, as elaborated in chapter eight, rendered the risk of judicial review more salient. Consequently, when faced with the opportunity offered by external criticism and an internal incident, the ombudsmen set to tip the organisation's balance towards greater formalisation of the quality assurance process. This included their own increased participation in monitoring adjudicators' decision making.

In addition, I demonstrated the FOS's concern with consumer satisfaction. This concern was manifested in its investment in studying and managing consumer satisfaction. A rational choice approach would suggest that complaint handlers' attempt to manage and attain consumer satisfaction was related to their interest in swift negotiation of dispute settlements in order to maximise the number of case closures. According to this interpretation, complaint handlers' perception of

complainants' excessive expectations (and even of a compensation culture) resulted in their belief that swift case closures required attaining consumer trust and consent. Yet, an alternative interpretation would suggest that the FOS pursued consumer satisfaction as an end *per se*. This question is further explored in chapter seven.

Part III

The shaping of complaint handlers' decision outcomes and interaction with complainants, firms & the FSA

Chapter 6: The shaping of adjudicators' micro-level responsiveness

Introduction

Part II of the thesis (chapters three through five) focused upon the development of the Ombudsman's intra-organisational institutions, i.e. its domain perception, basic structure, and control system. Part III, beginning with this chapter, sets out to study how these intra-organisational institutions, together with contextual factors, shaped complaint handlers' decision making and interaction with complainants, firms and the FSA.

1. Contextual vs. institutional micro-level responsiveness

As delineated in chapter one, a rational-contextual approach would predict that complaint handlers' responsiveness fits the intensity of external demands in search of support and conflict mitigation. In contrast, the complaint handling typology suggested four alternative micro-mechanisms of individual-level responsiveness to consumer complaints. These were: (a) *bureaucratic* rule-following; (b) *professional* application of abstract knowledge; (c) moral judgment (or labelling) of *fairness* and (d) *therapeutic* evaluation of complainants' amenability to relinquish their complaint.

This chapter studies the determinants of complaint handlers' decision making. In particular, the analysis focuses upon the effect of the FOS's performance management scheme and counter quality controls, as described in the previous chapter, upon adjudicators' decisions to uphold or reject complaints and to collect information. The

chapter assumes the rational-contextual approach as its starting point and thereafter empirically assesses its explanatory power against the alternative micro-mechanisms.

Literature regarding the unintended consequences of performance management schemes would suggest that the rational-contextual hypothesis – i.e., responsiveness to resistant firms and persistent complainants – was especially pertinent to the FOS's context. In general, employees' performance is shaped by a combination of their individual efforts and random elements, which are not within their control. The linking of employees' compensation to their performance shifts the risk of underperformance as a result of contingent factors from employers to employees (Miller, 1992). Under such conditions employees are induced to act strategically to minimise their risk and its implications. As a result, performance management is associated with some unintended consequences. One expected effect of performance management, which is explored in this chapter, is "hitting the target and missing the point" (Bevan and Hood, 2006; Hood, 2006), i.e. employees' tendency to focus upon measurable tasks while discarding the inherent goals and qualitative aspects of their job. In the FOS's case, the target and bonus scheme reinforced the likelihood that adjudicators will be most responsive to those complainants *and* firms who were least likely to accept adverse decisions in order to maximise swift case closure. I hypothesise that targets were especially likely to have this effect when adjudicators enjoyed broad individual discretion.

Both statistical and interview data show that the target system created an *incentive* for adjudicators to be more responsive to those firms and complainants who were most likely

to challenge adverse decisions. As described below, in one adjudication team, which was *not* one of those that I researched, this incentive induced systematic rejection of complaints in an attempt to maximise the achievement of targets. Statistical analysis of the sampled complaints suggests that when faced with a broad, non-standardised, decision environment, adjudicators were more responsive to better informed complainants who they expected to be less amenable to adverse decisions. However, adjudicators' reactions to complaints against those firms that were most likely to request an ombudsman's review were mixed. Moreover, I find that adjudicators were disinclined to uphold complaints by aggressive complainants, despite their expectation that these complainants would be less amenable to accept adverse decisions. These findings lead me to reject the rational-contextual hypothesis. I suggest that despite the *incentive* created by the target system, the researched adjudicators' decisions and information gathering tendencies followed a combination of the bureaucratic, professional and fairness models.

2. Methodology

The chapter combines qualitative analysis of interview data with quantitative analysis of decision outcomes. The quantitative analysis relies upon data from a sample of 143 complaint files. As explained in chapter one, the sample was drawn randomly from all cases of three broad product categories, which were closed over a period of three years by 12 adjudicators, who during my research were members of two teams. However, since some of the adjudicators moved between teams, the sample comprises examples of work of six different teams. The sample is not strictly representative, because it gives equal

representation to each broad product category (single premium bonds, endowment mortgages and personal pensions) and to each of the twelve adjudicators. This sampling strategy had the advantage of allowing comparison across types of products, which came up as an important source of variance during the pilot study. The disadvantage of this strategy is that is does not allow meaningful analysis of *holistic* trends in the sample (e.g. how many complaints were rejected/upheld) inasmuch as these were logically biased by the equal representation of products. Consequently, the analysis focuses on comparison of variance within the sample.[1]

Section A builds upon the rational-contextual hypothesis and the expectation of strategic response to performance management schemes to delineate a series of utility decision tree models. These analyse the expected effect of targets and quality assurance upon adjudicators' *rational* choice between rejecting and upholding complaints. Section B draws upon interview data and a sample of complaint files to test operationalised hypotheses based on the decision tree models. Section C discusses the results and links them back to the theoretical framework as outlined in chapter one.

A. **Formal modelling of adjudicators' anticipated decision making**

Having described the FOS's heterogeneous goals and controls in chapter five, this section models how these were expected to have shaped *rational* adjudicators' micro-level responsiveness to complaints. I construct a simple utility theory model, which treats adjudicators' decisions as a rational choice under risk, between rejecting and upholding a

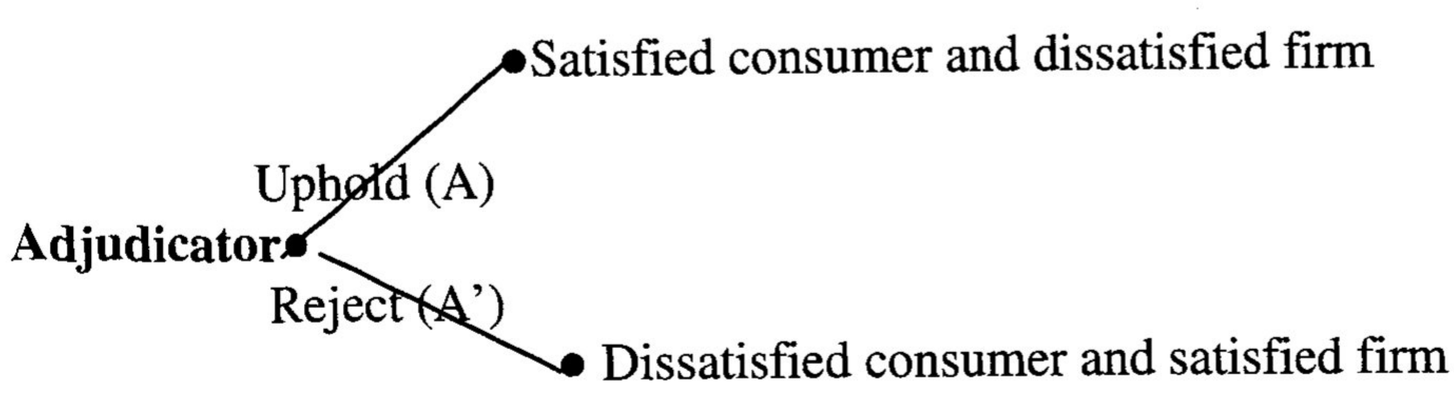
[1] For limited analysis of general trends, as reported in chapter three, I relied upon the larger dataset from which the cases were drawn.

complaint. I assume that rational adjudicators aim to maximise their utility and minimise workload and supervision by managers and ombudsmen. I will present a set of counterfactual decision scenarios and logically derive the expected effect of the performance management system from comparing these with the actual decision circumstances of adjudicators at the FOS during my research period. In the first three scenarios I assume that quality assurance mechanisms are not in place. Next, presenting a fourth scenario, I hypothesise how (and under what circumstances) the existence of quality assurance mechanisms is expected to have balanced the effect of targets. In the next section I will examine the extent to which a set of operationalised hypotheses generated from the decision tree models are supported by the data.

1. Complaint handlers' choice under risk

Scenario number 1 - No closure targets and no challenge of adjudicators' decisions:

This scenario assumes that firms and consumers cannot require an adjudicator's decision to be reviewed on a higher organisational level and that no case closure targets are in place. Under these circumstances adjudicators are faced with the option of rejecting a complaint – pleasing the firm and coping with the consumer's grievance and disappointment – or upholding it and facing a grateful consumer and a displeased firm. Their decision takes the following form:



Presumably in this simple scenario adjudicators are neutral between rejecting and upholding a complaint. However, firms' personnel, who interact with adjudicators, are expected to be less emotionally aggrieved by the FOS's decision to uphold a complaint, than complainants are by rejection of their complaints. Equally, consumers are expected to express greater joy and gratitude when their complaint is upheld, than firms' personnel are when a complaint is rejected. Therefore, all other things being equal, adjudicators will find it more pleasant to uphold complaints than to reject them. This is especially true in the common situation where consumers are perceived to be more vulnerable than firms. An adjudicator explained this:

> Some people say that we are biased and on the firms' side. The FOS is independent. We're not on anyone's side. It's quite nice when a complainant wins. There is no big joy for us if a firm wins. Why would anyone be in favour of the Royal Bank of Scotland?" (paraphrase, A9).

Another adjudicator said:

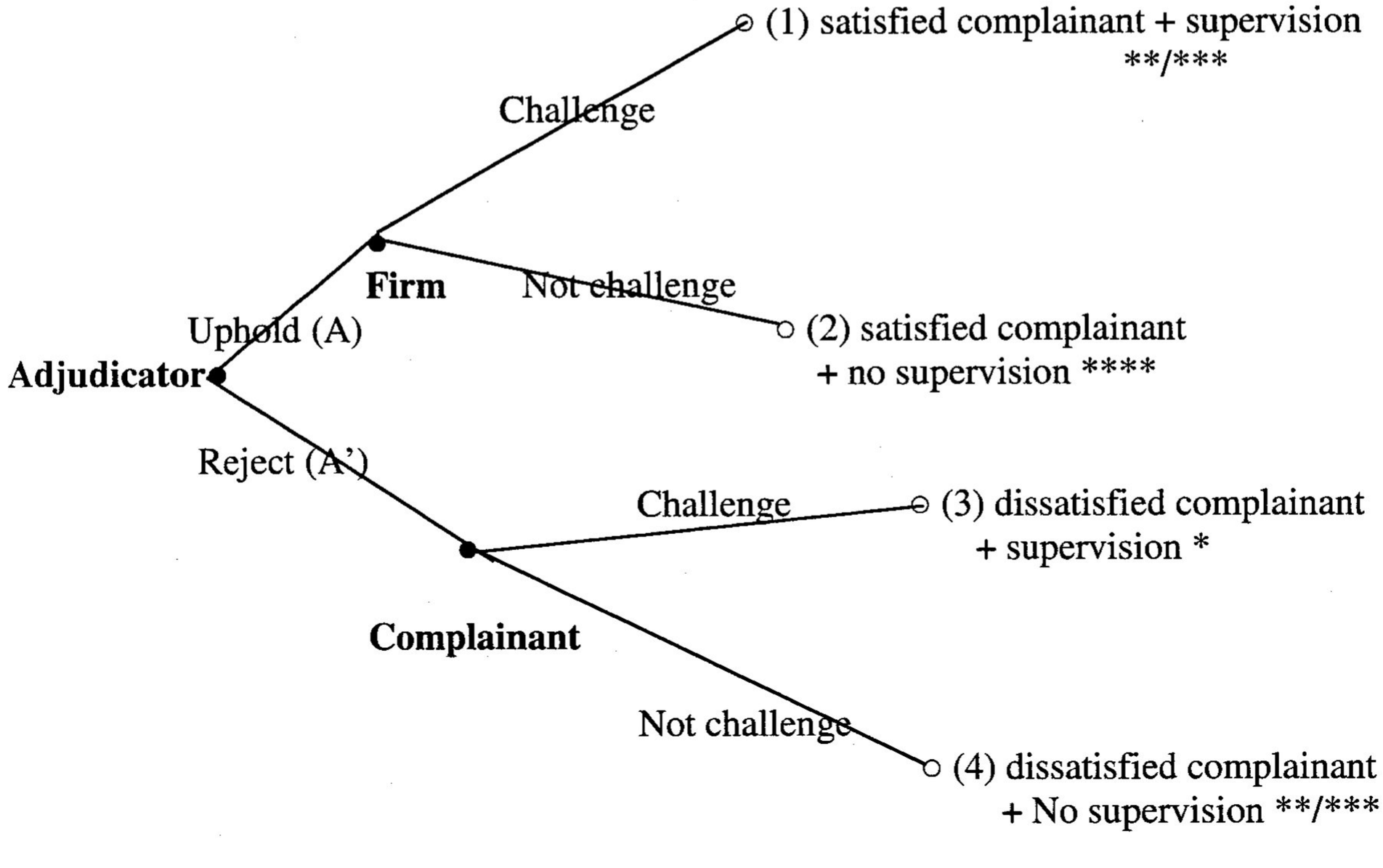
> It feels really good if you can mediate a case or if you get compensation for somebody. S/he gives an example of an old lady who bought a precipice bond [a retail financial product] for whom s/he got this week a compensation of 17,000 pounds (paraphrase, A5a).

My impression, as an observer, was that adjudicators found talking over the phone to consumers whose case was rejected stressful and unpleasant. Such conversations frequently reached a point where the complainant alleged that the FOS was biased and trapped in firms' hands, while the adjudicator asserted the FOS's independence and neutrality. After such conversations adjudicators usually got up from their desks and shared their irritation with colleagues around them. Conversely, adjudicators seemed to enjoy calling complainants to let them know that their complaint succeeded and that the firm is going to offer them compensation.

Then again, it is possible that because most adjudicators were recruited from the industry they identified with firms and, all other things being equal, preferred rejecting complaints to upholding them. A third hypothesis may be that adjudicators were likely to have varied biases, with some, all other things being equal, preferring the consumer side and others identifying with the firm. I cannot dismiss these two last arguments entirely. However, my *a priori* assumption is that facing consumers' disappointment and anger was so unpleasant that it had a stronger effect than adjudicators' social affinity with firms' personnel.

Scenario number 2 – Cases may be challenged, but no closure targets: In this second scenario, I assume that, as in the FOS's actual circumstances, firms and consumers may require that an adverse decision be reviewed, but no closure targets are in place. I hypothesise that adjudicators' decisions under these circumstances are shaped by their expectations of consumers' and firms' propensity to challenge their decisions, and the

relative value which they ascribe to consumer satisfaction vs. avoidance of ombudsmen's scrutiny of their decisions. Rational adjudicators' choice, under these circumstances, is expected to take the following diagrammatic form:



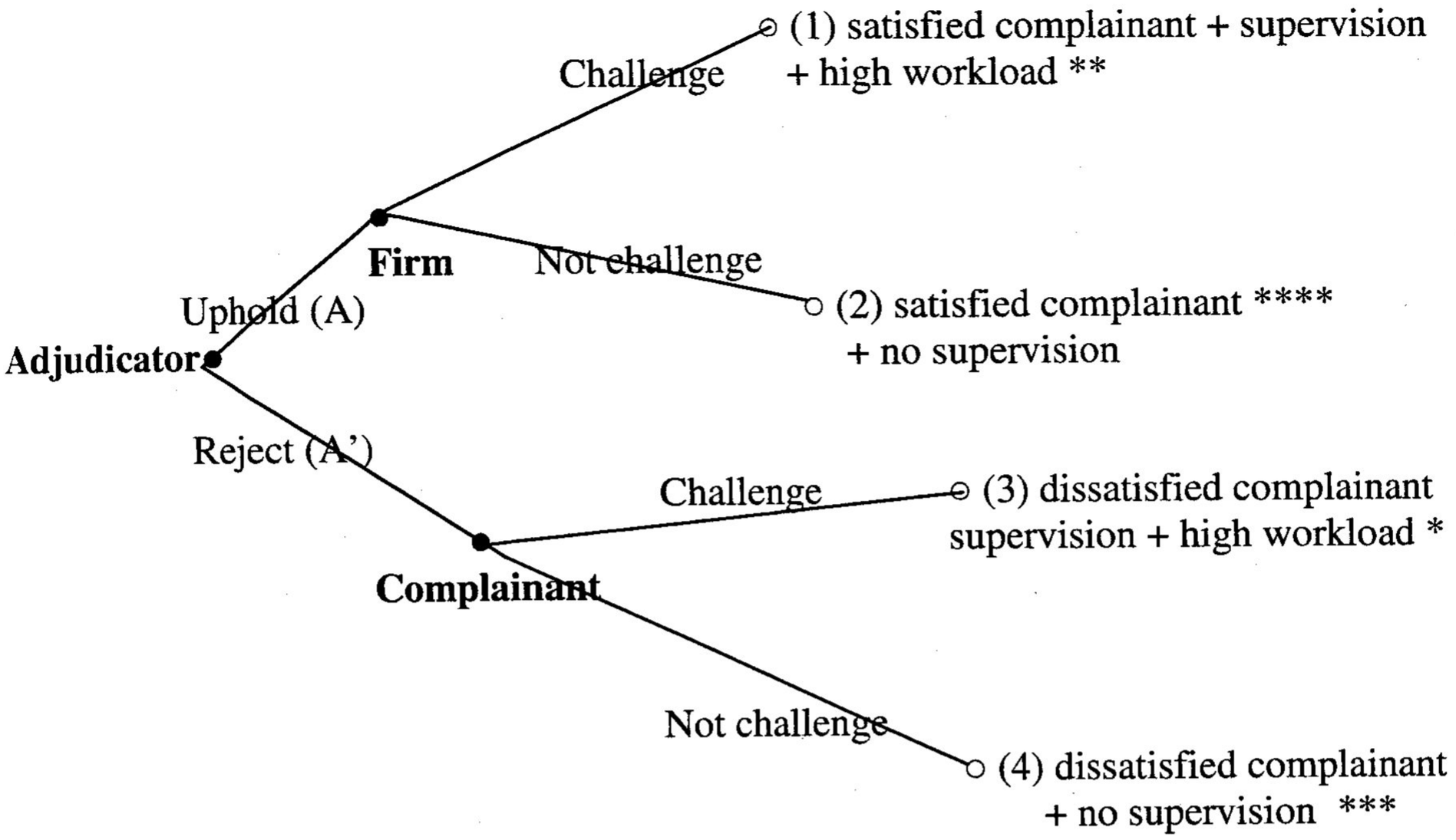
* = utility unit

Assuming, as above, that adjudicators prefer to satisfy consumers, if adjudicators expect that consumers and firms are equally likely to challenge their decision, upholding the complaint is their optimal strategy. By choosing to uphold the complaint the adjudicator avoids the worst scenario (3). If, in contrast, firms are more likely than consumers to challenge a decision, the hypothesised adjudicator faces a dilemma between a higher risk of ombudsman's scrutiny or consumer dissatisfaction. The adjudicators' choice, between upholding and rejecting the complaint, is expected to be shaped by the relative value

which they individually assign to consumer satisfaction vs. avoiding ombudsman scrutiny. Those adjudicators who assign higher value to consumer satisfaction will uphold the complaint, taking the risk of being challenged by the firm and an ombudsman's review.

Scenario number 3 – Closure targets and cases may be challenged: In this scenario, which resembles the FOS's actual decision environment (excluding quality assurance), adjudicators' decisions are exposed to an ombudsman's review, and they are required to close at least their targeted amount of complaint files and are remunerated for above-target performance. Under these conditions, all other things being equal, I would expect rational adjudicators' decisions to be guided by their expectations of consumers' and firms' relative propensity to challenge their decisions. This is because a higher ratio of cases going to an ombudsman's decision entails higher workload for the adjudicator, longer time to case closure, and consequently lower case closure output.[2] Adjudicators' decisions under these circumstances are expected to adhere to the following logic:

[2] As elaborated in chapter three, review of a case by an ombudsman had substantial implications for the time it took to bring a complaint to a close and presumably upon adjudicators' attainment of their target and bonus.

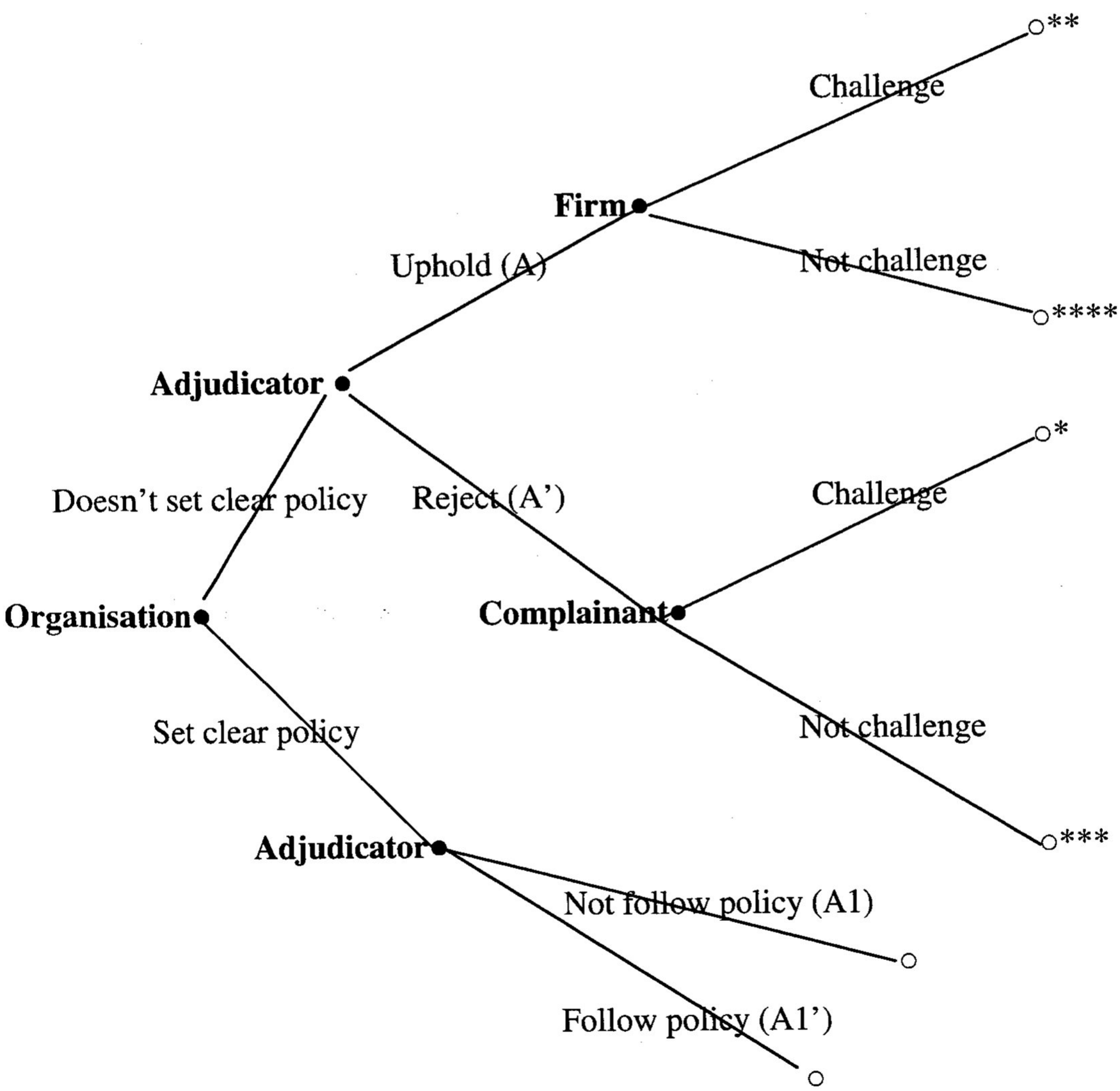


Hence, if firms and complainants were equally likely to challenge decisions, upholding complaints was the adjudicator's best strategy, since it avoided the worst case scenario (3). However, if it is firms that were more likely to challenge decisions, rational adjudicators are hypothesised to select a strategy of rejecting complaints and coping with consumers' dissatisfaction. This is because challenges in this scenario result not only in ombudsmen's scrutiny of adjudicators' decisions, but also in material detriment to adjudicators, whose performance and remuneration were related to the number of cases closed and the time to case closure. Therefore, the target system is hypothesised to resolve adjudicators' dilemma between option numbers (1) and (4) under conditions where firms were more likely than consumers to challenge their decisions.

Scenario number 4 – combining targets and quality assurance: To what extent were quality assurance mechanisms likely to effectively offset the expected effect of closure

targets? It seems reasonable that quality assurance was likely to be most effective when decision making was standardised or when a case's outcome was clear. Conversely, when discretion was inherently broad it was difficult for managers to ascertain discrepancy from a norm. Thus, the effect of targets on decision output is expected to have been more pronounced when adjudicators had relatively broad discretion, so that they could make a reasonable argument as to why a complaint could be equally rejected or upheld.

Therefore, a comprehensive model of adjudicators' decision making, taking account of the FOS's structure, targets and quality assurance processes, is expected to take the following form:



B. Empirical testing of the decision tree model's predictions

In this section I operationalise the above hypotheses derived from the comprehensive decision tree model (as illustrated in scenario number 4), and put them into empirical testing, triangulating data from interviews and a sample of complaint files.

The analysis below proceeds as follows. First, descriptive statistical data are presented, which demonstrate that in the relevant teams upholding complaints was associated with longer time to case closure. Hence, presumably high ratio of case closure had a negative impact upon adjudicators' attainment of targets and bonuses. Second, I analyse interview data, which demonstrate complaint handlers' awareness that the target and bonus system created an *incentive* for adjudicators to reject complaints when consumers were less likely than firms to challenge a decision against them. However, interviewees stressed that this was not always the case, because some complainants were more persistent than others. Additionally, they suggested that strategic rejection of complaints was the act of unprofessional, deviant, individuals. Third, I present statistical analysis of a sample of complaints. The main conclusion, which is drawn from the statistical analysis, is that adjudicators' decisions were shaped by ombudsman guidance and heuristics for the credibility of firms and complainants, rather than rational strategic action.

1. Descriptive statistics

As discussed in chapter three, firms were more likely to challenge adjudicators' informal decisions when a complaint was upheld than consumers were when their complaint was

rejected. In my sample, the average time to case closure when a case was rejected was 82 days, compared with 135 days when a case was upheld. In addition, even when firms did not challenge a decision to uphold a complaint, case closure, when a complaint was upheld, took on average 115 days, while rejection of a non-challenged case took on average 57 days. This was because upholding a complaint required analysis and negotiation of redress in addition to the initial assessment of liability. Consequently, the target and bonus system created an incentive for adjudicators to reject complaints, even regardless of firms' greater propensity to require an ombudsman's review.

2. Interview data

Rejection of complaints and target attainment

Interviews further confirmed that in most cases rejection of complaints facilitated target achievement. Interviewees asserted that some adjudicators strategically rejected cases in order to attain higher closure rate. As mentioned in chapter five, a case of systemic rejection of complaints in one team was internally exposed and acted upon during the research period.

Complaint handlers explained the micro-mechanisms which rendered complainants more amenable than firms to adverse decisions, and the consequences under which this disparity did not hold. Below are three quotations from interviews.[3]

The following ombudsman, who was previously an adjudicator, linked high rejection rate with some adjudicators' higher achievement of case closures:

[3] Three out of ten similar responses.

"It's usually quicker to reject a complaint, because if you reject a complaint, straight off, the complainant is quite likely to go away. Some complainants don't – they will argue a lot – but the majority of them will go away…They accept that their complaint won't succeed. To try to persuade a firm to deal with a complaint takes longer. So there are more resources involved in that …Adjudicators who reject all their complaints will do an awful lot more than those who spend their time negotiating, writing letters, trying to negotiate a settlement." (O1).

Another ombudsman, who was also previously an adjudicator, when confronted with the proposition that rejection of cases results in higher achievement of case closure, related this relationship to consumers' trust in adjudicators' expertise:

"Someone comes here, they are complaining, they don't know much about financial services, they don't know if they are right or wrong…An adjudicator says 'I looked at your case and I don't think you['re] gonna be successful', a lot of people will accept that because they think 'well these guys are the experts…'. So that's it. Only the really persistent people carry on. Whereas…if you [an adjudicator] go to an insurance company and you say 'I want to uphold this [complaint], even though you turned it down', the insurance companies are more likely to argue because…it's their job…They are …there to represent their companies and they are getting paid to …hold their line. So…you can certainly get more cases closed if you have high rejection rate." (O6).

The following adjudicator suggested that if some adjudicators were outperforming their colleagues, it is probably because they were rejecting complaints that should have been upheld. The response of this adjudicator suggested that such high performers were likely to attract scrutiny:

> "If we are all … doing fairly OK, and this one individual's hitting six or seven a week …they could either be working their socks off…in which case that's down to them… if that's how they want to work. It may be that they're not doing the work properly – they're rejecting complaints, which maybe they ought to be upholding. …What I'd be doing …I'd go up to the [outperforming] individual and say, 'What are you doing? How are you doing it?'…And I'd probably make a joke of it…It has happened in the past. Teams have been looked at, [people] thought 'Why are they doing so well?' and it's since transpired that they haven't been doing the work properly, it seems to come back down to that." (A4).

However, complaint handlers suggested that despite the *incentive* to reject complaints, decision making was generally shaped by professional knowledge of what constitutes suitable investment advice. They perceived strategic rejection of complaints as an inappropriate deviation from the norm. Moreover, an abnormal percentage of rejections could have resulted in investigation and disciplinary action. Therefore, adjudicators who rejected too many (above the team's norm) of their complaints were running the risk of closer monitoring.

Complaint handlers' expectations of firms and complainants cooperation

While suggesting that firms tended to be harder to negotiate with in comparison to complainants, complaint handlers further held more explicit expectations as to which firms and what types of complainants were likely to challenge their decisions.

It is noteworthy that when I asked adjudicators about specific firms' likely cooperation they tended to interpret the question as regarding their expectations of the quality of these firms' complaint handling. Adjudicators had precise expectations as to which firms were likely to generate 'bad' complaints *and* to demand an appeal if a complaint was upheld. For example:

> "[Firm X] are hellish to deal with, as are [firm Y], because 90% of their complaints get upheld…Because they're such bad firms… [which are selling] lousy products, badly sold. It's notorious. You get a [firm Y] file and you're looking for reasons to uphold [the complaint] rather than looking …whether it was a reasonable sale or not." (A3).

Similarly, a senior executive explained that the FOS had specific expectations regarding large firms' handling of their complaints and their interaction with the Ombudsman:

> "The top firms, we have [a] different encounter with each one, different style, history of dealing with complaints, history with the ombudsman, and you can characterise them quite easily. There is one of the big financial institutions, which I would say is absolutely first class. We have [a] small volume of complaints from

them, the ones that we do get have been …carefully analysed, there is…coherence…as to why they rejected the complaint…There are others who must have a similar …share of the market, who appear to deal with customers in a very different way." (E6).

Complaint handlers commonly asserted that IFAs were more likely, when compared with large firms, to challenge adverse decisions. Yet, those who handled complaints against IFAs were relatively sympathetic to the resistance of these small firms to adverse decisions (A5a; A7).

Finally, while suggesting that rejecting a complaint was usually quicker than upholding it, complaint handlers emphasised that this was not always the case, because some complainants were more persistent. The profile of the *persistent complainant* came up in a large number of interviews.[4] It was also a central theme of a highly-attended internal talk by a senior official, which I observed. Interviewees related two main profiles of persistent complainants. One was educated complainants of high socio-economic status groups, who were likely to be more confident in their position. The other was argumentative, fastidious complainants, who would not be convinced by rational explanation. Interviews suggest that complaint handlers perceived complainants of high socio-economic status with disdain. The second type of persistence was perceived as a form of personality deviance.[5]

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[4] Twelve interviewees made reference to some form of complainant persistence.

[5] Mulchay's (2003) interviews with NHS medical consultants found that they were likely to perceive any complaint in negative terms and caused by the personality of the complainant. In 21 out of her 141 interviews, consultants described complainants as exhibiting some form of a mental illness (*Ibid,* p. 111).

3. Quantitative analysis of variance in adjudicators' decisions

The following section uses data from a sample complaint files to analyse the combined effect of targets and quality assurance upon complaint handlers' decisions. Below, I introduce indicators and operationalised hypotheses and report the statistical analysis results. Section C discusses what conclusions may be drawn from these results in conjunction with the interview data above.

Operationalisation and detailed hypotheses:

i. Responsiveness. The explained dependent variable – responsiveness – is measured according to whether a complaint was upheld or rejected by the adjudicator.[6] The sample provided sufficient variance for analysis. Of the 143 cases in the sample 104 (73%) of cases were rejected and 38 (27%) were upheld. In addition, I analyse the extent to which adjudicators engaged in gathering information beyond what was originally provided by the firm.[7] This variable assesses the degree of effort invested by the adjudicator in investigating the complaint. Of the 143 cases, further information was gathered in 48 (33.6%) cases. There was a significant bi-variate correlation between the degree of investigation and the upholding of a complaint (Chi^2=25.041; Pearson =0.42; p=0.00). Thus, suggesting that these two measures of responsiveness clustered.

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[6] Where a compensation offer was initiated by a firm before the complainant filed the complaint with the FOS and the offer was subsequently reinforced by the adjudicator, such a decision is coded as a rejection. If an offer was suggested by the adjudicator and accepted by the firm, such a decision is coded as upholding the complaint. However, it can be argued that reinforcement of a firm's initiated offer is equivalent to upholding a case and mandating a similar redress. Consequently, I compared the effect of the independent variables upon the dependent variable in the whole sample, with their effect upon a sub-sample wherein firms' initiated offers were excluded.

[7] Firms always supplied the FOS with their internal complaint file and the original sales documentation.

ii. Standardisation

Hypothesis 1: Standardisation of decision making overrides the effect of the target and bonus scheme upon responsiveness.

In order to examine the hypothesis that clear organisational guidance – i.e. standardisation – shaped adjudicators' decisions, I distinguish two types of cases: (a) Cases where the FOS identified a systemic failure in the selling of a particular product by an individual firm, and (b) One-off or industry-wide complaints. The uniqueness of the first type of cases was that adjudicators were given fund-specific guidance from an ombudsman, and sometimes special training, regarding these cases.[8] Consequently, adjudicators' discretion was relatively restricted when compared with other type of cases. Such guidance and training not only supplied adjudicators with clear direction, but also alerted them that these cases were part of a larger instance of firms' deviant behaviour.[9]

My knowledge of ombudsmen specific guidance is based on complaint handlers' notes and correspondence on the files. I discerned such product- and firm-specific guidance only within the cases of team A. This does not necessarily mean that team B was not given similar guidance with regard to certain products. But this was not apparent from the files.

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[8] In chapter four I described one type of these cases, wherein ombudsmen guided adjudicators regarding the adequate rating of firms' specific funds. Chapter eight discusses additional examples.

[9] This operationalisation of standardisation does not capture cases where there was no firm-specific guidance, but the case was within a clear category of cases that should be upheld or rejected. Therefore, in practice, there was a larger set of cases in which adjudicators' decisions were relatively constrained.

iii. Firms' expected persistence

Hypothesis 2: An adjudicator's anticipation that a firm is likely to challenge a decision to uphold a complaint is expected to have a negative effect on the likelihood of a complaint being upheld.

This indicator aims to measure complaint handlers' expectations as to whether a firm would challenge a decision to uphold a complaint. I based my measurement of adjudicators' expectations on firms' actual propensity to challenge decisions when complaints against them were upheld, as manifested in the dataset from which my complaints sample was drawn.[10] Adjudicators' expectations were further confirmed in interviews, where I asked them about their expectations regarding specific firms with whom they regularly interacted. The sample included 42 firms, of which 20 firms were categorised as persistent.

iv. Complainants' expected persistence

Hypothesis 3: An adjudicator's anticipation that a complainant is likely to challenge a rejection of a complaint, or to be more time-consuming to deal with, is expected to have a positive effect on the probability of a complaint being upheld.

I further sought to measure the effect of adjudicators' expectations of complainants' propensity to challenge their decision to reject a complaint, or more generally of

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[10] A firm was categorised as persistent if it required an ombudsman's review in 40% or more of its upheld cases.

complainants' amenability to adverse decisions. I employ two indicators to capture adjudicators' expectations: (a) Complainants' aggressiveness (binary) – measured as a function of the number of letters sent by the complainant to the firm, while the firm investigated the complaint (i.e. before filing the complaint with the FOS). Complainants' aggressiveness is recorded as high for complainants who had extensive correspondence with the firm.[11] The idea of measuring expected persistence according to the number of letters/phone calls to the firm is based on interviews with complaint handlers;[12] (b) Status – complaint handlers asserted in interviews that the more educated and well-off consumers were more likely to challenge rejection of their complaint.[13] The measurement of status is based on classification of complainants' occupations. Professionals and managers are classified as 'high status', while routine and administrative jobs and small owners are classified as 'low status'.[14] A problem, which I encountered, was how to classify pensioners. The simplest solution seems to be that this group should either comprise a distinct status category, or be excluded from the analysis.

As illustrated in Table 6.1, there is no significant correlation between the two expected persistence indicators (i.e. 'aggressiveness' and status).

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[11] Three letters/phone calls or more to the firm are recorded as aggressive.
[12] This indicator was mentioned by six interviewees.
[13] This indicator was mentioned by five interviewees.
[14] The classification of occupations into status categories is based on Rose and O'Reilly (1998).

Table 6.1: Association between complainants' 'aggressiveness' and status

		Complainant's aggressiveness (intensity of correspondence)		Total
		Low	High	
Complainant's status	Routine, admin and small owners	34	18	52
		65.4%	34.6%	100.0%
	Professionals and managers	35	22	57
		61.4%	38.6%	100.0%
	Pensioners	17	4	21
		81.0%	19.0%	100.0%
Total		86	44	130

Chi^2=2.642; P=.267

While the above indicators match complaint handlers' expectations of 'persistence' as conveyed in interviews, the sample does not demonstrate a statistically significant relationship between these measures and complainants' actual requests for their case to be reviewed by an ombudsman. Yet, given the relatively low ratio of complainants' requests for review, it may be that the sample was too small to pick up this effect.

Additionally, the analysis in chapter seven suggests that due to complaint handlers' interpersonal strategies, 'consumer persistence' did not necessarily result in requests for an ombudsman review. Below I assess the validity of the suggested indicators against two alternative measurements of complainants' relative amenability to adverse decisions: (a) time to case closure, and (b) consumer satisfaction scores.

As depicted in Table 6.2 below, in accordance with interviewees' perceptions, complainants' aggressiveness (i.e. intensity of correspondence with the firm before filing a compliant with the FOS) had a statistically significant effect on the time from the adjudicator's initial decision to the closure of the case (controlling for whether the case was handled by team A or B). Complainants' status, however, did not have a significant

effect on the time to case closure. (By focusing upon the period *after* the adjudicator's initial decision and until the final closure of the complaint I avoid variance resulting from the possible complexity of the investigation prior to the decision.)

Table 6.2: Effect of 'aggressiveness' on the time from the adjudicator's initial decision to closure

	Non-standardised Coefficients		Standardised Coefficients
	B	Std. Error	Beta
(Constant)	19.494	9.618	
Complainant's aggressiveness – intensity of correspondence with firm	24.461	10.743	.226**
Team (A or B)	19.100	10.501	.181*

(N=104)
*selecting only cases that did not reach an ombudsman's review
**** $p \leq 0.001$; *** $p \leq 0.01$ **$p \leq 0.05$; *$p \leq 0.1$

The FOS's internal analysis of consumer satisfaction surveys suggested that individuals of high social status occupations (senior managers and professionals) and pensioners were significantly less satisfied with the organisation's services than those of low social status occupations (administrative and routine jobs). Thus, in accordance with interviewees' perception, complainants' of high socio-economic status were harder to satisfy when their case was rejected.[15]

Consequently, although my sample does not show an association between expected persistence and request for an ombudsman's review, adjudicators' expectations of complainants' relative amenability to rejection of their complaints are validated by alternative empirical sources.

[15] For a similar negative association between socio-economic status and satisfaction with health services see: Judge and Solomon (1993).

v. Targets' variation (caseload)

Hypothesis 4: Higher caseload in the two months before the adjudicator's decision is expected to have a negative effect on the likelihood of a complaint being upheld.

I do not have information about the over time change in targets for the relevant period or variation in individual-level targets.[16] Consequently, I cannot directly examine the effect of the variation of targets upon adjudicators' decisions. I use a measure of individual caseload during the two months prior to the adjudicator's decision as a proxy for target variation. It is plausible to assume that higher caseload mirrors managerial expectation of adjudicators to close a higher number of cases.[17] Caseload is operationalised in two ways: (a) The number of complaint files that an adjudicator processed during the two months before adjudicating the sampled complaint, *minus* the number of cases that the adjudicator closed during this same period; (b) The number of cases – whether open or closed at the date of issuing the decision – which the adjudicator processed during the two months before adjudicating the complaint.[18] Caseload varied across the two teams. The mean caseload of adjudicators in Team A was higher than that of adjudicators in Team B, and this difference was significant ($p<.05$). Yet, it is important to bear in mind

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[16] Moreover, although the average organisational targets increased during this period, it is probable that the studied teams' targets did not, or hardly, changed over the period. As explained in chapter five, the increase in targets was largely borne by the Assessment and Endowment Mortgage units, while enabling other units, such as the researched teams, to operate under lower targets.

[17] Higher caseload *may* reflect higher targets. But it may equally reflect an adjudicator's own decision to take on more work so as to attain the target over a shorter period of time, or to outperform the target, or to take on new cases, while old cases are not closing for different reasons.

[18] Computing caseload requires knowledge about all cases' date of allocation and closure. Information about cases' allocation was missing for about one-third of the dataset. I constructed a measure that approximates this missing data based on the average time-to-allocation of 10% of the cases for which this information was manually available from the computer system.

that Team B comprised adjudicators who previously worked in five different teams. The data allowed me to track individuals' movement between teams, and therefore to compare how their average caseload changed as a result. Hence, in addition to the comparison between teams A and B, I compare the behaviour of teams of high and low mean caseloads. Low caseload teams dealt predominantly with IFAs and small firms, while high caseload teams handled complaints against large firms with which the FOS had frequent interaction.

vi. Target achievement (productivity)

Hypothesis 5: Higher case closure in the two months before the adjudicator's decision is expected to have a positive effect on the likelihood of a complaint being upheld.

I further test for the effect of case closure achievement during the two months prior to the adjudicator's decision. My hypothesis is that the higher the achievement of case closure in the two months before the decision, the higher the propensity for the sampled case to be upheld. Conversely, low attainment of case closures is expected to result in pressure on the adjudicator to achieve his/her target, and consequently in a higher probability of rejecting a complaint.

Cases closed (productivity) and caseload were strongly correlated (Pearson=.557; p=0.00). Thus, as one would expect, caseload and case closure clustered.

vii. Relational distance

Hypothesis 6: The frequency of firms' interaction with the FOS is expected to have a negative effect on the likelihood of a complaint being upheld.

I hypothesise that adjudicators would act more leniently when handling complaints against firms with which they had frequent interaction vs. those with which they had infrequent interaction. The former included ten large firms, whose complaints constituted 50%-60% of the FOS caseload (E2; E6). The latter included large firms with a relatively small number of complaints, small firms and IFAs.

Most complaints in the sample (127/143) were against life assurance firms and banks and only 16 cases were against IFAs. Most of the cases (101/143) were against companies with which the FOS had frequent interaction since they were among the ten firms that attracted the largest number of complaints.

Hypotheses testing:

i. Hypothesis 1 (standardisation): There was a strong and significant association between the FOS's standardisation of response to firm-specific problematic products and adjudicators' upholding vs. rejecting of complaints. That is, when faced with specific ombudsman guidance that a complaint was part of a larger firm-specific trend, adjudicators were highly likely to uphold a complaint (78.3%)[19] in comparison to when no such guidance is known to have been given to them (16.8%). 'Standardised' cases

[19] Similar complaints were rejected before the ombudsman guidance was issued.

included complaints regarding two very large firms wherein the FOS risk rated firms' funds (see chapter four) and a batch of complaints against one of these firms.

Table 6.3: The effect of standardisation on adjudicator's responsiveness

		Adjudicator's decision		
		Firm won (rejected)	Complainant won (upheld)	
Standardisation	Non-standardised judgment (one-off & industry-wide type complaints)	99	20	119
		83.2%	16.8%	100%
	Standardised (firm-specific complaints)	5	18	23
		21.7%	78.3%	100.0%

(Chi^2=29.285; p=.000)

However, as Table 6.4 below demonstrates, the effect of standardisation diminished over time. When the ombudsmen guidance was first introduced in 2002, all cases (N=11) of this type were upheld once the guidance was issued. In contrast, in 2003 adjudicators adopted a more mixed approach to these cases, although they still tended to uphold them (7/12).

Table 6.4: Changes over time in the effect of ombudsmen guidance

		Adjudicator's decision	
	Year	Firm won (rejected)	Complainant won (upheld)
Standardisation	2002	0	11
		0%	100%
	2003	5	7
		41.7%	58.3%

Qualitative analysis of these cases and interviews suggests that the relaxation of the adjudicators' standardised approach was a result of firms' resistance[20] and executives and ombudsmen's subsequent emphasis that adjudicators should assess each case according to its own merit.

Standardisation had a further significant and positive effect on the extent of investigation, which did not diminish over time. The extensive investigation that was invested in these cases, despite their relative homogeneity, suggests that it was intended to buttress the FOS's stance in anticipation of an ombudsman (and possibly judicial) review.

ii. Hypothesis 2 (firm's expected propensity to challenge a case): The effect of firms' relative persistence seems to have varied between teams A and B.

Team A

In team A, there was a strong association between the persistence of a major firm and the standardisation of adjudicators' response to its complaints of a certain type, as explained above. Yet, as illustrated in Table 6.5, when handling *other* complaints regarding the same firm, adjudicators exhibited a strong tendency to reject them. Adjudicators upheld 9% of non-standardised cases against this most persistent firm, in comparison to 23.5% regarding other firms.

[20] Out of the 18 cases that adjudicators upheld, in 16 cases firms required to have the case reviewed by an ombudsman.

Table 6.5: Firm persistence and decision outcomes in Team A
(controlling for standardisation)

		Adjudicator's decision outcome (excluding firm offers)		
		Firm won (rejected)	Complainant won (Upheld)	
Firm's expected persistence	Low	26	8	34
		76.5%	23.5%	100%
	High	30	3	33
		90.9%	9.1%	100%
		56 83.6%	11 16.4%	67 100%

(Chi^2=2.544; p=0.1)

Although the above bi-variate association is not strictly significant (p=0.1), the effect of this variable on the propensity of a case being upheld is significant (p<.05) when further controlling for complainant's status and aggressiveness.[21] Thus, team A exhibited a dual approach to the handling of cases against this most persistent firm. When faced with ombudsman guidance, complaints were predominantly upheld. In fact, qualitative analysis shows that complaints regarding identical products were rejected prior to the ombudsman guidance, whereas they were consistently upheld once guidance was issued. However, when handling non-standardised complaints against the same firm, these were usually rejected.

A similar tendency regarded the extent of investigation. As mentioned, team A tended to collect more information when handling cases where specific ombudsman guidance was

[21] The validity of this association should be treated with caution because of its sensitivity to reliability problems in measuring standardisation. Thus, it is possible that I am underestimating the effect of standardisation regarding cases upheld against low-persistent firms, and thereby overestimating the effect of these firms' low persistence upon adjudicators' decision making. Then again, a qualitative assessment ameliorates this concern. It reveals that with regard to the 'high persistent' firm, two out of the three cases upheld could have been considered as 'high risk' products, since they were similar to the standardised firm-specific-crisis cases. In contrast, with regard to the 'low persistent' firms, the cases which were upheld regarded the more conventional endowment mortgage and with-profits bonds complaints.

issued. However, with regard to other cases regarding the same persistent firm, adjudicators were less likely to gather information when compared with their handling of cases against other firms (chi^2 =6.031; p=.023).

The above suggests that team A approached complaints against the most persistent firm with a *bureaucratic* stance. When faced with clear guidance, adjudicators collected extensive information and they were likely to uphold the complaints. In the absence of specific guidance, adjudicators were disinclined to gather further information and they were likely to reject the complaints.

Team B

Team B manifested a *non-significant* tendency to uphold cases against the most persistent firms (24% vs. 12%). With regard to the gathering of information, firms' persistence was associated with a significant propensity to conduct a more thorough investigation. (Admittedly there is a potential for reliability problems if standardisation regarding certain products actually took place in team B, but was not evident from the files.)

Table 6.6: Firm persistence and information gathering in team B

		Investigation		
		Standard	Extensive	
Firm's expected persistence	Low	20	5	25
		80%	20%	
	High	13	12	25
		52%	48%	
		33	17	50

(Chi^2=4.367; P=0.037)

One way to interpret the behaviour of team B is that complaint handlers gathered more information in anticipation of an ombudsman review *if* the complaints were to be upheld. An alternative interpretation, which agrees with complaint handlers' assessment of individual firms in interviews, suggests that 'firm persistence' coincided with adjudicators' categorisation of certain firms as 'bad'. That is, firms that persistently required an ombudsman's review were also those with which complaint handlers had an adversarial relationship. Hence, according to this interpretation, adjudicators collected more information with regard to complaints against persistent firms, because they suspected that the complaints *deserved* to be upheld. Thereafter, in accordance with the conclusions drawn from the gathered evidence, some of these complaints were upheld, while others were rejected. This second interpretation proposes that the micro-mechanism that guided adjudicators' complaint handling combined *fairness* and *professional* models of complaint handling.

iii. Hypothesis 3 (complainant's expected persistence): The two measures of complainants' expected persistence – 'aggressiveness' and status – had contrasting associations with the dependent variables. These relationships were significant only for a sub-sample of cases against non-persistent firms.[22] That is, complainants' expected persistence – both in terms of 'aggressiveness' and socio-economic status – had no effect upon adjudicators' handling of complaints against persistent firms.

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[22] This sub sample consisted of 30 endowment mortgages cases, 20 single premium bonds and 11 personal pension cases.

'Aggressiveness' (i.e. intensity of correspondence) was *negatively* associated with upholding of complaints.[23]

Table 6.7: The effect of complainants' 'aggressiveness' upon adjudicators' decision outcomes (controlling for firm persistence)

		Adjudicator's decision		
		Firm won (rejected)	Complainant won (upheld)	
Complainant's intensity of correspondence with the firm prior to filing of complaint	Non-aggressive	27	11	38
		71.1%	28.9%	100%
	Aggressive	19	1	20
		95%	5%	100%

(Chi^2 =4.580, p=.032)

Expected 'aggressiveness' was further negatively associated with the extent of adjudicators' investigation (Chi^2 =3.667, p=.056).[24] Comparison of high and low caseload teams shows that this disparity was pronounced and statistically significant only in the former.

In contrast, complainants' socio-economic status was *positively* associated with the probability of a complaint being upheld. Yet, when comparing high and low caseload teams, I find that it was only in the former that high socio-economic status was associated with upholding complaints. Complainants' socio-economic status had no affect upon adjudicators' propensity to gather information.

[23] Evident across all three product categories.
[24] Evident across all three product categories.

Table 6.8: Complainant's socio-economic status and adjudicator's responsiveness (controlling for firm persistence)

		Adjudicator's decision		
		Rejected	Upheld	
Status	Routine & admin jobs and small owners	23	2	23
		92%	8%	100%
	Managers & professionals	22	9	31
		71%	29%	100%

* excluding pensioners for whom no occupation is coded
(Chi^2 =3.878, p= .049)

In conclusion, in accordance with the expectations of the above decision tree models, high socio-economic status was associated with a tendency to uphold more cases and this tendency was pronounced in high-caseload teams. However, socio-economic status had no impact upon the extent of investigation. Additionally, in contrast with the predictions of the decision tree models, complainants' 'aggressiveness' was associated with adjudicators' tendency to reject complaints and to avoid further investigation. Under conditions of high caseload adjudicators were even more likely to avoid further investigation of complaints filed by persistent complainants. These findings seem to suggest that complaint handlers employed 'aggressiveness' as a heuristic for unworthy complaints.

In a multi-variate (logistic regression) analysis, the combined effect of the above variables, regarding the sample of non-persistent firms, is significant and strong. High socio-economic status *increased* the probability of a complaint being upheld by 7. 'Aggressiveness' *reduced* this probability by 12.5.

Table 6.9: Probability of a complaint being upheld
(Limited to non-persistent firms)

	B	Std. Error	Exp(β)
Complainant status	1.907	.783	6.734**
Complainant's aggressiveness (intensity of correspondence)	-2.531	1.130	.080**
Constant	-1.883		

(N=58; R^2 =.3)
**** $p \leq 0.001$; *** $p \leq 0.01$ **$p \leq 0.05$; *$p \leq 0.1$

iv. Hypotheses 4 and 5 (caseload and case-closure variation): The effect of caseload and case-closure is compound. High caseload was associated with adjudicators' extensive information gathering and with their inclination to uphold complaints. High case closure (productivity) was associated with *less* information gathering and had no association with adjudicators' decision outcomes. Analysis of variance among adjudicators reveals that the association between caseload, information gathering and the upholding of complaints had to do with the tendency of two adjudicators in team A, who had the highest caseload and were also more inclined than others to both collect information and to uphold complaints. In a multi-variate analysis, when controlling for the degree of investigation (in addition to firm persistence, socio-economic status and aggressiveness as above), the association between caseload and upholding of cases disappears and the effect of productivity is positive and significant ($p<.05$). The effect of both productivity and all other independent variables remains significant when adding a dummy variable to account for the idiosyncratic tendencies of the two adjudicators.

v. Hypothesis 6 (relational distance)

No effect was found to adjudicators' *relational distance* to firms. That is, larger firms and those firms with which the FOS had frequent interaction were not treated leniently when compared with small firms and IFAs.

C. **Conclusion**

The sample upon which the above results are based is small (N=143). Important parts of the analysis are limited to an even smaller sub-sample (N=58). The sample was not representative of the FOS's work as a whole, since it was drawn from the work of 12 adjudicators, two teams and certain broad product categories. It is with these limitations in mind that the conclusions below should be read.

The rational-contextual hypothesis predicts that rational complaint handlers will act strategically to attain external support and to mitigate conflict with firms and complainants. This hypothesis seemed especially pertinent to the FOS's case given the subjection of its employees to a performance management and incentive regime, which created an incentive for them to focus upon swift case closure. This hypothesis was the basis for the delineated decision tree models.

Literature regarding the effect of targets points out that one implication of performance management schemes and performance-linked compensation is to shift the risk for underperformance from employers to employees. It was therefore expected that

employees will act strategically to minimise this risk. The FOS's target and bonus system required adjudicators to close a set number of cases per period and remunerated them for exceeding their targets. The main contingency, which adjudicators faced, was firms' and complainants' relative amenability to adverse decisions. The less amenable firms and complainants were to adverse decisions, and the more cases were challenged, the harder it was for adjudicators to fulfil their target and win a bonus. Consequently, the decision tree model predicted that, when faced with relatively broad discretion, adjudicators would act strategically to minimise this risk by being responsive to those firms and complainants who they perceived as resistant to adverse decisions.

Then again, the FOS target system and counteracting controls, as described in the previous chapter, mitigated these expected effects of the target system. First, the target system was internally balanced to allow for differences in firms' and consumers' relative amenability to adverse decisions, thereby reducing the risk born by adjudicators. The more adversarial the FOS's relationship with a firm was, or the higher the perceived expectations of certain consumer base for redress were, the more the control system was attuned towards attaining quality and consumer satisfaction, and the less towards case closure. In other words (as was illustrated in chapter five, figure 5.1) the harder consumers and firms were to satisfy, the more focus was given to quality over quantity. Second, in those areas of the FOS where targets were especially high – the Assessment and Endowment Mortgage units – decision making was more standardised. Therefore, in those units adjudicators had less individual discretion and the quality assurance system was therefore expected to be more effective. Third, in response to adverse publicity and

internal reaction to the focus on case closure, the quality assurance process was elaborated and a bonus cap was introduced.

Descriptive statistics suggest that firms tended to challenge adverse decisions more often than complainants. Thus, I hypothesised that, under conditions of broad discretion, adjudicators would strategically reject complaints against resistant firms. It was further hypothesised that the reverse would be true when adjudicators perceived complainants as likely to challenge their decisions. I further predicted that adjudicators' responsiveness to complaints would be mediated by their relative target achievement.

Interview data equally confirmed that complaint handlers expected that in most cases rejecting complaints was likely to facilitate disposal of cases and therefore to boost target and bonus achievement. They emphasised that this was usually the case, but not when complainants were either 'aggressive' or of high socio-economic groups. They further asserted that some firms were more cooperative than others. Interviewees believed that some adjudicators adhered to rejection of complaints as a means of facilitating case closure. Indeed during the research period a case of systematic rejection of complaints in one adjudication team was internally exposed and acted upon. However, interviewees perceived such systematic rejection of complaints as the deviant behaviour of unprofessional individuals.

The most prominent finding of the above statistical analysis is that when adjudicators were provided with ombudsman guidance regarding a firm-specific product, they strictly

followed the guidance and tended to uphold the relevant complaints. This finding is of interest when recalling that firms were especially likely to challenge decisions to uphold complaints when these regarded a trend in a larger set of cases. Under these consequences, in anticipation of firms' appeal for an ombudsman review (and potentially for judicial review), adjudicators tended to conduct thorough investigation of individual cases despite their relative homogeneity. The FOS's handling of such systemic complaints is further discussed in chapter eight.

Adjudicators' expectations of firms' propensity to resist an adverse decision seem to have had disparate effects in teams A and B. Yet, in both cases the micro-mechanisms that shaped adjudicators' behaviour differed from the expectations of the rational-contextual hypothesis. In team A, adjudicators tended to uphold complaints against the most persistent firm when they had specific ombudsman guidance, but were disposed to reject complaints (and avoided further investigation) in the absence of such guidance. In contrast, adjudicators in team B were inclined to conduct thorough investigations regarding complaints against the most resistant firms although this did not necessarily result in upholding of the complaints. The quantitative analysis and interviews suggest that firms' persistence was also a proxy for adjudicators' perception of certain firms as 'bad' and of complaints against them as *a priori* credible. To sum up, team A adopted a relatively bureaucratic – defensive – stance to the handling of complaints against the most persistent firm. In contrast, team B seem to have combined a *fairness* model to gathering information and a *professional* model to decision making. However, it should

be emphasised that the above differences may be shaped by my ignorance of specific ombudsman guidance to team B.

The proxies for targets' variation and targets' attainment – caseload and productivity – were found to have an unstable relationship with the dependent variable. While these variables did produce significant results, it could be that these had to do with the idiosyncratic behaviour of two adjudicators in team A.

When handling complaints against non resistant firms, adjudicators were more responsive to complainants of higher socio-economic groups (professionals and managers). I attributed this finding to adjudicators' expectation that this group of complainants was harder to satisfy and more likely to resist adverse decisions. That this tendency was restricted to high caseload teams supports this interpretation. This finding would seem to support the expectations of the decision tree model and thereby of the rational-contextual hypothesis. An alternative explanation would be that adjudicators perceived educated complainants as more trustworthy. A strong support for this interpretation is offered by adjudicators' inclination to reject complaints by high status *and* aggressive complainants.

A significant challenge to the rational-contextual hypothesis is posed by the statistically significant negative relationship between complainants' 'aggressiveness' – measured in terms of intensity of correspondence with the firm – and adjudicators' decision outputs and information gathering. As demonstrated above there was a significant *negative* relationship between complainants' 'aggressiveness' and both the degree of investigation

and upholding of complaints. A possible interpretation of this finding is that adjudicators perceived aggressive complainants as *a priori* unreliable. This interpretation may be associated with complaint handlers' perception, as discussed in the previous chapter, that complainants were becoming more persistent due to media frenzy or a general 'compensation culture'.

Overall, the above findings, while mixed and based on a small sample, suggest that when faced with a non-standardised decision environment adjudicators' gathering of information and decision making was shaped by their moral labelling of firms and complainants. These findings are consistent with previous research on decision making by street-level inspectors and bureaucrats as elaborated in chapter one (pp. 39-44). It is plausible that the target and bonus system intensified these tendencies due to adjudicators' need to make speedy decisions and thereby to embrace heuristics to guide them.[25] Team A's bureaucratic approach to complaints against the most persistent firm deviated from these tendencies. The reasons for this local standardisation of approach are further explored in chapter eight.

[25] These findings are consistent with Gilboy's (1991) ethnography of US immigration officials' decision making under high time constraints. To reiterate, Gilboy found that officials' decision to refer certain travellers for further investigation was shaped by a combination of specific local guidance from their supervisors and a set of 'negative' and 'positive' profile categories.

Chapter 7: Attaining Consumer Satisfaction – Persuasion and Emotional Labour

Introduction

The previous chapter analysed the determinants of adjudicators' responsiveness to consumer complaints as reflected in the intensity of their investigation and decision outcomes. The conclusion drawn from the statistical analysis was that adjudicators' decision making embodied a combination of bureaucratic, professional and fairness models of complaint handling. Specifically, the analysis suggested that complaint handlers' decisions were shaped by ombudsmen guidance and by adjudicators' moral labelling of firms and complainants. Both the rational-contextual and the therapeutic model seemed of lesser bearing to the findings.

This chapter proceeds to analyse complaint handlers' interpersonal communication with complainants. It explores the strategies which complaint handlers employed in order to achieve consumer consent and satisfaction even when rejecting complaints. The analysis demonstrates how complaint handlers' writing style emulated personal informal communication. It further shows how complaint handlers used rhetorical strategies to secure complainants' confidence in their decisions. Additionally, the data demonstrates complaint handlers' attempts to manage what they perceived as unrealistic consumer expectations for redress. It moreover suggests that complaint handling took the form of what Hochschild (1983) has termed *emotional labour*. Accordingly, complaint handlers were encouraged to engage in informal voice-to-voice communication with complainants, and to convey empathy and sympathy with their grievances. Adjudicators' endured complainants' displays of frustration with

firms, with their unsuccessful investments and with the complaint handling process. Finally, the data shows how the review of adjudicators' decisions by the ombudsmen was effectively transformed into a mechanism for handling those complainants that were hardest to satisfy. I therefore argue that while the *content* of adjudicators' decision making (i.e. information gathering and outcome) involved a hybrid of the bureaucratic, professional and fairness complaint handling models, their *interaction* with complainants came closer to the *therapeutic* model.

I suggest that complaint handlers' therapeutic interaction with complainants cannot be explained merely as a rational attempt to maximise *swift* case closure. Rather, I argue that the FOS's concern with consumer satisfaction was embedded in complaint handlers' domain perception and their client-service ethos. Thus, I conclude that an institutional approach, rather than just a rational-choice perspective, is called for in order to adequately interpret the findings.

My analysis below of adjudicators' strategies is based, in addition to non-participant observation, on systematic analysis of semi-structured interviews with complaint handlers, examples from complaint files and a decision training session.[1] Two provisos are worth stressing. First, while I conducted over thirty interviews with complaint handlers, only ten of them were with adjudicators, of which five interviews centred on the strategies of attaining complainant cooperation. However, when triangulated with data from other interviews, complaint files, the training session and internal guidance, it is possible to arrive at reliable conclusions. Second, it should be stressed that my claim below is *not* that the specific strategies, which came up in

[1] The training session was led by two ombudsmen and attended by a group of some twenty adjudicators and their managers in addition to another ombudsman and an executive.

interviews and complaint files, were necessarily representative. These specific strategies are not important in and of themselves. My proposition is that taken together the data below demonstrates complaint handlers' strategic attempt to attain consumer trust, consent and satisfaction. In other words, I suggest that the examples below reveal complaint handlers' sensitivity to the emotional aspects of complaining and ultimately a version of the therapeutic model of complaint handling.

A. **Theoretical tools and focused research questions**

1. Writing style.

In order to understand adjudicators' decisions as a form of communication it is useful to compare them with their next of kin: judicial decisions.

Posner (1995) distinguishes two types of judicial writing styles: the dominant pure formal legal style and the rare impure pragmatist style. He describes the pure formal style thus:

> "Most judicial opinions are carefully drafted to emphasize the difference between their diction and that of ordinary speech…Judicial opinions in pure style tend to be long for what they have to say, solemn, highly polished and artifactual – far removed from the tone of conversation – impersonal…The standard 'pure' opinion uses technical legal terms without translation into everyday English, quotes heavily from previous judicial opinions, includes much detail concerning names, times and places, complies scrupulously with whatever are the current conventions of citation from, avoids any note of levity,

> conceals the author's personality, prefers familiar and ready-made formulations to novelty and bows to current norms of 'political politeness'…The familiarity of the pure style makes it invisible to practitioners of the style and the intended audience of lawyers" (*Ibid,* p. 1429).

Posner contrasts the formal, pure style, with the impure style:

> "Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the 'professionalizing' devices of the purist writer – the jargon, the solemnity, the high sheen, the impersonality, the piled-up details conveying an attitude of scrupulous exactness, the fondness for truisms, the unembarrassed repetition of obvious propositions, the long quotations from previous cases to demonstrate fidelity to precedent, the euphemisms, and the exaggerated confidence…impure judicial stylists…like to be conversational, to write as if it were for the ear rather than the eye. They like to avoid quoting previous decisions so that they can speak with their own tongue – make it new, make it fresh…They like to be candid and not to pretend to know more than they do or to speak with greater confidence than they feel" (Posner, 1995, p. 1430).

He makes the point that writing in impure style involves greater effort for the judge, since it excludes replication of previous decisions, requires dealing with ambiguities and translating legal concepts into everyday language.

Posner acknowledges the rhetorical advantage of conforming to the established writing style within a community. Accordingly, he explains judges' rhetorical advantage in adhering to the pure formal style:

> "For many judges the implied audience [of their decisions] consists primarily of the judge and judges of the lower court whose decision is being reviewed and the lawyers for the parties. Anyone else is an (authorized) eavesdropper. The lawyers and the lower court judges are the most knowledgeable and interested professional consumer of the appellant court's opinion…For this rhetorical purpose, the 'pure' style is the best because this tiny, focused, professional audience has settled expectations concerning the appropriate diction and decorum of judicial opinion…" (Posner, 1995, p. 1431).

While Posner emphasises the lower court judge, whose case is being reviewed, and the sides' lawyers, as the judge's addressees, other scholars highlight that judges perceive their decisions as abstract contributions to a body of law and therefore as a conversation with the legal community more broadly (Wald, 1995).

The above suggests that while judges seek to explain their decisions and to influence one another and their professional community outside the courts, they are not addressing the immediate sides to the dispute – the plaintiff and the defendant. These appear before them as a form of evidence through testimony. Even in the impure style, as related by Posner, the aim of the judge is to reach the ear of the lay public at large, rather than the actual sides to the case. The feelings of the individual plaintiff and

defendant, their capacity to follow the decision and the extent to which it persuades them, are not the main concerns of either the purist or the impurist judges.

The main thrust of my analysis below of adjudicators' writing style and communication is that their audience were the immediate sides to the dispute and especially the complainant. Adjudicators' writing style markedly differed from the pure judicial style. Theirs was personal, informal communication with the individual complainant. However, adjudicators' decisions further differed from the impure style in the standardisation of this informal mode of communication.

2. Persuasion

Going beyond style we encounter the broader field of persuasion (i.e. rhetoric). A detailed review of the rhetorical tradition (to speech and text analysis) is well beyond the scope of this thesis. In what follows I offer an introduction, which I consider sufficient for my analysis of adjudicators' decisions and strategies. This is mainly based on Aristotle's *Rhetoric*.

Rhetoric concerns the use of argumentative procedures in order to make contentions persuasive to their hearers or readers in a given communication situation (Edmondson, 1984). Aristotle defines it as "the faculty of observing in every given case the available means of persuasion" (1355b). He distinguishes between three means of persuasion: 'ethos', 'pathos' and 'logos'.

Ethos, or what Edmondson (1984) suggests labelling 'self-representation', depends on "the personal character of the speaker when the speech is so spoken as to make him

credible" (Aristotle, 1356a). Personal character includes the speaker's 'good sense', moral fitness and well-disposedness towards the audience (Aristotle, 1378a, Edmondson, p. 16).

Pathos refers to putting the audience into a frame of mind, which makes it more amenable to accept the speaker's arguments. In order to set the audience's mood, the speaker has to be able to understand the character of his/her audience and the triggers of emotions (Aristotle, 1356a).

Logos regards the validity of the speaker's arguments and the proof provided by the speaker (Aristotle, 1356a), on the basis of either induction from examples or deduction from principles. Modern scholarship of rhetoric has further elaborated how reasonable and persuasive arguments are constructed outside the constrained realms of formal logic (Perelman, 1979, 1982).

In the analysis below of adjudicators' decisions I show that adjudicators' communication strategy combined logos with self-representation and pathos as means of persuasion. It is the recourse to ethos and pathos that distinguished complaint handlers' decisions when compared with pure judicial style.

3. Emotional Labour

The complaint handling process involves one-to-one, frequently voice-to-voice, interaction, where it is impossible to strictly tell the speaker apart from his/her audience. To analyse the essence of this type of interaction I need a theoretical

framework that is sensitive to the effect of the interaction upon the 'speakers' themselves.

The concept of emotional labour was put forward by Hochschild's (1983) feminist critique.[2] It denotes the commercial use of employees' private ability to manage their emotions. That is, requiring employees to superficially act as though they feel (or do not feel), or to actually render themselves to feel (or not feel). Hochschild explains: "I mean to point out a link between a private act, such as attempting to enjoy a party, and a public act, such as summoning up good feeling for a customer" (*Ibid*, p. 19). Later work defined emotional labour as employees' display of organisationally required emotion, focusing on observed behaviour, rather than on employees' internal management of their emotions (Ashforth and Humphrey, 1993). According to Hochschild, jobs that call for emotional labour have three characteristics in common:

> "First, they require face-to-face or voice-to-voice contact with the public. Second, they require the worker to produce an emotional state in another person…Third, they allow the employer, through training and supervision, to exercise a degree of control over the emotional activities of employees" (*Ibid,* p. 151).

On the face of it, pathos and emotional labour are closely related. Both include the manufacturing of an emotional state in others. However, emotional labour focuses upon the requirement that the speakers generate in themselves emotions (which they do not feel), or to suppress emotions (which they do feel). While all forms of pathos

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[2] Hochschild studied this notion in the context of flight attendants' work, but maintained that it is relevant to understanding the conditions of labour over a broad range of customer-facing jobs.

involve influencing the emotions of others, presumably only some of them require employees' emotional labour. This distinction is compatible with Hoschshild's original characterisation of emotional labour, although it deviates from some of the later scholarly works which followed her.

Referring back to the complaint handling typology, Hochschild's notion of emotional labour is compatible with a therapeutic model, rather than with a fairness model. To reiterate, a fairness model of complaint handling involves reliance upon intuitive moral labelling of firms and complainants. Thus, it entails the employment of 'genuine' feelings. The fairness model of complaint handling sharply stands out against a Weberian rational form of bureaucracy. In contrast, emotional labour, or a therapeutic model of complaint handling, entails the bureaucratisation of employees' display of emotions (Putnam and Mumby, 1993).

The argument, which I develop below, is that adjudicators did not just aim to persuade complainants, using a personalised writing style and persuasion strategies. They further aimed to attain consumer consent and satisfaction by physically absorbing complainants' anger and disappointment, while suppressing their own emotions.

B. **Adjudicators' decisions – thick description of two cases**

In this section I provide the reader with a thick description of two complaint files, which I will later draw upon in the analysis of adjudicators' writing style and rhetoric.

The two cases were drawn from my sample of 143 complaint files.[3]

[3] The two decisions were chosen following qualitative discourse analysis of 15 decisions of 7 adjudicators, where the complaint was rejected. The 15 decisions were chosen to equally represent complaints filed by low status (routine and administrative jobs) and high status (professionals and

The first decision (A) is a representative case. It dealt with a widespread problem – the application of early *surrender fees*.[4] The decision featured common characteristics to many of the decisions in my sample. Large parts of the decision were actually standard paragraphs, inserted as auto-text, which appeared in many other decisions. The second decision (B) dealt with an identical problem of surrender fees. The adjudicator avoided the use of standard paragraphs and put more of his/her individual writing style into the decision. Avoiding standard paragraphs was not unique to this adjudicator, but it was less prevalent. Both adjudicators were experienced FOS employees, with both academic (BA degrees) and financial services background. Both mentored other adjudicators in their respective teams. Although I do not aim to pass judgment on adjudicators' decisions, to my non-professional eye these decisions were not incompatible with the FOS implicit norms in handling similar cases.

1. Decision A – a typical example

The complainant, a pensioner, invested a substantial sum of money in a single premium bond, which she subsequently surrendered given its low performance, incurring Market Value Adjustment surrender penalties.

Her complaint form set down two claims. One, of poor customer service after the sale – the adviser did not respond to her request to meet in order to discuss the bond's performance and possible early surrender. Two, that she was pressurised by the adviser to buy the product to begin with. From her complaint form and letters to the firm one gets the impression that it was the first issue – the sense of inadequacy and

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managers) complainants. While in this section I describe two decisions in detail, later in this chapter I further use extracts from the other 13 cases.

[4] Surrender fees were sanctions that firms imposed upon policyholders who withdrew their investments before the end of their fixed-term contracts.

humiliation of being ignored by the adviser – which stood at the centre of her complaint.

The complainant wrote a relatively large number of letters to the firm before her complaint was rejected. After the case was transferred from CCD she waited over 4 months for her case to be allocated to the adjudicator – substantially longer than the average waiting time - since the relevant firm did not send its file to the FOS. Therefore, *a priori*, the adjudicator had grounds to expect the complainant to be irritated and hard to satisfy. By the measurements applied in chapter six, this complainant would be considered 'aggressive' and potentially persistent. However, following the adjudicator's rejection letter to the complainant, the case was closed with no further correspondence.

On the same day that the firm's file finally arrived the case was allocated to the adjudicator, who wrote his/her assessment of the complaint to the complainant within three days. The adjudicator did not contact the complainant by phone or by mail prior to sending the decision as complaint handlers tended to do when they expected some time to pass between the allocation of the case and their decision. After analysing the complaint, the adjudicator wrote in an internal note:

> "ACTION: reject, bond suitable, [the complainant] could have cancelled bond without contacting rep [the adviser]; MVA [surrender penalty] disclosed at point of sale."

The adjudicator's decision to reject the complaint, which was subsequently sent to the complainant, was framed as a letter addressed to the complainant, 'Dear Mrs.....' signed 'yours sincerely _____, Adjudicator', followed with the adjudicator's direct phone number. The decision had no subtitles and its paragraphs were unnumbered. It was 2½ pages long.

The decision opened with a standard paragraph (inserted into the text using auto-text computer function) which adjudicators commonly used when no prior phone contact or correspondence was exchanged between them and the complainant:

> "I am writing to introduce myself as your Adjudicator and to set out my assessment of your complaint"

The tone of this opening paragraph is informal and friendly ('introduce myself' and 'your adjudicator').

The adjudicator next explained his/her understanding of the complaint, quoting an approximation of the complainant's statements on the complaint form, while interpreting the claims into the FOS's discourse. The claim that the complainant was pressurised to buy the product was interpreted as a claim of the product's unsuitability, and the complainant's allegation that the adviser discarded her request for a meeting was narrowed down to a concern with the devaluation of the bond's surrender value as a result of this delay. The order of the complainant's claims was reversed – the pressure (or suitability) claim first, followed by the poor service claim, which was seen, in FOS terms, as secondary in importance. While demonstrating that s/he read

and understood the complainant's allegations, the adjudicator did not mention what the firm was arguing. This, again, was in common with other adjudicators' decisions.

The adjudicator then proceeded to explain the 'rules of the game', quoting three standard paragraphs, a version of which was included in most decisions when a complaint was rejected. The tone here becomes more formal and legalistic.

"The Financial Ombudsman Service is impartial and independent of both the industry and consumers. My role is to clarify what has occurred based on the evidence presented to me. Evidence is the critical factor, and it is the weight of evidence presented by one or other of the parties that will determine my view of the case.

Where an investor alleges fault, negligence or breach of the rules on the part of an adviser, it must be established…that the complainant's account of events is more probable than not. In addition, where an investor is claiming damages it must be shown that the loss claimed was caused by negligence, fault or breach of the rules alleged. This means that…unless the Ombudsman is persuaded that your account of events is more probable than not, as regards both the fault of the adviser and the loss you claim to have suffered, the Ombudsman will reject your complaint...

At the time the bond was sold financial advisers were specifically required to comply with a number of regulations when giving advice to customers. These regulations included a duty to 'know their customer' before giving any financial advice. Ordinarily this requirement would be satisfied by the completion of a

> 'fact find' at the time of the sale, a document recording the customer's financial and personal circumstances and investment objectives."

The above standard paragraphs indicated two personas – the Ombudsman and the Adjudicator. The adjudicator had the passive, non-confrontational role of clarifying what had happened and it was the evidence that actively determined the adjudicator's view of the case. The Ombudsman should be persuaded by the complainant's account of events. If the complainant, or the adjudicator on her behalf, would fail to convince the Ombudsman – the Ombudsman would *reject* the complaint. While the adjudicator was familiar (and his/her name appeared at the end of the decision), the Ombudsman was alien and authoritative.

The legal hurdle which the complainant had to pass, according to the above, required her to show that she had suffered loss as a result of the adviser's fault, negligence, or breach of the rules. The firm, however, was said to usually satisfy that it complied with the regulations by completion of a 'fact find' (a document completed by the adviser at the point of sale). However, this stated test was loosely linked with complaint handlers' actual perception of their normative decision environment. As explained in chapters three and four, adjudicators perceived complaint handling as a subjective judgment of a product's suitability to the individual complainant, rather than the investigation of a regulatory breach by the adviser. They perceived complaint handling and the FOS's roles as distinct from regulation and enforcement by the FSA. Moreover, they emphasised that 'box-ticking' (i.e. the completion of a 'compliant' fact-find) could *not* in itself satisfy the requirements of advice suitability. Thus, the legal test, as represented to the complainant in the adjudicator's decision, seems

stricter than how it was actually understood by the FOS, while the firm's obligations were presented as lenient in comparison to the FOS's actual requirements.

Having set out the rules of the game, the adjudicator went on to analyse the evidence - the documents which the financial adviser produced at the point of sale (a fact find and the summary and recommendation document) and the firm's commercial literature regarding the specific product. With regard to the former s/he asserted, switching to professional retail investment jargon:

> "The fact-find …*states* that you *wanted* income and growth from your capital and *describes* your attitude to risk as 'low/medium'….
>
> The 'summary & recommendations' document, *which has been signed and dated by you to confirm your agreement with the content, states* that you *wanted* advice on investing over the medium to long term and that after being advised …you *decided* to invest …" (my emphasis).

Note how the documents – the fact find and the 'summary and recommendation' – are personified. It is the documents, rather the firm or the adjudicator, that 'state' and 'describe' what has happened at the time of sale. The adjudicator further quoted the warnings in the firm's commercial literature, which was supplied to the complainant at the time of sale, about the application of penalties for early surrender. All in all, the adjudicator here emphasised that, according to written documents, the complainant acted upon her choice and free will and signed the documentation to acknowledge that. Thereby – in an understated way – undermining the complainant's argument that

she was pressurised to buy the product. While the adjudicator emphasised that the complainant signed the 'summary & recommendations' document, a reader who is familiar with retail investment would have noticed that the adjudicator did not mention the 'fact find' in this regard. This was because the 'fact find' was not signed by the complainant in this instance and because the two documents contained different sets of information. Once describing the evidence, the adjudicator reached a conclusion, which was conveyed in the same retail investment jargon:

> "On the basis of the above information, I would regard a with-profit bond to be suitable for an investor with a low to medium attitude to risk and the objective of achieving income and growth on their capital over the medium to long term."

Presumably, at this point the adjudicator should have halted – s/he has set the boundaries of the dispute, declared the substantial legal test and the evidence rule, assessed the evidence and thereafter reached the conclusion that the bond was suitable to the complainant given her documented attitude to risk. However, the adjudicator then took a step back, blurring the conclusiveness and any moral implications of the above conclusion. The adjudicator emphasised the constraints to which s/he was subjected in assisting the complainant given the evidence from the time of sale and the absence of contradicting evidence to support the complaint. S/he wrote:

> "Your statements on the pressure applied by the representative are evidence I can take into account *and I have no reason to doubt those statements*. However, in the absence of any evidence to support your statements *I have no option* but

to assess the suitability of the bond on the basis of the information available from the time it was sold. As I have stated above, that evidence shows that the bond was suitable given your stated objectives and attitude to risk, and that the risks of early surrender were disclosed. Therefore I have not seen any evidence from the point of sale to show that the bond was unsuitable." (my emphasis).

The adjudicator further discussed the complainant's claim of being ignored by the adviser and dismissed it as irrelevant. S/he did, nevertheless, empathise with the complainant's feelings in this regard, although not very convincingly.[5] S/he wrote:

> "Although I can fully appreciate your frustration at the problems you encountered when attempting to meet with the representative, if the meeting had taken place the representative could not have advised you to surrender the bond and could only have informed you of the surrender value. As you were in possession of the above contact details for [the firm] it would have been possible to get that information without contacting the representative."

The adjudicator closes, reverting back to informal language, with an apology that given the evidence constraints s/he was *unable* to recommend upholding the complaint. Note that the harshness of the word "reject" is avoided.

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[5] Presumably genuine compassion would have taken the form of 'how horrible this must make you feel – I am really sorry', rather than 'I appreciate your frustration'.

> "Because of this, I *regret* that I am *unable to recommend* that your complaint should be upheld."

Finally, the adjudicator acknowledged the complainant's anticipated disappointment and opened a door for further correspondence, shifting responsibility for the closure of the case to the complainant:

> *"Although I appreciate that this is likely to come as a disappointment to you, I nevertheless hope that my explanation is helpful.* However, if you have any new points that you consider we should take into account and which you believe would make a significant difference to the outcome of your complaint, please let me have them by [within 14 days]. If I do not hear from you by [within 14 days] I will assume that you do not wish to take the matter further with us, and I will let the firm know." (my emphasis).

2. *Decision B – taking informality one step further*

The complainants – a retired pensioner and a housewife – invested in a single premium bond. This had few 'exit points', wherein the couple could have withdrawn their investment without incurring penalties. They missed the relevant 5-year exit point and therefore incurred exit penalties upon surrender of the policy. Their complaint to the FOS was that the firm should have alerted them to cash-in the bond on time.

Shortly after being allocated the case the adjudicator sent the complainants a standard acknowledgment letter. Two weeks after sending this letter s/he called the complainants to discuss the case over the phone. On the following day s/he sent them a written decision by mail. The decision was relatively short and in a letter format. It avoided the use of standard paragraphs and was relatively jargon free. It opened with a reference to the previous day's communication:

> "I refer to my telephone conversation with Mr [complainant]…I am writing to confirm our discussions about your complaint.

The adjudicator summarised the complaint as expressed in that phone conversation, as 'lack of discussion' between the complainant and the firm:

> "Your complaint relates to the lack of discussion concerning the Market Value Adjustment Factor (MVA) applied to the with-profits policy upon surrender by yourselves recently."

The above lack of discussion, between the firm and the complainants, stands out against the communication/discussions between the complainant and the adjudicator. The phrase "we discussed" and "our discussions" appears three times in the decision. For instance:

> "*We discussed* the reasons why your complaint cannot succeed, in particular the weight of evidence in relation to documentation held by the firm detailing the

> fact that the provider…could apply a MVA in the future in times of poor performance *or a lot of people leaving the fund*" (my emphasis).

Note the usage of the casual phrase "people leaving the fund", as opposed to the conventional life assurance term "early surrender". Similarly, the expression "I understood", with reference to the complainant's arguments and actions, appears twice, stressing that the complainant was listened to, that his arguments were considered, and that the adjudicator approved of his actions as a reasonable response to the situation. For instance:

> "I confirmed I understood the reason why you encashed the bond when you did as you were concerned over the performance and the possible future performance and future application of further penalties. However, I explained that I could only base my decision on the evidence available and that demonstrates that you were made aware of the MVA in the documentation and, because you had not sought further advice from [the firm] prior to encashment, there was no obligation on them to provide you with further advice at the point when you were looking to surrender the contract."

The adjudicator's assertion 'I confirmed I understood the reason why you encashed the bond when you did' is sensitive to the fact that complainants, as revealed in many complaint forms, felt shame and guilt for making wrong financial choices with adverse implications for themselves and their dependents.

Finally, the adjudicator acknowledged the complainant's disappointment, invited further correspondence and stressed the provisional and informal status of the decision:

> "I know our conversation came as a disappointment to you, however, if you come across any additional evidence then please feel free to send it in to me. I will then review it and see if it changes my view. I will now close my file but can confirm that it may be reopened if you can provide the above and it changes my view."

C. Adjudicators' writing style – purist, impurist or other?

As demonstrated above, adjudicators' decisions were structured as two- to three-page letters, addressed to the complainant, using first and second persons. In comparison, when drafting final decisions for the ombudsmen's signature, adjudicators referred to the complainants in third person. Hence, while adjudicators' decisions were directed to the complainant, ombudsmen's decisions were addressed to both sides of the disputes and already with one eye to the court in case of judicial review.

If the complainant was represented by a professional third-party (rather than a family relative), some adjudicators would still write directly to the complainant, sending a copy to the representative, rather than the other way around.

Adjudicators' writing tone, when compared with judicial style, was friendly, personal and empathic. Adjudicators rarely referred to statutes, nor quoted previous ombudsmen's decisions. Their decisions were aimed to communicate their judgment to the complainant, rather than to contribute to a general body of law.

While adjudicators stressed the importance of facts as the basis of their decisions, whenever possible they avoided making a conclusive determination of credibility. Rather, they used a balance of probabilities rule, avoiding reliability findings that were likely to offend the complainant or the adviser in the case of an IFA.[6]

Adjudicators were guided to use simple, jargon free, language. The FOS decision style guidance instructed them:

- "Be careful with abbreviations, acronyms and jargon. They might have led to the misunderstandings that caused a customer to complain about a firm in the first place. If you can't avoid them — always explain what they mean…
- Don't use legal or Latin expressions unless you know the reader will understand them...
- Phrases such as 'please be advised that …' sound bureaucratic. Use everyday words and phrases" (Decision style guidance, FOS intranet, January 2004).

Still, in practice adjudicators' core reasoning was typically conveyed in professional terminology. Moreover, if an adjudicator's decision was challenged, the adjudicator's

[6] Firms' complaint handlers were not personally involved in the complaint, since they were not the ones who conducted the sale. However, in the case of an IFA it was likely that the person who handled the complaint was personally involved in the execution of the reviewed sale. Consequently, these cases were perceived as both financially and emotionally more complicated for firms to accept if a complaint was upheld.

letter to the complainant was easily converted into an ombudsman's formal decision, using the same core arguments, while reverting to third-person and to a semi-judicial format. Last, it should be emphasised that the informal structure of adjudicators' decisions – a letter format – and the statements of acquaintance and empathy were standardised auto-text phrases, authorised by the ombudsmen. That is, they were a standardised imitation of personal, informal communication.

All this suggests that while adjudicators' decisions differed from pure formal judicial style, they did not conform to the informal impure style either. Most adjudicators' decisions were written in a distinct style wherein professional discourse was wrapped in a standardised imitation of informal, personal communication. This standardisation saved adjudicators the costs of creativeness that would have been required by impure writing style. Only a few decisions, such as decision B, came closer to a genuine form of informal, jargon-free communication with complainants.

D. **Adjudicators' rhetorical strategies and emotional labour**

Above, I classified adjudicators' dominant writing style as a standardised imitation of a personal, informal, communication. In what follows I set to further demonstrate that complaint handlers perceived, and employed, their written decisions and voice-to-voice communication as means of persuasion and socialisation, aiming to attain complainants' trust, consent and satisfaction. I describe various forms of persuasion strategies (distinguishing self-representation, pathos and logos) and emotional labour. Additionally, I demonstrate how ombudsmen's review of adjudicators' decisions was effectively converted into a mechanism for dealing with those complainants who were not satisfied through persuasion and emotional labour.

1. Complaint handling as persuasion and communication

Complaint handlers perceived communication and the persuasion of the losing side as central to their role. Decisions were perceived as more than a written thought-process, conducted by the adjudicator in search for the *right* decision – they were explicitly seen as a form of communication and persuasion. In the following extract from the abovementioned decision training session, participants interpreted the essence of a 'good decision' in terms of persuasive communication, incorporating strategies of self-representation, pathos and logos. The alternative possibility, according to which a 'good' decision might be one that is professionally correct was not complaint handlers' key criterion.

> Ombudsman 1 asks what's a good decision.
>
> Complaint handlers: clear; technically and grammatically correct so as to give confidence to the person who receives it that it was investigated properly; logical; demonstrating that all the relevant factors were taken into account; persuasive...tactful and sympathetic with the complainants' position.
>
> Ombudsman 1: I think sympathy is very important (paraphrase, decision training, April 2004).

The guidance, which was distributed to complaint handlers following the above discussion, equally emphasised the communication and persuasion aspects of good decisions:[7]

> "Our objective is to produce decisions that are:

[7] The module referred to both adjudicators' initial view and ombudsmen's final decision, and to both the scenarios of upholding and rejecting complaints.

- Correct and free of mistakes

- Objective and impartial

- Confident and authoritative

- To the point and persuasive

- Polite and sympathetic

It should be apparent [that]:

- We understood the complainant's complain

- We listened to what both sides said

- We know what we are talking about

- Why the loser lost" (decision module, April, 2004).

Two adjudicators, whom I interviewed, specifically referred to their decisions as a sales process, wherein they sell the decision to the losing side (A5a, A9). The ombudsman (referred to above as ombudsman 1) also made this analogy, during the above training session:

> A good decision, s/he tells the adjudicators 'is when the losing side understands why they lose. *We are trying to sell a decision*' (paraphrase, decision training session, April 2004) (my emphasis).

More broadly, complaint handlers perceived *communication* of their decision to the complainant as equally important to reaching a decision. To recap, this was evident from the criteria for 'quality' as depicted in chapter five, which perceived communication as integral to quality. Complaint handlers frequently claimed that most complaints were professionally straightforward, involving simple and recurrent

issues. It was communicating those decisions to the complainants and getting them to accept the rejection of their complaint that they perceived as more challenging. Consequently, complaint handlers found it especially gratifying when complainants who *lost* their case thanked them for the good handling of their case. For example, in the abovementioned decision making session, a veteran adjudicator remarked: "it is much more satisfying to get a thankful letter from a complainant who lost, rather than somebody who got rewarded a sum of money". Equally, in another instance, a team manager and his/her administrators were all delighted when a young adjudicator shared with them her phone conversation with an elderly complainant who called to thank her after she rejected his case.

2. Gaining consumers' confidence – self representation techniques

Emphasis upon the FOS's independence, and the self-representation of adjudicators as not only meticulous and professional, but also as inclined to take the consumer's side (if the evidence allowed), featured systematically in adjudicators' communication with complainants.

Emphasising the FOS's independence from firms

For the FOS to gain complainants' cooperation and satisfaction it was imperative that consumers be assured of the organisation's and the adjudicator's independence from firms.[8] The following adjudicator summarised his/her understanding of why it is that most complainants avoided challenging adjudicators' decisions:

[8] Firms' complaint handlers, in their decisions, employed a similar strategy, using a language that distanced them from the firms' advisers, implying their independence.

> "People [complainants], generally, they've been told once by the firm 'you don't win'. So then they come to us. And, ultimately…if they accept that we're an independent body…aren't working for the firm…then they will largely tend to accept the conclusions reached." (A7).

As decision A demonstrates, adjudicators' decisions normally contained a standard paragraph, which declared the FOS's independence from both firms and consumers. In phone conversations, complaint handlers repeatedly emphasised the FOS's independence from firms. Three interviewees referred to the importance of the appearance of independence (in addition to the FOS's actual independence). For example:

> "I don't like [it] when firms write to me using my first name simply…suggesting… an informal relationship [with the firm]. If I was a complainant I wouldn't like that. It does look a little bit too close …Complainants have picked up on it in the past where we've asked a company for response, [and the firm answered]…for example 'dear [the adjudicator's nick name]' bla bla. It does create the wrong impression. We are independent, we are asking for the right information. It's not practical to talk to somebody [from the firm] over the phone Mr. this Mrs. that. It's not. But…in correspondence …The danger is that if it looks too informal in writing they [the complainants will] jump to the wrong conclusion" (A1).

In addition, as illustrated in both decisions A and B, adjudicators demonstrated their independence from firms by putting their emphasis on describing the complainant's

arguments, while either ignoring firms' claims or discussing them in considerably less detail and space than those of the complainant. In addition, adjudicators usually refrained from simply adopting the firm's line of argument for rejecting the complaint. Moreover, a member of the FOS support unit, which provided decision training services to firms as part of the relationship-building with them, explained that s/he requested firms not to copy the FOS's standard paragraphs, so that FOS decisions would maintain their distinctiveness (S1).

Demonstrating mastery of the complaint

Adjudicators demonstrated to their readers that they were familiar with the case and had invested time and thought in its investigation and consideration.

Adjudicators often declared their care in assessing the complaint, such as:

> "I regret that I am unable to recommend that your complaint should be upheld. I realise you will be disappointed, but I did investigate your complaint, and all the evidence presented carefully before arriving at this view."

They proved their knowledge of the details, and especially their acquaintance with the complainant's arguments. As demonstrated in the analysis of decisions A and B, decisions commonly opened with an elaborated statement of the adjudicator's understanding of the complainant's arguments. In the decision training session, referred to above, an ombudsman instructed adjudicators that it is good practice, whenever possible, to use complainants' own wording when describing their complaint so as to assure them that the adjudicator read their complaint. The

adjudicators were further guided to discuss a complainant's argument, even if they considered it to be irrelevant, if it seemed that otherwise the complainant would not be satisfied. An ombudsman explained this to complaint handlers:

> If the complainant insists on something irrelevant we address that, because if not they'll keep coming back (paraphrase, decision training, April 2004).

Another strategy, which was manifested in complaint files regarded management of consumer perception of the time invested in handling their complaint. A team manager explained that if adjudicators estimated that a case could be decided within a few days from its allocation to them they should avoid sending the complainant the regular acknowledgment letter, which informed the complainant that the case had been allocated for investigation. Otherwise, the complainant might conclude from the short period between the acknowledgement letter and the decision that the case was not adequately investigated (M4). I have shown how this strategy was adhered to by the adjudicator in decision A.

Advocacy

While the FOS emphasised its independence from both sides, adjudicators' decisions were written as if they were predisposed to uphold the complaint. Adjudicators frequently wrote, when rejecting a complaint, from the position of the complainant's advocate, who was constrained by the lack of supporting evidence. Consequently, when adjudicators rejected a complaint they passed the buck to the complainant for not providing them with appropriate evidence. An adjudicator explained this process as follows:

If s/he rejects the complaint, s/he'll call the complainants before sending his/her decision out and explain to them his/her reasons. S/he'll start by saying that s/he looked for grounds upon which s/he can uphold the complaint and convince the firm, but found none because the evidence on the file refutes these grounds. This gives them the impression that s/he's on their side (paraphrase, A5b).

Another adjudicator remarked:

> "Rather than saying, 'You've got no chance, mate,' I'll say something along the lines of, 'In order for your complaint to succeed, I would need to see this, that… It's not a case of me not believing what you're telling me. It's the fact that I can't uphold it because you haven't provided this evidence'" (A4).

As shown, decisions A and B above likewise emphasised that adjudicators were constrained by the lack of supporting evidence.

3. Managing consumers' expectations – setting the right frame of mind

Satisfaction and disappointment are a function of expectations (Hirschman, 1982, Ch. 1). In Aristotle's words: "we are angered if we happen to be expecting a contrary result; for a quite unexpected evil is especially painful" (1379a). As discussed in chapter five, complaint handlers commonly alleged that consumers' expectations for redress were being raised by the media to unrealistic levels, and that as a result consumers were more disappointed if their case was rejected. Consequently, complaint handlers aimed to reshape complainants' expectations so that they would be amenable to accept delays in the handling of their case and an adverse decision in case

of rejection. Two major strategies were manifested in the data – setting realistic expectations and avoiding prematurely raising expectations.

Setting realistic expectations

One strategy which complaint handlers referred to was the need to adjust down unrealistic consumer expectations. The adjustment of expectations could regard the FOS's role, processes, powers, evidence rules and the probability of the case being upheld. Below are a few examples as to the uses of this strategy.

I have already demonstrated, in the context of decision A, that adjudicators tended to describe the rules of the game – complainants' vs. firms' burden of proof – in a way which portrayed them as less pro-consumerist than they actually were. Similarly adjudicators, in interviews, explained their common assertion to consumers that the FOS is not a 'consumer champion', as an adjusting-expectations mechanism. An adjudicator explained this practice:

> "The complainants tend to view us as being very much on their side… that's some kind of preconceived notion which is possibly forged by the press…we have to make it clear to them that…we may not necessarily adjudicate on their side" (A6).

Another adjudicator referred to the need to clarify to consumers that the FOS would not take revenge on the firm on their behalf. (A similar assertion was made on the FOS's website in response to 'frequently asked questions'.) This shows complaint

handlers' awareness that complaints were not motivated solely by expectation for pecuniary redress, but equally by anger and retribution.

> It's important to talk to the complainant in advance…Because people think that once we open the file we will kick firms, punish them, cross-examine them. So they have to know in advance that we don't (paraphrase, A5b).

One interviewee referred to the need to lower consumer expectations with regard to the complaint's expected outcome:

> "If a complaint is going to fail, if you can set the complainant's expectations – so you don't build them up to think they are going to win. You kind of let them think from the beginning…you will look at it but it would be difficult for them for the case to succeed, then they are more likely to accept it if that's the case" (O1).

A member of a support unit, which conducted the consumer satisfaction survey, gave an example of the unit's contribution to setting realistic consumer expectations:

> "There was a leaflet that used to go out to people who phoned up CCD with an endowment complaint, that seemed to show that everyone had won their case It had some examples, and each example…[was of] people who had won. And I said [to those responsible for the publication], 'You can't do that. You have to show where a case has been rejected, as well.' So, they've done a change there" (S4).

Consistency of representation

In addition, complaint handlers avoided prematurely raising consumer expectations. They stressed the importance of consistency in the FOS's representations to complainants regarding the prospect of their case to succeed. An executive explained this:

> The main difference between the FOS and [the] tribunals is that in our case people don't just get a decision one day out of the blue. We tell people right from the start what our decision will be at the end of the process – to prepare them for this. This is why we hardly need to go to [an ombudsman's] formal decision. We can make most of our decisions informally (field notes, paraphrase, E6a).

Consequently, complaint handlers aimed to avoid a situation wherein an ombudsman would have to reverse an adjudicator's initial view to uphold a complaint. Adjudicators were encouraged to seek an ombudsman's advice if they were unsure what the ombudsman's view of the case would be in case of a review. An ombudsman explained this:

> "I might disagree [with an adjudicator's decision]…which is always *horrible*, particularly if the adjudicator has upheld the complaint…So I then reject the complaint… complainants don't like that" (O1) (my emphasis).

While inconsistency between adjudicators' and ombudsmen's decisions sometimes, although rarely, occurred, adjudicators were careful to avoid inconsistent

representations in their own communication with complainants. The standard adjudication procedures, as set to adjudicators by the organisation, supported consistency of representation. Adjudicators sent their decision to the losing side, whether the firm or the complainant, and did not inform the winning side of their positive assessment of the case until either finalising negotiations with the losing side, or reaching a point where they referred the case to an ombudsman. As a result, complainants were not informed of an adjudicator's inclination to uphold their complaint and of negotiations with the firm on their behalf so that their expectations were not prematurely lifted. This procedure allowed adjudicators to flexibly back up from an initial inclination to uphold a complaint if confronted with new information. The example below from a file in my sample illustrates the advantage of this strategy. The following fairly neutral letter was sent by an adjudicator to a complainant while awaiting the firm's consideration of the adjudicator's view that the complaint should be upheld:

> "Further to my letter of [date]…I can confirm that I have written to [the firm] to request clarification of certain points in relation to your complaint.
>
> I have requested that the firm deal with my enquiry as a matter of urgency. I shall contact you again when in possession of a response."

In the above case, the firm resisted the adjudicator's decision against it and provided further evidence in support of its position. Consequently, the adjudicator accepted the firm's stance and sent a rejection letter to the complainant. The complainant – who was unaware that his complaint was on the verge of being upheld and was not

presented with the adjudicator's argumentation as to why the case should be upheld – accepted the rejection with no further questions.

Another example demonstrates how, in the occasional case, the adjudicator's caution about raising a complainant's expectations resulted in the complainant's withdrawal of her complaint, while the adjudicator was actually inclined to uphold it. In fact, the complaint was part of a batch of cases, almost all of which were decided in favour of the complainants. The complainant, a widow in her 70s, invested in a single premium bond, which the FOS evaluated as of higher risk than that asserted by the firm. The adjudicator, upon reviewing the case, noted to himself:

> "Thoughts: – do Q's [questionnaire] to inv [investor] re understanding of ATR [attitude to risk]; - inclined to uphold despite RWL [documentation from the time of sale] stating medium risk OK"

The adjudicator then wrote to the complainant's son, who represented her, asking for a few clarifications regarding the adviser's annotations from the time of sale, which suggested that the complainant was aware of the involved risks. Given the adjudicator's inclination to uphold the complaint, further information gathering was likely to strengthen this inclination. In order to avoid prematurely raising expectations the adjudicator wrote:

> "Given that [the complainant's] complaint is largely about her unawareness of the risk involved and the inappropriateness of those risks it is difficult for me to see a way in which this complaint can be upheld.

However I would appreciate any further comments [the complainant] might like to make about her understanding of the term medium risk and her recollection of the circumstances surrounding the completion of the document referred to.

In the absence of persuasive argument from [the complainant] I believe that it may not be possible to uphold her complaint."

Following the above letter, the complainant's son informed the adjudicator that his mother had decided not to pursue the complaint further given the adjudicator's assessment.

4. Voice-to-voice communication

The FOS's complaint handling computer programme prompted adjudicators to constantly communicate with complainants. Automatic messages indicated to adjudicators when letters were due to be sent to the complainants, informing the latter of the progression of their case (or apologising for delays). Additionally, adjudicators were urged to talk to complainants over the phone, relate to them on an informal basis, and were praised if they were 'competent on the phone'. Talking to consumers over the phone served at least three different ends. First, it was an opportunity for adjudicators to represent themselves to complainants and to gain their confidence and set their expectations from the complaint handling process, as discussed above. Second, complaint handlers emphasised the importance for complainants to have a human contact after a prolonged wait and a frustrating interaction with firms. Third, voice-to-voice communication allowed adjudicators to assess complainants'

persistence, their amenability to be persuaded and to mould the complaint handling process accordingly.

An ombudsman, who was formerly an adjudicator, made the case for talking to consumers over the phone as a form of socialisation with the complainant:

"It's important to talk to… the complainant and what I used to do and some adjudicators do is when you get a new case you ring up the complainant say 'I am sorry you had to wait for us but I just got your case and I am going to look at it and I just want to confirm I am understanding your complaint'. And if you are really good about that, they like you when you do that, then they got a point of contact. I think the adjudicator who uses the phone a lot is probably going to be more successful than the sort who writes letters" (O1).

Another ombudsman similarly explained the importance of being aware of complainants' need to have a human contact. This ombudsman more generally perceived communication as the most important skill for adjudicators.

> "People have been waiting to bring their complaint to us… they haven't had any human contact so to speak…it might just be that they haven't understood something …it's easier to understand something on the phone. So we do that often." (O8)

While the above interviewees focused on socialisation or on making the complaint handling process more humane, the following adjudicator explained his/her use of

phone conversations as a tool to learn about the complainants and to assess their expected persistence:

> "Speaking to someone on the phone…You can probably get a good idea from the first ten to fifteen seconds of a phone call, maybe less, about what the conversation's going to be about, what the general demeanour of the person is, whether they are aggressive, whether passive, or passive-aggressive, whether they'd be manipulative" (A6).

Finally, another adjudicator explained conversation over the phone with complainants as a form of self-representation, socialisation and assessment of the complainant's set of mind:

> "By the time the complaint will come to us as an adjudicator … [the complainants] have been waiting a long time. People often want to hear a human voice …the Ombudsman Service can …be perceived as being a bit like a court, quite intimidating… for a lot of complainants. And so to ring them up and speak to them and…for them to hear that you're just an ordinary person who's deciding their complaint – that can often be quite helpful…it gives you much more flexibility to understand where they're coming from…You can generally tell from people whether they are open to persuasion or whether they're so closed minded in their belief that they're right that, ultimately, you think, 'I'm not going to be able to close this, because he just won't accept what I say.' And it's an extraordinarily effective tool for working with, really" (A7).

5. Sympathy

Complaint handlers were sensitive that complaints, irrespective of their likely outcome, reflect complainants' discontent. Demonstrating sympathy with the complainant's situation was another principle that complaint handlers adhered to in order to satisfy complainants and to render them more open for persuasion. An adjudicator explained:

> "You've got to remember…that if somebody's complained to us, then they've obviously got a real grievance. Whether that grievance is justified or not is not necessarily the issue here...if they've brought it as far as this…there's a reason they brought it –…because they're upset, either by the firm's complaint handling or by the [life assurance] policy initially. So, you have to bear that in mind" (A3).

As demonstrated in decisions A and B, complaint handlers' communication consisted of a standard paragraph, acknowledging the complainant's anticipated disappointment at the rejection of their complaints. In addition, adjudicators sometimes acknowledged that a firm's action, while not forming a basis for compensation, was nevertheless inadequate. This way they both distanced themselves from the firm and gave complainants some satisfaction that their complaint was justified. The FOS's internal research found that such assertions were associated with higher consumer satisfaction (S4). The following comment of an adjudicator in a rejection letter to the complainant illustrates this strategy:

> "I have noted your comments about being sent a… response letter [from the firm] intended for someone else and would agree that this is not indicative of the levels of professionalism and service that you could reasonably have expected…I appreciate that you will have little or no faith in the firm's investigation since the letters appear to be identical, so I would like to take the opportunity to assure you that I have considered all your representations before reaching my views."

6. Pacifying

Complaint handlers further referred to the need to appease complainants and avoid confrontation with them, in order for them to be able to let go of their case if rejected. A decision module instructed complaint handlers:

> "We choose our language carefully, avoiding phrases that will stir the parties' emotions. And we make sure we do not provide scope for any 'misunderstandings' by troublesome parties who will seek out any excuse to keep matters going" (decision module, April 2004).

The same logic was manifested in the FOS's decision training to firms' complaint handlers, where firms were advised to avoid recourse to a legalistic tone, to apologise when rejecting a complaint and to generally pacify the tone of their decisions (S1).

Below I indicate a few specific pacifying strategies that came up in interviews and files.

Avoiding questioning complainants' credibility

As already mentioned, in the context of decisions A and B, adjudicators deliberately avoided assessing the credibility of complainants' factual statements. For instance, an adjudicator wrote to a complainant:

> "I do not doubt your honesty and integrity in this matter. It is certainly not a test of who is more likely than not to be telling the truth. It is a case that you are recollecting a conversation you had some four years ago and these assertions have been reasonably rebutted by the person to whom you have attributed them. I see nothing in [the adviser's] background that would make me believe that she had intended to deliberately mislead you and indeed cannot see that it would be in any way in her interest to do so. In all, whilst I appreciate that you will be disappointed, I hope you will understand why I have taken the view that I have."

One adjudicator explained the logic behind the tendency to avoid credibility findings:

> "I once wrote an adjudication, [which] got complained about. This guy was a head teacher – he was very much trying it on. There was no valid complaint… and he withheld a lot of documentary evidence. I referred to this documentary evidence in my letter rejecting his complaint, and saying, 'This is what the firm provided me,' and I said something along the lines of, 'of which you didn't provide me copies…,' and he took umbrage to that...he basically turned round and said I was calling him a liar and that case got looked at [by] the Service Quality Team…You've got be wary of that…tact and diplomacy is...good…let people down gently. I don't like to upset people at all. I mean, even if you

think they're a rotten stinking liar, you've got to say, 'Look, I can see where you're coming from, but it's not going to win'." (A4).

Screening unpleasant evidence

One adjudicator explained that s/he, as a mentor of new adjudicators on his/her team, guided them to avoid, if possible, showing complainants insulting evidence that would provoke them.

"There may be things on the file, say, a report from the representative [who sold the policy to the complainant]…and there may be some comments within the report which, if we told the complainant, may sort of escalate problems further. There may be scandalous remarks in there about the truth and the ability of the complainant to tell the truth, and issues that really wouldn't help us to resolve a complaint" (A7).

Avoiding contact

While adjudicators perceived voice-to-voice interaction with consumers as vital to gaining their consent and satisfaction (as discussed above), they differed in their views as to when such contact should be conducted and when it was more likely to exacerbate consumers' frustration and disappointment. The following adjudicator, for instance, explained that s/he found it ineffective to contact people *before* sending out a rejection letter:

"Some people [i.e. other adjudicators] will actually speak to…[the complainants] before they issue their view, but I find that if you do that, people

are already more argumentative…So unless you've got a very good cast-iron reason why that case doesn't succeed, speaking to them earlier rather than later, can exacerbate the situation rather than calm it down...*It's not that I'm not competent on the telephone*, I am, but I've learned from experience that it doesn't always help your case to ring someone beforehand to discuss what you're going to say. And if they ring you, then it's your opportunity to explain to them exactly why you've made the decision that you have. You have to give them the chance to digest what you're saying, which isn't always possible if you ring them first without them having something substantial in front of them" (my emphasis) (A3).

It is worth noting the adjudicator's apologetic tone – 'it's not that I'm not competent on the telephone, I am' – which indicates the general importance that adjudicators and their managers assigned to informal communication with complainants.

Adjudicators were allowed, with authorisation of their managers, to exclude a closed case from being sampled for the consumer satisfaction survey, if they felt that this would result in further stirring of the complainant's emotions. A team manager explained:

> If someone is just a lunatic, deliberately obstructive, there is no reason to stir them, it's just not worth it. They'll start the argument all over again. You don't want to exacerbate the situation, to start them off again and go back to correspondence (rephrase, M4).

Similarly, in response to my request to contact complainants' whose case was closed, as part of the research, I was told by an executive that this was problematic, since it might raise complainants' expectations that their case could be reopened.

7. Explanation

The above strategies emphasise self-representation and pathos. Five interviewees, and the above-quoted ombudsman during the training session, referred to the importance of complainants feeling that they got an adequate explanation for why their case cannot win. One adjudicator explained this as follows, linking pathos and logos:

> "Explanation…is the most part of what we do. We're not trying to tell them that they're going to lose…you certainly don't use language that has negative connotations to it, so you wouldn't ring the complainant and say, 'I've looked at your case and I think you [should] lose,'…because that's just, straightaway, a red rag to a bull. You've got to try to really empathise with their position, sometimes sympathise with their position, also, but you have to give them a clear understanding as to the reasons why the complaint is not going to be upheld, on this occasion, based on the evidence that you've got. So, you've got to make them understand what sort of rules were in place at the time, what were the principles, why is this policy, or this advice, deemed to be suitable by us, even though the complainant is steadfast in their belief that it was totally wrong. *So, it's … an explanation process, rather than a telling process, really*" (A7).

Another adjudicator explained the importance of explanation for achieving consent:

"You also have to be aware that people want a full answer. So, if you give them a one page view that just says, 'No, you don't win,' they're going to come back and they're going to be argumentative. Whereas if you give them the full circumstances, explain to them why you've come to the decision that you've come to and what you've based that decision on, they're more likely to agree with you. As adjudicators get more experienced, telephone calls are helpful, as well. If you can discuss a case with someone, let them know you understand what their complaint is, that they don't win 'because'." (A3).

8. Matching explanation to the individual complainant

Complaint handlers further emphasised the importance of tailoring their explanation to the expected ability of the complainant to understand it.

For example, during the above decision making training an ombudsman explained that 'it is …important to match explanation to the complainant's ability' and gave 'a pejorative example of an adjudicator who used a standard paragraph on how a with-profits policy works when the complainant was a professional actuary' (rephrase, decision training, April 2004).

Similarly, an adjudicator suggested that while people required an explanation, it was useless to provide them with documents that they were unlikely to understand.

"It's pointless…sending the complainant everything that you've got [on the file], because often, to the complainants, it won't mean very much…the complainants …will then feel…flooded by all the information. Much of the information they

> may already have had, anyway, and if it's not going to alter the outcome, then it doesn't make any difference to them seeing it or not, really" (A7).

A member of the consumer satisfaction support unit explained that the FOS's internal experimentation with the effectiveness of decision wording suggested that complainants of high socio-economic group required more explanation in order to be satisfied:

> "You've got to have a good explanation of why the case has been rejected, particularly for social groups higher up the scale. Some of our customers are …quite bright people and quite well-heeled, and they will not take a standard rejection without explanation, they want to understand. So…their [decision] letter has got to be detailed" (S4).

What the above and additional evidence seems to suggest is that complaint handlers perceived explanation (logos) as more important with regard to educated and well-off complainants, assuming that self-representation and pathos were less effective with this group.

Extracts from the following decision illustrate how a decision, directed at an educated and well-off consumer, was likely to differ from the self-representation and pathos rhetoric of decisions A and B. As illustrated below, the tone of the decision was decisive, confrontational and avoided expressions of empathy. It avoided recourse to standard paragraphs, which suggest a greater investment in tailoring the decision to the complainant's specific case.

The complainant, a managing director, invested in a single premium bond. The adjudicator summarised the complainant's arguments, while, in common with other decisions, ignoring the firm's arguments. However, s/he did not go into standard explanations of the FOS's independence, the burden of proof, etc. The adjudicator's assumption was, I believe, that the complainant, given her status, was not in need of such explanation and would find it condescending. Rather, the adjudicator directly confronted the issue of investment suitability:

> "I have considered the suitability of the investment sold to you by the firm and, particularly, whether it was suitable in terms of risk. I have studied the evidence that both parties have presented. This leads me to conclude that the [product] could be accurately described as a medium to high risk and, in my view, that level of risk was generally suitable for an investor in your situation."

The adjudicator next analysed the complainant's circumstances, emphasising the complainant's active involvement in holding, considering and choosing between investment options:

> "Prior to the advice the fact find shows that *you held* £XX in various current and savings accounts and £YY in equity investments. It is noted that *you wished to look* at investing £ZZ and that you did not require a capital guarantee. It is also noted that *you wished* to *consider* investments *but not* savings at the time. I would therefore agree with the firm's view, you *understood* the difference between investments and savings and were *prepared* to place funds outside of

bank deposits in order *to seek* potentially more favourable returns" (my emphasis).

Rather than referring to a balance of probabilities and avoiding credibility findings, the adjudicator directly confronted the complainant's claim that she did not understand the product and was misled about its characteristics. S/he wrote:

"You say that you were very new to investments...However, the fact find indicates that you had invested in [financial products] as long ago as [5 years before the relevant investment]. This suggests you had experience of stock market linked investments. Having regard for your previous investment experience I believe you would have been in possession of sufficient information to make you aware of the nature and operation of the product and its inherent risks before agreeing to proceed."

S/he further explicitly allocated blame to the complainant:

"Even if the representative provided assurances that the investment was secure, as this contradicted what the literature stated, then it should at least have been queried with the firm before the contract was entered into. A cancellation notice would have given you a further period of time to reconsider your decision in the absence of the representative. It was not returned, so it is fair to assume that you accepted the terms offered."

The adjudicator closed the decision without the common expressions of regret and empathy:

> "In light of what I have said, I am unable to recommend that your complaint should succeed. I hope, however, that my explanation of the position is of some assistance. If you think that there are new facts or arguments not previously considered in this case which would make a significant difference to my assessment, please let me have them, in writing, immediately. If appropriate, I will then arrange for the case to be reviewed."

9. Emotional labour – letting consumers release anger and pressure

In addition to the above strategies of persuasion and communication, adjudicators directly engaged with consumers' disappointment. In these interactions, consumers at times took out their anger towards the firms, their frustration with their low-performing investments and their guilt for making bad investments on the adjudicators that handled their cases. Adjudicators were generally expected, or at least tended to, suppress their own anger and indignation and expressed their understanding of consumers' frustration. During the time I spent at the FOS I observed several instances where complaint handlers or administrators communicated with discontented complainants over the phone. What was noticeable about these conversations was complaint handlers' amiable and polite correspondence during these long conversations, which contrasted with their release of pressure once a conversation was over. Indeed, the FOS consumer satisfaction surveys showed a stable nearly 100% score for staff politeness (compared with 70% overall satisfaction score). For example, a field note taken during my pilot study documents:

Next to my desk is an adjudicator speaking over the phone with a complainant (a woman) regarding an insurance product. He is telling her that the ombudsman is independent. They are not covering up for her insurance company. The conversation is long. He keeps saying that he understands that she is upset. At a certain point he somewhat raises his voice and says 'no, but I want to explain this to you'. When he hangs up the woman in the desk next to us (an administrator of the team) says: 'one of those is it?' He answers 'I can understand that people are upset but –' and goes off to make himself a hot drink (field notes, 29.10.03).

The following facetious exchange between a complaint handler and the FOS's senior executives in the course of an intranet discussion depicts the strain of complaint handlers' interaction with discontented complainants. It captures the expectation that adjudicators should hold back their irritation when communicating with complainants, while acknowledging their need to release pressure by other means.

"Q: Although an on-site gym isn't viable, would it be possible to set up a punch bag somewhere? It might be useful after some of the more difficult phone calls...

A: A lot of... [team] managers feel they perform this function" (*management on-line answers to employees' questions*, FOS intranet, July 2004).

Adjudicators recognised complainants' release of anger as an integral part of the process for certain individuals, and a path towards achieving their ultimate consent. An adjudicator explained how s/he responded to abusive behaviour:

"Q: How stressful is it for you [to be talking to complainants whose complaint was rejected]?

A: …It can be stressful for some people [i.e. adjudicators], some people just don't like using the phone…but I find that if you're calm, if you're not argumentative, if you let them whinge, which is generally what they want to do, and just say, "Aha," in the appropriate places, then overall I think it isn't necessarily as stressful as it could be" (A3).

Another adjudicator explained how letting complainants release anger eventually helps settle the complaint:

"Q: Have you ever hung up on someone?

A: No, I haven't, I've preferred to listen to what anyone's saying, even if they're ranting. As long as they're not using too much profanity, then I'll tend to listen to them…You just consider them to be a storm, a big whirlwind, and then they do eventually blow themselves out. And, if you've listened to everything they've said, it gets to a stage where they've really got nothing more to say, and then you've got the chance to explain your point of view. And as long as you can keep it fairly much on an even keel, then I'd say, again, nine times out of ten, you can actually bring the complainant round…*if you can resist the temptation to be aggressive back then it helps the process a great deal*" (my emphasis) (A6).

An executive explained that adjudicators should not be abused and that in a few instances complainants were informed that their file was not going to be handled further as a result of abusive behaviour. At the same time s/he said:

> "We ask…our staff to endure a lot….When they pick up the phone they never know if someone will scream at them, be abusive to them, or cry" (E3).

10. Ombudsmen review for the most persistent

Above I described those strategies that complaint handlers adopted to maximise the satisfaction of *all* complainants. The ombudsmen review process, however, was turned into a mechanism for handling the most persistent complainants from within the FOS's clientele. That is, those complainants who were hardest to satisfy.

Until mid-2002, adjudicators' decisions included a standard paragraph, which explicitly stated the possibility of appeal to an ombudsman for review. Over time, as a result of the increase in the number of complaints and the FOS's *de facto* reluctance to increase the number of ombudsmen, a policy decision was made to alter and eventually omit this standard paragraph.[9] Thereafter, the FOS satisfied itself with describing the two-tier process in documents which were sent to complainants upon filing their complaint, while avoiding reference to this option in adjudicators' decision letters.[10]

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[9] According to an executive (E5) the policy decision was that the option to ask for an ombudsman's review would be omitted from adjudicators' initial decisions (termed 'initial views'), but included in their later adjudication, which was a decision sent by the adjudicator to both sides after the losing side rejected the initial view. In practice, most adjudicators avoided the adjudication stage and either further corresponded one-sidedly with the losing side, or referred the case to an ombudsman's decision.

[10] During this period the ratio of cases that were reviewed by the ombudsmen decreased from 20% in 2000/1, to 15% in 2001/2, 11% in 2002/3 and finally to 8% as of 2003/4. Source: The FOS's annual reports.

Not all consumers were unaware of the possibility to require an ombudsman's review. An assistant team manager explained that a certain firm's high socio-economic client base entailed a larger number of requests for an ombudsman's review:

> "With the complainants [of firm X, which served a high socio-economic client base], because they're so knowledgeable, they know what their rights are, [and] if they know they can take it all the way – they will take it all the way."(M3).

Adjudicators were guided to inform complainants who called or wrote back to them after the initial rejection of their case of their right to ask for an ombudsman's review if it seemed that they were dissatisfied. However, the guidance as to when adjudicators were expected to notify complainants of this option was not straightforward. The following adjudicator described his/her practice to avoid informing complainants of their right to ask for a review, unless it was clear that s/he could not otherwise close the case:

> S/he says that sometimes when people come back to him/her after an initial view s/he would think 'maybe now I should tell them', but then thinks 'well no, just answer their letter, see if they come back once more'. It can be a few letters back and forth until they finally go away. Only if s/he sees that it's no use, they keep coming back, will s/he tell them that s/he will pass the file to an ombudsman if they so wish, emphasizing 'if they so wish', I don't just pass it. Final decision [of an ombudsman] is a lot of work, you know'. You have to pass the file to the manager first, and they may ask you to change it and then to the ombudsman. Changing a decision according to an ombudsman's view is

'changing a work of art'. You've done a decision which in your view is the best you can do, and now it has to be changed and that may take you a lot of time. You can't just cut and paste. People want to see a decision which is different than your initial view. They want to see that the ombudsman looked at their file anew. S/he asks me what other adjudicators do, how many times would they correspond back and forth with a complainant before referring a case. S/he says that s/he wishes that they had some clearer guidance on when cases should be referred, but there is none…S/he once asked his/her assistant team manager… about a case and s/he [the assistant team manager] told him/her to refer it [to an ombudsman]. But there is no general guidance. (Paraphrase, A8).

In effect, what comes out of interview data and analysis of files is that what adjudicators tended to do was to assess complainants' persistence, and whether it was more efficient to keep corresponding with them or to pass the file to an ombudsman.

In an internal on-line discussion between executives and employees, an anonymous complaint handler contested that adjudicators were expected to actively pursue further communication with aggressive complainants whose complaints were duly rejected.

"Q: Why is it that if someone hangs up on you when you are attempting to explain to them further why their complaint has been rejected we have to follow the case up? It seems we pro-actively pursue those that 'shout loudest' when we are just doing our job…

A:…We have to be courteous and maintain a professional approach, trying to see that disputes are resolved.

Q: … the point I was trying to make is that if we have maintained a courteous and professional approach throughout an individual's entire complaint and they are not willing to listen, why is it we then have to write another letter after they have hung up explaining the points we were trying to make on the phone? *It seems we pro-actively pursue people's complaints the ruder they are to us. If they are not willing to listen to our explanation, why do we not then close the case?*

A: We need to show that we have explained why we feel that the complaint should not be upheld, *and have alerted the customer to the opportunity to come back to us if they consider the adjudicator has got it wrong*. In any event we should always confirm in writing telephone conversations when the adjudicator rejects a complaint" (*management on-line answers to employees' questions*, FOS intranet, March 2005) (My emphasis).

An ombudsman explained the rule of thumb which adjudicators should apply when deciding whether or not to refer a case for an ombudsman's review:

> "Q: What's the guidance for the adjudicator, [when] the complainant comes back [after the case was rejected]? They don't actually write why, but they don't agree with the decision….
>
> A: When I'm training people [adjudicators]…If, you read it as a reasonable person, and it looks like they're just having a moan but they're not expecting a further response, then you don't have to do a [final] decision. If it sounds like they're expecting a further response, you should then do a [final] decision, because they're unlikely to be satisfied with a further response from you, as an

adjudicator. So they need it from an ombudsman. That's where I'd draw the line. But, obviously, that's a reasonableness test that everybody's going to apply slightly differently. So, I appreciate some will go one way and some will go the other" (O3b)

The practical test, as suggested by this ombudsman was not just an expected persistence test, but also an expected satisfaction test ("you should then do a [final] decision, because they're unlikely to be satisfied with a further response from you, as an adjudicator. So they need it from an ombudsman."). It is noteworthy that the ombudsman and the adjudicator above (as well as other interviewees), did not articulate the ombudsman review process, in this context, as a form of quality monitoring of adjudicators' decisions. Rather, they perceived the ombudsman review as a means for closing the cases of those complainants who could not be otherwise satisfied.

Hence, it would seem that under conditions of high workload and long waiting queues for an ombudsman's review, the escalation of a case to an ombudsman became a means for dealing satisfactorily with the most persistent and knowledgeable complainants.

E. **Conclusion**

This chapter demonstrated how adjudicators aimed to render consumers cooperative and satisfied when rejecting their complaints. I described adjudicators' recourse to a personalised writing style, pathos and self representation techniques. Going beyond

writing style and rhetoric, adjudicators' voice-to-voice interaction with complainants involved humanising the complaint handling process, providing complainants with explanation and enabling them to vent their anger and frustration.

A rational choice perspective would suggest that adjudicators' focus upon consumer satisfaction was shaped by their interest to minimise their workload and consumer requests for an ombudsman's review. Such explanation would link adjudicators' focus on consumer satisfaction to both their perception of unrealistic consumer expectations and to the incentives created by the target and bonus scheme. According to this interpretation, adjudicators' investment in attaining consumer satisfaction was related to its facilitation of case closure.

However, in practice many complainants were unaware of their right to ask for an ombudsman's review to begin with. In addition, even if complainants had known of their right to request an ombudsman's review, most of them were unlikely to pursuit their case further once rejected by an adjudicator. Hence, when faced with non-persistent and uninformed complainants, adjudicators could have driven complainants away by being unpleasant and by avoiding correspondence with them. In contrast, complaint handlers' *general* alertness to style, rhetoric and emotional labour attests to their effort to achieve consumer satisfaction and consent as a goal *per se*. Information asymmetry could have mitigated challenges of adjudicators' decisions to an ombudsman, but it could not have served as a means for achieving high consumer satisfaction.

The FOS's investment in the attainment of consumer satisfaction is better explained as an attempt to both facilitate case closure (and target attainment) *and* to maximise consumer satisfaction. Complaint handlers' dedication to consumer satisfaction cannot be explained *only* in rational choice terms. It should be understood in light of the FOS's aim for exclusive domain vis-à-vis the courts (see: chapter four) and the centrality of consumer satisfaction as the FOS's meta-measure for its success (see: chapter five). In this sense, complaint handlers' focus on consumer satisfaction was deeply ingrained in their pejorative perception of legalism and formalism. It was also shaped by complaint handlers' client-service (or sales) ethos. Ultimately, the FOS's fervour for consumer satisfaction, as depicted above and in chapter five, was related to complaint handlers' need for a positive image of the public value of their work.

Chapter 8: Firms' cooperation with the FOS as a multi-actor game

Introduction

This chapter analyses the FOS's interaction with firms when upholding complaints against them. I examine the conditions under which firms' cooperation with the FOS collapsed, the strategies employed by the FOS to attain firms' cooperation and their effectiveness.

Rational choice theory anticipates the evolution of strategic cooperation between regulators and regulatees in iterated games. Extension of cooperation theory to the context of complaint handling similarly suggests the likelihood of stable cooperation between firms and complaint handlers.

The FOS had an interest in attaining firms' cooperation with informal conciliation of complaints due to the workload implications of excessive appeals for an ombudsman decision as illustrated in chapter six. In addition, conflict between the FOS and the industry could have put the ombudsman at risk of external intervention due to the City's prominent political status. Equally, there are a number of reasons why we would expect rational financial firms to value the FOS and cooperate with it. First, the FOS provided individual firms with a collective means for managing their relationship with persistent complainants. The ombudsman's investment in managing consumer expectations and containing their dissatisfaction outside the public sphere, as described in chapter seven, was presumably beneficial to the industry. Second, as elaborated in chapter four, firms were under no legal obligation to apply the FOS's decisions across the board, which presumably made adverse decisions by the FOS

inexpensive to large firms. Third, the FOS possessed sensitive information about firms' failure to satisfy their customers' expectations and possible regulatory breaches. It would seem that such information could cause firms harm if disclosed to the FSA or the media, and its possession in the hands of the FOS should have rendered firms cautious and cooperative.

However, the data presented in this chapter provides ample evidence of large retail investment firms' persistently challenging adjudicators' informal decisions. Additionally, with regard to endowment mortgage complaints, while firms tended to accept adjudicators' informal decisions, they strained the FOS's resources by forcing it to deal with a disproportionate temporary rise in the numbers of these cases.

I argue that the adversarial relationship between firms and the FOS was primarily caused by the unpredictability of the environment within which this interaction took place. First, while the FOS articulated its domain in terms of individual and confidential dispute resolution, it had limited control over other actors' usage of its decisions. Firms were especially resistant to informal conciliation when a complaint was part of a larger set of cases because of their concern that agreement to redress individual complainants would be interpreted by the FSA as admitting a larger systemic problem and would thereby result in large-scale compensation. Equally, firms faced the risk that individual FOS decisions would be picked up and 'enforced' upon them by the media as *de facto* precedents. Moreover, I suggest that the FOS's failure to attain firms' cooperation was related to internal factors that inhibited 'rational' strategic action.

Additionally, I demonstrate that while the FOS used the threat of reporting systematic failures to the FSA as its ultimate tool to induce firms' cooperation, the FSA was disinclined to act upon information received from the FOS. I suggest that the FSA's disinclination emanated from the balance, which it struck, between its responsibilities for the suitability of firms' sales (i.e. conduct of business) and the adequacy of firms' financial stability (i.e. prudential regulation).

Section A below builds upon rational cooperation theory to delineate the expected interaction of firms and a complaint handling agency in a multi-actor game that further involves a regulatory body and the media. Section B describes the FOS's adversarial relationship with firms in four case studies of the ombudsman's handling of wide-scale complaints. Sections C and D analyse why cooperation commonly collapsed in the FOS's context. Section E explores what can be learnt from the FOS's relationship with firms, the FSA and the media about the role of the ombudsman in the retail investment regulatory regime.

A. **The expected cooperation equilibrium**

In this section I develop a multi-actor model of firms' and complaint handlers' interaction within a regulatory regime that further consists of a regulator and the media. I assume that the complaint handling body aims to attain firms' cooperation with informal resolution of those complaints that reach it (as in the fairness and therapeutic models), rather than to apply regulatory rules and raise the standards of service to consumers as a whole (as in the bureaucratic and professional models). I suggest that under these conditions complaint handlers' power to induce reluctant firms' cooperation is rooted in their access and ability to report sensitive information

from complaints to the regulator and the media. I further suggest that firms are likely to cooperate with a complaint handling body, which is selective in its reporting of information from complaints. By *cooperation* I mean firms' amenability to quick, informal conciliation and redress regarding those complaints that reach the complaint handling body. The rest of the chapter seeks to explain why this expectation frequently failed in the relationship of financial firms and the FOS.

1. Cooperation theory and its application to complaint handling

Cooperation theory

Regulatory interaction with firms has commonly been analysed in terms of a Prisoner's Dilemma constellation. Axelrod (1984) proved, on the basis of computer simulation, that in a Prisoner's Dilemma game cooperation is likely to emerge in iterated interactions if players adopt a *tit-for-tat* strategy. That is, if they cooperate as long as the other player cooperates, defect if the other player defects, and resume cooperation once the other player does. He further established that once cooperation emerges it is likely to be stable. Scholz (1984; 1991; 1997) applied Axelrod's analysis to the propensity of firms' cooperation with regulatory obligations. He claimed that if regulators adopt a strategy according to which they sanction firms' substantial non-compliance, while shying away from sanctions in cases of technical rule breaking, firms are likely to engage in substantive compliance beyond technical requirements.

Application to complaint handling

Complaint handling bodies, and ombudsmen in particular, are typically devoid of formal sanction powers. However, complaint handlers have access to abundant information regarding firms' failure to satisfy their customers, which is likely to be

valued by regulators, by the media and the public at large. Complaint handlers' access to such information is potentially a powerful disciplinary tool against uncooperative firms given the value that most firms attach to their reputation.

Cooperation theory would suggest that *rational* complaint handlers are unlikely to disclose information from complaints with regard to *cooperative* firms to the regulator, to the media or to the public (e.g. by means of complaints league tables). Providing such information would divest them of their power to target the disclosure of damning information in order to discipline *uncooperative* firms. Rather, cooperation theory predicts that complaint handlers are likely to focus upon individual and confidential dispute resolution and to resist universal provision of information from complaints to the regulator or the media. Under these conditions, complaint handlers' *ad hoc* power to pass information to the regulator with regard to uncooperative firms, or to name and shame these firms in the public domain[1], turns into a threat and penalty. Firms are thereby likely to accept informal conciliation and to voluntarily apply complaint handlers' adverse decisions to similar complaints that reach the complaint handling body, while not necessarily to all their other complaints and transactions.

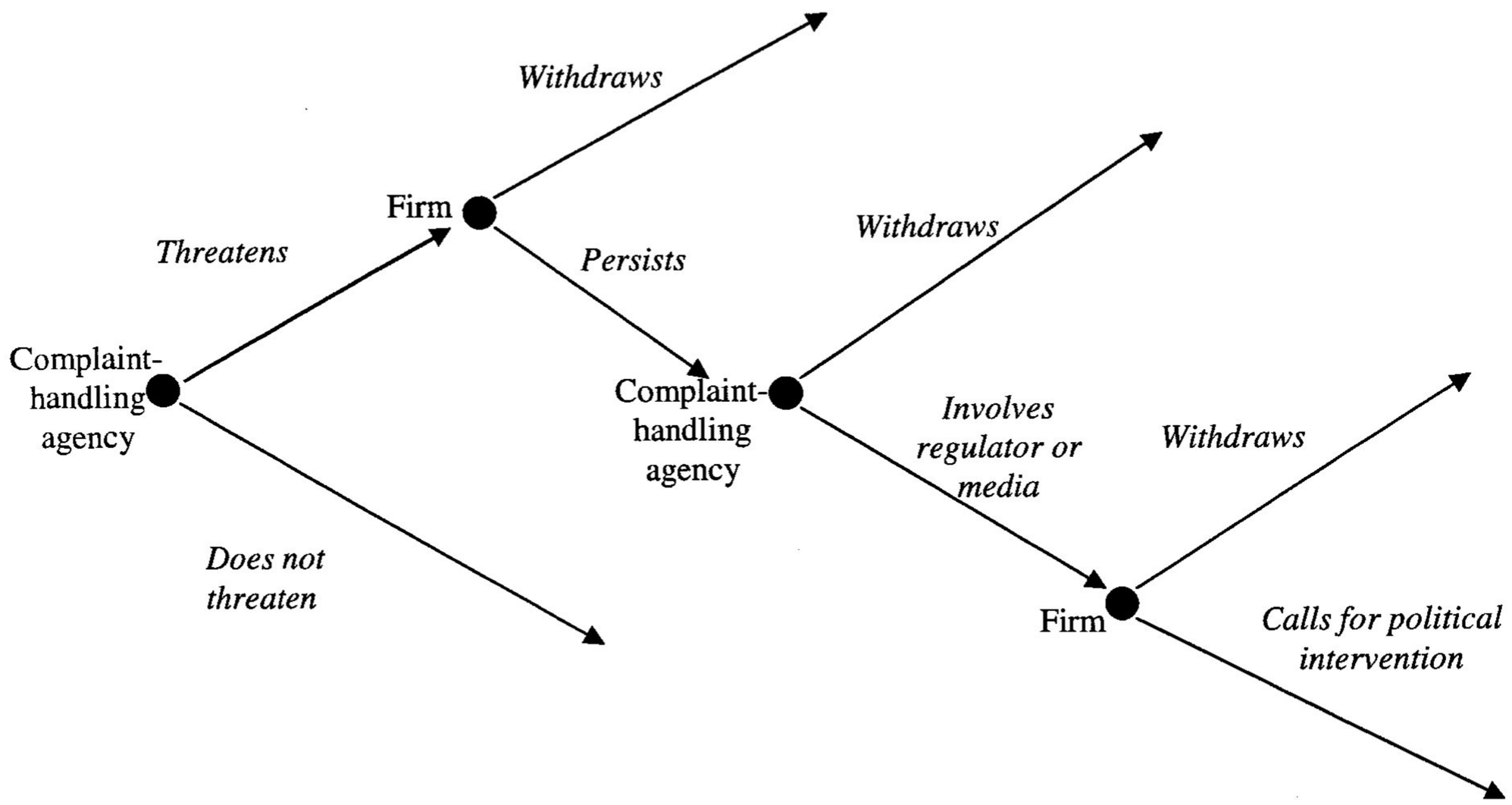
In addition, it should be emphasised that it is not only the complaint handling agency that can appeal for the intervention of a third party (i.e. the regulator and the media). Firms can retaliate by calling for external support; for example by protesting to the agency's political principals.

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[1] Gormley (1996) suggests that ombudsmen, and other 'counter-bureaucracies', have a symbiotic relationship with the media, with counter-bureaucracies supplying stories and the media faithfully covering them (*Ibid,* 280).

Figure 8.1 depicts firms' predicted interaction with the complaint handling body as a multi-actor game, wherein the latter can punish firms by appealing for the intervention of the regulator and/or the media. It further depicts firms' ability to expand the conflict by appealing for the intervention of a third-party (e.g. politicians).

Figure 8.1: Firms' interaction with a complaint handling agency as a multi-actor game



2. Expectations regarding the FOS's interaction with firms

How applicable are the above expectations likely to be to the FOS's interaction with retail investment firms?

From the FOS's perspective, a cooperative firm was one that was inclined to accept informal mediation. Complaint handlers had an incentive to enlist individual firms'

cooperation with informal conciliation since this had an impact upon their workload and productivity. Thus, the above rational choice model would expect the FOS to avoid passing information to the FSA and/or *naming and shaming* as long as firms were amenable to informal mediation. Moreover, the FOS had an interest to avoid conflict with the industry as a collective due to the City's prominent status and its ability to procure political support in the face of overburdening complaint handling.

Why would rational firms accept informal conciliation and forgo their right to an ombudsman's review in each and every lost case when no additional charges were levied on them for doing so?

First, it is plausible that firms were likely to cooperate with the FOS, regardless of its ability to sanction their non-cooperation, because they had an interest in its existence and effective operation. As discussed in chapter three, the FOS's predecessor – the Insurance Ombudsman Bureau – was voluntarily established by the industry in the face of external criticism and the Law Commission's initiatives to reform the insurance law. This suggests that the ombudsman scheme was initially expected to provide firms with a buffer to regulation. Additionally, as demonstrated in chapter seven, the FOS provided firms with a credible forum where complainants were able to release their anger and 'cool off'. This was advantageous for firms since it both relieved them of the need to handle persistent complainants and mitigated the propensity of consumers to voice their grievances in the public sphere. Moreover, it is plausible that the existence of the FOS (and the financial regulatory regime more broadly) contributed to consumer confidence in financial markets. Indeed, the FOS's Chief Ombudsman proclaimed that consumer confidence in the financial industry was

one of the scheme's explicit goals (FOS, Annual Report, 2006). Research on firms' perception of the IOB suggests that firms realised these advantages:

> "Most [firms] were…supportive [of the IOB], seeing it as a useful device for dealing with intractable complainants and…in providing an independent appeal mechanism for consumers" (Graham and Birds, 1992, p. 36).

In addition, as discussed in chapter four, since the FOS's decisions set no legal precedent for firms' handling of other complaints and transactions, cooperation was supposedly inexpensive for firms.

Finally, as implied from the game theoretical model above, it would seem rational for firms to cooperate with the FOS, because of its unique possession of reputation-sensitive information regarding consumers' dissatisfaction with their selling and complaint handling practices.

3. Focused research questions

The above discussion therefore predicts that by limiting their role to individual and confidential dispute resolution, while using information from complaints strategically to penalise specific firms' uncooperative behaviour, complaint handlers were likely to attain firms' cooperation. In contrast, the empirical analysis below depicts, and aims to explain, the prevalence of adversarial relationships between the FOS and retail investment firms. Accordingly, this chapter addresses the following questions:

(a) What strategies did complaint handlers employ to attain firms' cooperation?

(b) What explains the FOS's adversarial relationship with some large retail investment firms?

4. Methodology

The analysis in this chapter is based on information gathered from complaint files, FOS internal correspondence, public documents and interviews including those with five FSA officials. My access to interviews at the FSA was unfortunately limited. I have also analysed the responses of trade bodies, firms and consumer representatives to a consultation paper regarding the FOS's handling of wide-scale complaints, which was issued jointly by the FSA and the FOS. Time did not allow me to extend the research to interviews with firms' complaint handlers.

B. Adversarial relationship between firms and the FOS

In line with the expectations of cooperation theory, the FOS's statistics suggest that firms required an ombudsman's review in only 10.5% of upheld cases (5% of mortgage endowment complaints and 21% with regard to other type of cases) (FOS, Annual Report, 2006).[2] Thus, firms usually accepted adjudicators' informal decisions. Nevertheless, the case sample and interviews suggest that the FOS's relations with some large retail investment firms, including those with which complaint handlers had regular interface, were extremely adversarial. Below I describe and analyse the FOS's relationship with firms and the FSA in four case studies of the ombudsman's handling of complaints regarding systemic issues. The case studies manifest firms' adversarial relationship with the FOS. They further portray that the FOS was inclined to deal with

[2] The figures relate to the FOS's operations as a whole, while my study regarded only its handling of retail investment complaints.

firms' uncooperative behaviour by reporting them to the FSA, but *not* to the media. Finally, a recurrent pattern of the case studies is the FSA's disinclination to act upon information provided by the FOS.

1. Risk rating of firms' funds.[3] This case has already been discussed in chapter four, where it was analysed in the context of complaint handlers' domain perception. Here I focus upon their strategies in attaining firms' cooperation and their effectiveness in doing so. To reiterate, in 2002 the FOS identified a wide-scale marketing of certain single premium bonds as low risk financial products. According to normal practices, as understood by the FOS, these bonds should have been marketed as higher risk products to consumers with corresponding high risk profile. Few ombudsmen, in different instances, analysed the products' investment structure and guided adjudicators as to what they perceived to be the correct risk rating. The result was consistent upholding of these complaints. Adjudicators' argumentation directly challenged the firms' risk rating of the relevant products. Firms persistently requested ombudsmen's review of adjudicators' decisions and protested to the FOS's senior executives. Interviewees explained that firms were concerned that in the event of an FSA inspection their agreement, in an individual case, that their risk rating was flawed might result in the FSA requiring them to apply the decision to all relevant complaints, or even to all their past sales, and, in the most dramatic scenario, to reassess their risk ratings of other funds. An ombudsman explained:

> "If we say [that the risk of] this fund is not this risk [as claimed by the firm], then they [the firm] come across a problem that we're saying that to them,

[3] Data is based on analysis of 17 complaint files and interviews with complaint handlers (A1, M2, O1, O2, O3a and O3b, O6, E1).

issuing hundreds of decisions to them, and the FSA [might] walk in the next day and say, 'So, is this fund not this risk?' And then they've got a hundred thousand other cases, which they might have to proactively review, which costs them a fantastic amount of money."

The same point was made by another ombudsman in an internal talk to complaint handlers:

> Most firms accept our [risk] rating scale. [4] But…some…do not…they have sold thousands of products to low risk consumers. If they agree with us [in a specific case] the FSA may come round and say, 'You agreed with the ombudsman on this case, so why don't you compensate all those who bought it.' And they'll say 'Right' and go bust. (Paraphrase, Field notes)

This concern was further asserted by an official from the Association of British Insurers with regard to a similar case. In practice, however, when the FOS reported a few of the resisting firms to the FSA, seeking its help, the latter was disinclined to intervene. Following negotiations between firms and the FOS's senior ombudsmen, the FOS agreed that in future it would restrict itself to judging whether the marketing of products was suitable to the needs of individual complainants, rather than assessing their absolute risk. Thus, the wording of future decisions was adjusted: rather than making assertions regarding the risk rating of firms' funds, adjudicators were guided to focus their analysis upon firms' assessment of the complainants' risk profiles and financial needs. This approach was eventually successful in enlisting firms'

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[4] There was no uniform, authoritative, risk scale. Rather, each firm created its own scale (E1). The FOS had its own internal guidance regarding funds' risk ratings.

cooperation. Analysis of complaint files shows how one large firm subsequently adopted a strategy wherein it voluntarily offered redress to those complainants who referred their case to the FOS.

Hence, firms' initial resistance seems to have been a reaction to the FOS's formulation of general principles to guide its assessment of complaints, and the risk that agreement to redress in an individual case would result in the FSA requiring them to apply the decision to all similar cases. Cooperation was regained by particularisation of the FOS decisions, and the FSA's manifested disinterest to intervene. Hence, the FOS and firms could then embark on a cooperative route of individual and confidential dispute resolution.

2. *InsuranceOne mis-selling.*[5] The FOS received a substantial number of similar complaints regarding an investment product, which was marketed by InsuranceOne[6] (and regarding similar products, which were marketed by other firms at the same time). As the first complaints reached the FOS, the media was already referring to InsuranceOne's selling of the relevant product as a scandal.

The manager of the team that handled these complaints noted their similarity, and asked an ombudsman for guidance. This resulted in a coordinated internal position according to which the product had been largely mis-sold and in the upholding of all similar complaints. The firm required an ombudsman's formal decision in each and every case. Meanwhile, the FSA, on the basis of its own information gathering,

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[5] Data is based on 10 complaint files, interviews (A2, M2, O1, O3a, E1, E6 and T7) and public information. Some of the details were omitted to avoid identification of the relevant firm.
[6] Pseudonym.

approached the firm regarding the same product and required it to undertake a sample review of its past sales.

Pending the outcome of the FSA's sample review the firm continued to challenge adjudicators' decisions to uphold the complaints, avoiding admission of liability. An executive explained that the firm appealed for an ombudsman's decision in each and every case, because '[InsuranceOne was] hoping to find inconsistencies in the FOS's decision making' (paraphrase, E1a). Faced with the firm's resistance to applying ombudsmen's decisions to its pending complaints, the FOS reported to the FSA its concerns regarding the product and the firm's attitude (as it did with regard to a few other firms which marketed similar products). This was followed by meetings in which the FOS conveyed to the FSA what it learnt from the complaints about the firm's practices in selling the product. The information received from the FOS supplemented the FSA's own analysis.

Once the sample review was completed, the FSA's supervision division referred the case to its enforcement division to negotiate the details of consumer compensation and penalty with the firm. The firm was now required by the FSA to proactively review all its past sales of the relevant product. The FOS, at the request of the FSA, halted its handling of pending complaints until the conclusion of the proactive review and negotiations. The FSA and the firm reached an agreement for redress of the firm's customers, including those who complained to the FOS. The firm was additionally publicly shamed and fined by the FSA. Once the formal enforcement process has been completed, the firm was amenable to cooperate with the FOS in rapidly resolving all pending cases.

How to account for the FOS's adversarial relationship with InsuranceOne? A plausible explanation, which was suggested by two senior interviewees (E1a; E6), is that since InsuranceOne was already facing an FSA review it had nothing to gain from informal cooperation with the FOS. Additionally, as mentioned above, by the time that the FOS started making its decisions, the media had already covered the case. Under these conditions the FOS could not offer the firm an individual and confidential dispute resolution regime.

3. Dual Variable Rate Mortgages.[7] The following case study, regarding the FOS's handling of mortgage complaints, is of special interest given that mortgages were not regulated by the FSA at the time.[8] In mid-2001 the FOS received some six hundred complaints alleging unfair and unequal treatment by a few major banks and building societies – Halifax, Nationwide, HSBC, Abbey National and Cheltenham & Gloucester – which offered low mortgage rates to new customers while tying some of their existing clients to higher rates. As the FOS was in the process of assessing the relevant cases these were already widely covered in the press. In September 2001 the FOS made an initial decision in favour of the complainants in two cases. It subsequently announced that it would handle complaints employing Lead Cases with regard to each firm, operating as *de facto* precedents, while allowing firms and individual complainants to argue that their case differed from the Lead Case. There was intense media coverage of both the FOS's decisions and firms' 'compliance' with them. Consequently, the number of similar complaints to the ombudsman rapidly escalated (from 570 in 2001 to 6500 in 2002).[9] Nationwide building society made a

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[7] The description of this case is based on public FOS press releases and newsletters, media analysis (LexisNexis) and interviews.
[8] As explained in chapter 2, mortgage intermediation became an FSA regulatory activity in 2004.
[9] Source: FOS annual reports.

first move to restore its reputation and announced its intention to apply the ombudsman's decision to all its customers who were in a similar position, resulting in some 90 million pounds of compensation. Consequently, pressure was put by the media on its competitors to follow, which they did reluctantly in varying speeds and degrees, incurring both high redress and reputation damage.

While the FOS's decision on Dual Variable Rate mortgages complaints was rewarded with strong consumer and media support (S4), the financial burden of its decisions created a backlash. The Building Societies Association, together with some other industry bodies, pleaded to the Treasury to limit the ombudsman's powers by introducing a judicial appeal mechanism over its decisions and for the FSA to take over cases with wide implications. In response to firms' criticism, the Treasury initiated a review to assess the need for change in the regulatory framework (O5; T5). This was followed by a consultation with firms issued by the FOS and the FSA, which eventually resulted in a compromise that required relatively minor changes to the FOS's processes. Yet, the case reveals the threat, which the FOS faced, when its decisions were picked up and 'enforced' upon firms by the media. It demonstrates firms' ability to enlist political support to restrain the FOS. It further shows that the FOS's adversarial relationship with firms was not restricted to those areas that were regulated by the FSA.

4. Handling mortgage endowment complaints. The FOS estimated that as a result of time limitations on the filing of mortgage complaints,[10] the number of endowment mortgage complaints would fall dramatically as of 2006 or 2007. Consequently,

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[10] Complaints had to be filed within 3 years of the first letter warning the policyholder of a shortfall, or within 6 months of the second review letter.

massive recruitment of additional staff in order to manage endowment mortgage complaints would have required the FOS to shed staff in the long run. This it was reluctant to do. Therefore, the FOS's executives were compelled to cope with the organisation's rocketing caseload of this product via tight case closure targets, the creation of a new unit and the adoption of standardised processes for handling endowment mortgage complaints, on top of the increase in backlog. These measures threatened both consumer and employee satisfaction.

In addition to the increasing volume of incoming mortgage endowment complaints, the FOS found that it was upholding a relatively high ratio of these complaints,[11] with a large variation between firms. This suggested that some of the increase in numbers of complaints was caused by certain firms' policy to reject complaints, irrespective of their merit. A senior executive asserted:[12]

> "There are companies who…their strategy is solely based on trying to reduce the amount of compensation they are paying [on mortgage endowment cases] …these companies…have got rejecting complaints down to a fine art…working out how many letters, of what length, of what style, of what content is effective to deter people from going on complaining to us." (E6)

In contrast with the abovementioned case studies, most firms were relatively disposed to accept adjudicators' decisions to uphold endowment mortgage complaints that reached the ombudsman (M6; O3b). As mentioned above, there was a major disparity between firms' appeal rate with regard to endowment mortgage cases (5%) when

[11] In 2005/6 the FOS upheld 39.6% of endowment mortgage complaints, while only 26% of other complaints; Source: FOS, Annual report, 2005/6.
[12] Three additional executives replied in a similar way.

compared with other types of complaints (21%). When asked why this was the case, a team manager suggested that from a firm's perspective the number of endowment mortgage complaints which were reaching the ombudsman, out of the firm's enormous caseload of this product, were too few to warrant fighting for (M6).

Faced with this uncontrolled short-term increase in caseload, the FOS urged the FSA to intervene. While (as discussed below) the FOS was usually reluctant to supply the FSA with general statistics regarding reversal (i.e. reject/uphold) rates per firm, it was inclined to do so with regard to mortgage endowment complaints in order to make a stronger case for the FSA's intervention and to support its targeting of firms' poor complaint handling (E1, E6, T4, T7). The FSA for its part conducted a series of targeted reviews, and in April 2002 sent a letter to the Chief Executives of the largest firms, requesting them to review their firms' procedures (Great Britain, Parliament, House of Commons, Treasury Committee, 2004). In a number of cases the FSA's targeted reviews ended up in formal enforcement. Yet, the FOS continued to receive an increasing number of endowment mortgage complaints and its reversal rates continued to be high. In fact, while in 2002-2003 the average rate of reversals was 39% (Great Britain, Parliament, House of Commons, Treasury Committee, 2004), in 2004 it was 45% (Merricks, 2004).

Consequently, in December 2004, the FOS's Chief Ombudsman gave a public speech, in which he condemned certain firms' abuse of the FOS's resources, but did not reveal the names of those firms. In the same speech the Chief Ombudsman disclosed that the FOS reported the names of a number of these firms to the FSA, to assist the latter's targeting of its supervision and enforcement actions (Merricks, 2004).

Interviewees interpreted the Chief Ombudsman's speech as shaming (and pressuring) the FSA into action against firms.[13] Subsequent to the above speech, the FSA's Chief Executive sent, and publicised, a second letter to all firms' Chief Executives requiring them to manage their endowment mortgage complaints or else face regulatory action.

How to explain the FOS's interaction with firms in this case? Firms were generally receptive to conciliation in individual endowment mortgage cases, presumably because the FSA had already asserted its disinclination to conduct a wide-scale review of their past sales. However, it was firms' disinclination to uphold complaints before they reached the ombudsman that strained the FOS's resources and concerned its executives. The ombudsman was therefore inclined to report firms to the FSA, and subsequently to induce the FSA into enforcement action by publicly airing its failure to act upon information provided. The one strategy which the FOS chose to avoid, after consideration, was to publicly *name and shame* the relevant firms. Had it taken that route, it is plausible that firms would have reacted in a similar way to their response to media publicity regarding Dual Variable Rates, i.e. upholding a larger ratio of their own complaints, while voicing their dissatisfaction with the FOS to the Treasury and its political executives.

5. Beyond specific case studies. Above I analysed four cases of adversarial relationship between firms and the FOS. However, adversarial relationship was not the general rule of the FOS's relationships with firms. Some complaint handlers, especially ombudsmen and executives, suggested that large firms were usually amenable to cooperation with the FOS. For instance, an ombudsman explained:

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[13] Three similar responses.

"If you've been dealing with the firm long enough you should be able to talk to them, and we deal with the same firms all the time, so you should actually get some sort of a relationship with the person you normally talk to." (O1)

Another adjudicator gave an example of a large firm, which not only tended to accept adjudicators' informal decisions, but often offered to compensate complainants once the case reached the FOS, saving complaint handlers the need to investigate the case. S/he asserted that under these conditions adjudicators would not probe into the reasons for the firm's decision to offer compensation. That this was the relevant firm's strategy was confirmed from analysis of complaint files:

> "[Firm X]…are quite reasonable, if you can present a logical argument as to why something will be upheld…It does happen a lot with them that the company rejects [the complaint]…originally to the complainant, they [the complainants] bring it to us and they [Firm X] just decide to make an offer for whatever reason." (A1)

The above adjudicator asserted more generally:

> "With the firms…You find that people are more amenable once you dealt with them in the past. If you make a suggestion to mediate a case for example…because…you built up a relationship with them it's something they'd consider." (A1)

However, the complaints sample and interviews, especially those with adjudicators (A3, A4, A5, A6 and A7), suggest that the above four cases were not a unique manifestation of conflict between the FOS and retail investment firms. Rather, interviewees claimed that some firms were likely to challenge FOS decisions irrespective of the financial implications of the decision. For instance a team manager explained:

> "I could name certain companies that [their complaints] would all probably go to the ombudsman [for final decision] and we would uphold the complaint on all of them, because it's the sort of company that just won't take our word for what our stance is and will push everything through [to an ombudsman's decision]." (M1)

An adjudicator similarly remarked:

> "There are certain firms that you know are going to push cases to [an ombudsman's] decision. They're firms like X, Y and Z [names of three well-known firms]. They tend to be the bigger firms and really a lot of it is down to delay rather than actually them thinking they're right." (A3)

Few adjudicators (A3, A6, A7) asserted that building amicable relationships with firms' complaint handlers does not necessarily facilitate professional cooperation, since some firms' executives operated a policy, which compelled their compliance teams to challenge adjudicators' adverse decisions.

Thus, going beyond the four detailed examples, the picture of the FOS's relationship with retail investment firms seems to further diverge from the expectation of cooperation theory. This leads me to explore the causes for this adversarial relationship and the strategies which complaint handlers employed when faced with firms' uncooperative behaviour.

C. Why standardise?

A common trait of the above case studies was the coupling of the FOS's adversarial relationship with firms and the standardisation of complaint handlers' decision making. In the above cases, as well as with regard to the FOS's handling of high-profile cases such as Split Caps, Precipice Bonds and Equitable Life complaints, adjudicators' decisions were shaped by ombudsmen-elaborated guidance. Typically, guidance from an ombudsman was sought by team managers after identifying a trend in firms' complaints. Adjudicators' strict following of such guidance resulted in standardisation of their handling of systemic complaints, possibly beyond the intention of the ombudsmen.

I suggest that the FOS's consistent handling of systemic complaints to a degree of standardisation was driven by complaint handlers' motivation to avoid blame. It was induced by firms' resistance and heightened media coverage of the FOS. Under these conditions adjudicators anticipated firms' appeal for an ombudsman review if the complaint was upheld and they wanted to commit the ombudsmen to their position in advance. Similarly, ombudsmen operated under the assumption that a judicial review was likely in these cases. They were therefore interested to avoid inconsistent decision making that could expose the FOS's approach to greater scrutiny. Finally,

executives anticipated political and media scrutiny of the FOS and therefore wanted to be able to explain the logic of the organisation's decision making. Therefore, standardisation was driven by a combination of bottom-up and top-down defensive pressures. It was also self-reinforcing inasmuch as it amplified firms' resistance to adverse decisions, which thereby prompted adjudicators' appeal for further ombudsmen's guidance and their strict following of this guidance.

An FOS internal case handing module prescribed that adjudicators should seek an ombudsman's advice whenever a case required interpretation of a firm's policy document, standard procedures or if "there are lots more similar cases in the pipeline". The guidance further required that adjudicators seek advice if "the case has already come to the attention of the press".[14]

The analysis below of one case wherein an adjudicator appealed for an ombudsman guidance regarding the risk-rating of a firm's fund, offers valuable insight into the FOS's internal dynamics and its interaction with firms with regard to systemic complaints. The case reflects complaint handlers' concern that inconsistency in their handling of similar complaints would be used by firms to undermine the soundness of their approach.[15] It further suggests that firms indeed tracked such inconsistency and invoked it in order to challenge adverse decisions.

In this instance an adjudicator was allocated a complaint when the FOS was in the course of a fierce dispute with another firm with regard to a similar issue. The adjudicator was inclined to uphold the complaint, but before doing so requested

[14] Source: FOS, Case handling module.
[15] A similar concern was documented in an additional case, which involved correspondence between an ombudsman and another adjudicator.

advice from an ombudsman, writing "I am mindful of the situation with [another firm's] fund and so would like to be sure of my ground before writing to the firm." The ombudsman replied that s/he believed that *this* firm adequately risk rated the product, but suggested that the adjudicator gather further information from the firm regarding the exact composition of the fund and thereafter seek advice from two additional ombudsmen. In reply to the adjudicator's request for further information the firm's complaints administrator pointed out that in the past the firm received five adjudications and one ombudsman's decision in its favour with regard to the same product. Unlike the first ombudsman, the two other ombudsmen, from whom the adjudicator sought further advice, proposed that the firm's risk rating of the fund was incorrect and that the complaint should be upheld. The adjudicator therefore upheld the complaint, and sent out an email notification to the rest of his/her team members to ensure future consistency. Four additional similar adjudications were issued to the firm. The firm appealed for an ombudsman's review in all five cases. In its application for an ombudsman review the firm once again contended that in the past the FOS issued decisions in its favour, including a decision by an ombudsman with regard to the same product. Prior to the ombudsman's decision a meeting was held between the ombudsman, the firm's head compliance officer and the fund manager. The discussion during the meeting was not documented on the file. Following this meeting, a compromise was reached between the FOS and the firm regarding the future handling of these cases.

Equally, during my fieldwork, the FOS coordinated its internal approach to the handling of Precipice Bonds complaints, which attracted intensive press coverage. These complaints presented a challenge for the FOS on two grounds. First, the

products were frequently sold by IFAs, who were prone to collapse as a result of wide-scale compensation on these cases. Consequently, the stakes of an adverse decision were high for these firms and the FOS faced a number of judicial reviews. In addition, because these products were often marketed via mail advertisements, the complaint handlers rejected many of the complaints on the grounds that no advice was given. (Then again, the FOS adopted a very liberal interpretation to what constituted *advice* in these cases.) Consequently, the FOS was liable to face criticism from both firms and consumers when handling these cases.

To maximise internal consistency, the handling of Precipice Bonds complaints was allocated to a small number of specialised teams, who were required to closely coordinate their approach. Adjudicators were provided with product-specific training and guidance from the ombudsmen. Additionally, following requests from the FSA, there was also close cooperation and exchange of information between the two agencies. A team manager explained that Precipice Bonds were handled by specialised teams, because of the high media coverage that was associated with them.

> "[Precipice Bonds]…there's a lot of media about it – so it was felt that it was too important for lots of different areas to deal with it…So, we are specialists in the individual product…Assessment [adjudicators] don't know that specialised knowledge so they shouldn't be dealing with those." [M3]

The same team manager explained that unlike other types of complaints s/he required adjudicators to consult him/her in each and every case to ensure the consistency of

their decisions. An ombudsman closely supported this team manager in centralising the analysis of firms' sales documents and policies. The team manager explained:

> "We want to make sure that we're being consistent…and making sure that …we're all doing the same thing…I've set up a lot of information for people to use…I've got a Precipice Bond workbook with copies of all the documentation for the cases that we've already looked at. Any new cases, I'll put in there…send emails to the team with regard to that. And I've set up a Word document…which details other cases that have been looked at and what has been felt about the documentation." [M3].

A support manager explained that because of the high media coverage around Precipice Bonds, the FOS both internally standardised its approach and closely coordinated with the FSA.

> "[In precipice bonds] we [the FOS and the FSA] have got a coordinated approach to all the Precipice Bonds stuff …In fact we [the FOS] are aiming to deal with them on a very coordinated approach, such that if we find issues with a certain firm…we would actually then batch all those cases and deal with them on a very quick follow through…it's probably politics as much as anything…it was very high profile. FSA were always in the press about 'Are you looking to make sure that people are OK with Precipice Bonds?' 'What were you doing about it in terms of regulation?'…it certainly became the case that very quickly the FSA and the FOS…needed to have…some kind of coordination about it.

> And indeed we have our own [internal] coordinated approach to dealing with Precipice Bonds as well" [S3].

In two consecutive training sessions, which a leading ombudsman provided to a small group of adjudicators who specialised in Precipice Bonds, adjudicators seemed keen to extract as detailed guidance as possible. This was especially the case with one adjudicator who was also anxious about a case that had already been analysed by a *Daily Mail* journalist who advised the complainant that his complaint should succeed. The ombudsman, in contrast, was relatively resistant to provide general guidance and reminded adjudicators that they must judge each case according to its own merit.

In conclusion, the above data suggests that the FOS's standardisation of its handling of wide-scale complaints was shaped by complaint handlers' sensitivity to firms' resistance and heightened media coverage. Standardisation *aggravated* firms' adversarial relationship with the FOS, but it was not the *initial* cause for conflict.

D. **The failure of cooperation**

The above suggests that the FOS's standardisation of its decision making was a *result* of firms' resistance and media converge. Whilst standardisation exacerbated firms' resistance, it was not the primary cause for adversarial relationship. The above case studies and further data from interviews below suggest that firms' adversarial relationship with the FOS was grounded in its inability to control the scope of its decisions. I propose that two overriding factors explain the FOS's failure to attain firms' cooperation. The first was firms' uncertainty regarding the FSA's inclination to act upon investment mis-selling. The second was the risk that the FOS's individual

decisions would be picked up and 'enforced' upon firms by the media. The paradoxical outcome of these factors was that firms both fiercely fought individual complaints that reached the ombudsman and probably complied with its decisions beyond their legal obligation. The variance in firms' reaction to these threats was shaped by firm-specific relative amenability to take the risk of limiting compensation to those cases that reached the ombudsman and the cost of applying a decision across the board. In addition, I show how complaint handlers' domain perception undermined their capacity for strategic action.

In what follows I discuss three major strategies, which came up in interviews, to tackle firms' uncooperative behaviour – acceptance, communication and passing information to the FSA. I further seek to explain how these strategies affected firms' interaction with the FOS, and why they were frequently ineffective in attaining firms' cooperation.

1. Acceptance

It is possible that one reason for the FOS's failure to attain firms' cooperation was rooted in adjudicators' *passivity* and their belief that the firms were under no obligation to accept their informal adverse decisions. Adjudicators held that firms were entitled to request an ombudsman's decision even if the case in question was part of a larger group of similar cases wherein the FOS approach had already been ascertained. This perception was related to the FOS's individuality discourse, which was analysed in chapter four. Adjudicators tended to perceive their position vis-à-vis

uncooperative firms as powerless. They saw little which they could do to render firms cooperative. For example the following adjudicator explained:[16]

> "[Firms] tend to be…an immovable object. You can go back to them and say, 'This is still not right, etc.,' but, at the end of the day, if there isn't a manager [at the firm's end]…to sign it off [an agreement to compensate the complainant], then there's nothing really you can do to negotiate and just get on with it, which means it then goes to [an ombudsman's] final decision and the ombudsman tells them they're wrong." (A3)

The same adjudicator, while acknowledging that the FOS could threaten firms with reporting systemic uncooperative behaviour to the FSA, explained why adjudicators were unlikely to invoke such a threat:

> "At an adjudicator level, we tend not to [threaten firms with reporting them to the FSA], because it doesn't really give us any leverage…If you're dealing with a case…on a case-by-case basis, screaming at them 'FSA' every other case isn't really going to get you very far…If you've got twenty-odd cases where the firm is just being obstructive and not sending files in, then you can refer up the tree and get the managers involved and whatever, so, further negotiations can take place. But, on an individual case officer [i.e. adjudicator] basis, screaming 'FSA' at them very rarely does anything to help you out." (A3)

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[16] Six similar responses.

Another adjudicator felt equally helpless when handling a complaint, where an ombudsman had already rejected the firm's position in a number of similar cases:

> "Yeah, we will say, 'These are trends.' The firm may disagree with the stance we're taking on trends, in which case they're just going to dig their heels with the case I'm looking at, even though three before me have been upheld. I'm absolutely nothing, I am that (signalling small with his fingers), and they realise that, and they ask for an ombudsman's decision, out of spite, sometimes, I think, who knows? So, it can be frustrating…but that's part of the job." (A4)

2. Communication

It is further possible that the FOS's failure to obtain firms' cooperation was rooted in its executives' disinclination to report firms to the FSA and their predisposition to assume that firms' uncooperative behaviour was rooted in miscommunication. In contrast with adjudicators, executives and ombudsmen were relatively optimistic about their ability to encourage firms to voluntarily cooperate with the ombudsman and moreover to handle their own complaints appropriately. Executives were inclined to perceive their role as educators of the industry, and to perceive the FOS and the industry as sharing mutual interests and a common professional discourse. Their role perception was more in line with that of the professional ombudsman configuration, rather than a pure individual dispute resolution model. Consequently, they were reluctant to threaten firms with reporting them to the FSA until exhausting all amicable measures.[17]

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[17] Six similar interviewees' responses.

To an extent, the FOS's slow escalation from communication to invoking threats can be interpreted as a rational strategy. For example, one ombudsman manifested such a pragmatic approach. S/he suggested that it was important to communicate to uncooperative firms that consenting to adverse decisions would not create a precedent regarding other cases. However, once communication proved ineffective, firms would be reported to the FSA emphasising the systemic nature of the problem:

> "Q: What kind of strategies can you use [to attain firms' cooperation]?
>
> A: … keep the lines of communication open…visits to firms, and just explain to them why we're doing what we're doing. Sometimes they have ideas that it might apply to a whole swathe of other cases that they've got, it's not. They're more concerned with their bottom line. They're in the real world. They're trying to make money. We're not in that world, so they're more focused on the money we're costing them. I'm just hoping that they can see our way of thinking, but we do have firms that say, 'No, don't agree.' They're entitled to do that...At the end of the day, I'm quite willing to approach the FSA, through [the principal ombudsman] or through service quality [unit], and say, 'I've issued 10 decisions on this subject, they're not doing it, God knows how many other thousands of complaints are out there which they're still not doing it on'…I always try the persuasive route, first…but, at the end of the day, if they're not going to do it and it's wrong, then off to the FSA we go." (O2)

However, the FOS's preference for communication was also rooted in its executives' perception of their role as educational and of their relationship with firms as cooperative. A senior executive explained his/her preference for communicating with

firms and helping them improve their complaint handling practices, while saving the threat of involving the FSA for the most extreme instances. It is noteworthy that s/he suggested that the FOS should be considerate of the difficulties that firms faced in dealing with the influx of complaints. Thus, it would seem that this executive was inclined to report firms to the FSA only when their uncooperative relationship was coupled with malice.

> "I much prefer spending time on getting firms to do it right, particularly if the firm says 'Actually what happened was that we employed incompetent managers for two and a half years, we now sacked them, have a better team in place, and it would take us some time to dig us out of this hole'…Most organisations…are in sort of half a mess most of the time… that's just part of life. We have to assume that no firm is going to be superlative all of the time. There are going to be blockages. It's better to work through them, get to the other end, and try to [get] down to a better relationship. And if we really can't, then after really trying all our best shots, and that includes raising the level of the game, getting the Principal Ombudsman to see their group chief of customer relations, getting [the Chief Ombudsman] to see the Chief Executive, to get our Chairman to see their Chairman, and saying 'Now we have to report you to the FSA.'" (E6)

The same executive suggested that (outside the special case of endowment mortgages) firms and the FOS shared common interests, and instances of firms' uncooperative relationship with the FOS were rooted in misunderstanding by their junior staff.

Consequently, the solution to adversarial relationship would be to escalate the level of communication within the firm:

> "[Firms] see the ombudsman as an effective last port of call where, we are a lot cheaper than the courts, we don't have big financial impact. OK, we uphold a few cases they don't like, and some of their junior staff get upset about it. But we have talked to the chief executives about it…and they are broadly saying 'thank God for the ombudsman, we don't want these cases going to court, it's all done privately, the ombudsman understands us…goodness who knows what would have happened if these cases went to court'." (E6)

Another executive explained the centrality of communication and education as means of both collecting information about firms, shaping firms' perceptions and working out amicable solutions with them.

> "What we do initially [when faced with an uncooperative firm] is go out there [to the firm] with a training hat on…as part of that we are beginning to find out what's going on there. So while we are enforcing our messages, we are also finding out [that] maybe [what happened is that] they have contracted out, maybe they got a new senior manager who is a lawyer as opposed to from PR…Maybe we have actually changed the manager here and they don't get along with the new manager…And maybe…they just lost a lot of staff…and what they actually need is a reinvestment of staff and reinvestment of our complaint handling experience… It could be that…there is a lot of regulatory intervention…they have become very defensive…it could be commercial

reasons – a firm isn't doing very well…it decided that it doesn't want that line of business anymore, so why should it be particularly generous with complaints? They don't care whether these would be their customers or not. There are so many pieces of information that we would expect to be picking up as part of communication. Communication from our point of view is not just going out and telling people what to do. It is also listening and finding out why is it like that, and then jointly trying to alter perception and practices." (E2)

S/he further explained the moderate escalation from communication to threatening firms with reporting them to the FSA. Note how the role of the ombudsman, according to this executive, is accommodative and supportive – 'talking', 'explaining', 'training', 'drafting letters', in contrast to the punitive 'regulatory area' of the FSA.

"Sometime we may decide that over a period of time we really have spent so long explaining…giving them training, talking to their manager, talking to their senior manager, drafting letters from our ombudsmen to their directors, getting [the Chief Ombudsman] involved in having lunch with their Chief Executive, and still [their behaviour] doesn't seem to be improving. That's obviously where it seems to be moving very much into this regulatory area where our ability to pass information of a systemic nature to FSA." (E2)

To summarise, the FOS was slow to threaten uncooperative firms with reporting them to the FSA. Such a threat was typically invoked after a long period of FOS attempts to communicate with the respective firm, going all the way from its street-level

complaint handling personnel to the firm's Chairman and Chief Executive. To an extent, moderate escalation from communication to punishment could be seen as a pragmatic strategy, which aimed at achieving firms' cooperation. The above interviews reveal that it was further ingrained in executives' perception of the organisation's domain as educational and consensual rather than regulatory. Yet, the next section suggests that the FOS's disinclination to threaten firms with reporting them to the FSA was further shaped in response to the FSA's disinclination to act when the FOS provided it with information.

3. Reporting firms to the FSA

Adjudicators' passivity and executives' professional model of complaint handling may partially explain the FOS's failure to attain firms' cooperation. However, the data suggests that firms and the FOS's uncertainty regarding the FSA's inclination to act when provided with information by the FOS offers a more powerful explanation.

The FOS perceived threatening firms with reporting them to the FSA as its most severe measure in swaying uncooperative firms to alter their conduct. The underlying threat being that the FSA could require the firm to proactively review all its past sales of the same product, compensate all relevant consumers and publicly shame and fine the firm as part of an enforcement action.

The legal basis upon which the FOS could call for the FSA's intervention was either the rule requiring firms to cooperate with the ombudsman, or the requirement that firms handle their complaints fairly, consistently, and both identify and remedy any

recurring or systematic problem identified by a complaint (FSA handbook, DISP 1.2.22, 1.6)

The FOS and the FSA's memorandum of understanding, which was signed in July 2002, positively required the FOS to report to the FSA information from complaints when this indicated issues of 'regulatory relevance' or shortcomings in firms' complaint handling procedures.

The application of cooperation theory to complaint handling, as set out earlier, predicted that in order to attain firms' cooperation in handling those cases that reached the FOS, complaint handlers would be reluctant to report systemic problems with regard to *cooperative* firms. In accordance with these expectations, the FOS was reluctant to provide the FSA with *general* comparative information about its uphold/reject rates per firm (other than regarding endowment mortgages).

Interviewees explained that passing such statistical information to the FSA could have discouraged firms' cooperation. This is because a firm's acceptance to apply an ombudsman's decision to all its pending complaints at the FOS would have resulted in abnormal uphold rate, which might put the firm at risk of FSA scrutiny. For example, a senior executive explained:[18]

> "If we just passed unqualified data to [the FSA], supervisors…might suddenly jump on some aspect and say 'Oh goodness you seem to uphold a lot more

[18] One out of six similar responses.

complaints against this [firm]' and…rush off to the firm saying 'Oh, you've been behaving badly here.'" (E6)

The FOS's internal guidance, which interpreted its memorandum of understanding with the FSA, reflected the FOS's (and the FSA's) sensitivity over sharing information. It opened with the assertion that "Neither party [the FSA or the FOS] has the *right* to information from the other but…both recognise that only by sharing information at an appropriate level can the interests of consumers and firms be most effectively met" (my emphasis). With regard to passing information to the FSA upon its request, the guidance maintained that this could result in firms' reluctance to share valuable information with the FOS:

"The FOS faces some constraints in the provision of information to the FSA…:

(a) Data Protection Act restrictions…(b) Administrative cost of retrieval; and

(c) Firms' perceptions – FOS is concerned that firms will be less willing to provide information if they believe that the FOS will immediately and without restriction pass it to the FSA."

The following executive highlighted why in order to receive information from firms the FOS might restrict its communication with the FSA (whilst further suggesting that the type of information that the FOS sought from firms was irrelevant to FSA supervision):

"A bank is very well placed to have a sense of what are they doing at the moment that could generate complaints…that's part of the intelligence that we would be expecting to pick up as part of our ongoing interface with firms. It's all about building relations and building trust, and we would be doing that not

from a regulatory perspective but we would say 'Look, it would really help us firm if you can give us a steer [on] how many complaints are you planning for in the next year?'…

Q: If I am a firm, I would ask 'if I give you that information how would I be assured that this doesn't go to the FSA'.

A: …we would say well we can't give you a legal disclaimer, but it's highly unlikely…it's far too wily for FSA, or we want the information for very different reasons." (E2)

However, as an exception to the above, ombudsmen and executives asserted that the FOS *would* report to the FSA 'something that any regulator ought to be looking at' even if a firm was cooperating in consensually handling those cases that reached the FOS. A senior FOS executive explained this, noting that passing information to the FSA under these conditions was an exception to the FOS's general preference for confidentiality:

"We…balance the firm's right to privacy, and the fact that we see ourselves as an organisation that is involved in private dispute resolution…we are not in the business of naming and shaming firms, we are not in the business of shopping them to the regulator for minor things…our business is dispute resolution. If we can resolve disputes that's fine…Unless there is something of a public interest …something that any regulator ought to be looking at…If it's not a matter that instinctively calls for…regulatory intervention…we don't want to pass information to the regulator…Broadly, we expect them [the FSA] to go and find their own evidence, but sometime we think it's necessary to tell them." (E6)

Similarly, an FSA regulator, who had regular interaction with the FOS, explained that the FOS would report a systemic problem when it perceives a firm's behaviour to be 'egregious', irrespective of its cooperation with the FOS:

> "Q: Complaints *per se*, with a cooperative firm, is that a problem for the FOS…?
>
> A: Well, I think they just have a general public interest concern, as well, that if there are lots of people who are bothering to go to the Financial Ombudsman Service, who are being treated inappropriately, then there's probably a…much bigger group of complainants who have not challenged what the firm has said but have also been treated inappropriately and unfairly…and is something that they [the FOS] feel is appropriate for them to report. *But that has to be fairly egregious behaviour*" (T4) (my emphasis).

A team manager, when asked whether s/he would have reported InsuranceOne to the FSA if the firm was cooperative in redressing those complaints that reached the FOS, suggested that s/he would have done so *in this case,* because it was a blunt mis-sale.

> "Q: and if [InsuranceOne] weren't so hard in terms of rejecting so many of their complaints, do you think you would have gone to the FSA anyway?
>
> A: [silence] about that?
>
> Q: yeah,
>
> A: yeah, about that [we] probably [would have], because it was so blunt." (M2)

A number of FOS senior officials (E1; E6; O3b; S3) further remarked that they would be unwilling to tolerate firms' handling complaints that reached the FOS differently than all their other complaints. The following executive manifested this position in its most proactive terms:

> "if I started to see…that all you had to do as a consumer was write in and say, 'I don't think I'm having any of that,' and then go to the ombudsman [i.e. file a complaint with the FOS], and…get a different offer…that's…not treating …customers fairly and that is a principle…it's a [regulatory] rule, so I could tell the FSA about that…and so I'd want something done for that reason." (E1)

This executive conceded that adjudicators, because of their focus upon attaining their case closure targets, may have a disincentive to report systemic problems with regard to a cooperative firm. However, s/he asserted that the ombudsmen would be inclined to report a firm under these circumstances.

> "There is a disincentive if you're a lowly case handler [i.e. adjudicator], because, for you, it's just, 'Oh God, all my nice closures that I can see stacking up are going to disappear out of the window.' But…some cases…will start reaching the ombudsman…Now, OK, it might be that more has happened than the ombudsman thought, because there was a whole pile of cases being worked by Fred and Bob and Gill, who were trying to keep them away, but some were just filtering their way through…and then…ombudsmen start to think, 'Hang on, what's going on here?'…once things do reach the ombudsman, I don't think

the ombudsmen…have any institutional reason to say, 'We'll deal with these rather than tell the FSA'."(E1).

Yet, when a firm voluntarily offered redress, it would have been extremely unlikely for either the firm or the complainant to request an ombudsman's review of the case. Hence, even if the above executive was right to assume that the ombudsmen would be inclined to report a cooperative firm's regulatory breach, they were in fact unlikely to get involved in the handling of those cases.

The following senior official explained that while in theory the FOS would report a case of a firm that systematically rejected complaints but thereafter upheld them once they reached the FOS, it did not proactively compile information to expose such action.

"The…thing which is probably more prevalent [than firms' persistent challenge of adjudicators' informal decisions] is that firms in dealing with complaints before they get to the Ombudsman…adopt a policy turning down a certain amount of complaints…If they [the complainants] ever go to the Ombudsman and [the firms' decisions] get correctly overturned…they are prepared to incur the costs…

Q: Is that something that you would inform [the FSA]?

A: If it was ever proven I think that'll be very seriously looked upon…Do we actually report on that?... [I] never had the evidence to be able to report that… and I am not sure anyone else has in the Ombudsman Service…either…I don't

think…we do a great deal of proactive analysis of anything at the moment that would lead to [FSA] referral." (S3)

Thus, while adjudicators were unlikely to probe behind firms' inclination to voluntarily offer redress, ombudsmen and executives asserted that the FOS should (and would) report a firm that systematically rejected its complaints, while offering to redress the complainants once they appealed to the FOS. In practice, none of my interviewees could think of a case where a 'cooperative' firm was reported to the FSA, other than with regard to endowment mortgage cases. In the latter case, as already explained, it was the sheer volume of complaints that strained the FOS's resources, creating a special incentive for the FOS to monitor firms' handling of their own complaints. In other cases, a firm's tendency to offer redress once complaints reached the FOS was likely to go undetected since there was little incentive for either adjudicators or managers to raise it. Additionally, even with regard to failures that the FOS perceived as 'regulatory' in nature, the FOS's practice was to give firms an opportunity to handle their complaints and to pass information to the FSA only if firms manifested resistance to do so.

In contrast with the FOS's relative reluctance to provide the FSA with information regarding *cooperative* firms, the case studies discussed in section B reveal that the FOS reported *uncooperative* firms to the FSA in search of the latter's assistance. This strategy, however, was largely ineffective in mobilising FSA enforcement. The FSA supervisors were interested to know about firms' complaints performance since this contributed to their risk rating of firms. However, a prominent theme in the above case studies is the FSA's disinclination to step in as a result of information provided

by the FOS. Of the above case studies, it was only in the case of InsuranceOne and with regard to some of the extreme cases of firms' mishandling of endowment mortgage complaints that the FSA proactively intervened. The former was an incident where FSA intervention preceded provision of information by the FOS, and in the latter case the FOS forcefully pressed the FSA into action by publicising its inaction. This would seem to reflect the FOS's senior officials' perception that FSA intervention was likely only when its reputation was at risk. Interviews with senior FOS staff,[19] in addition to my observation of an internal training session and informal conversations confirm that complaint handlers were sceptical of the FSA's propensity to respond to information provided by the FOS. This perception further explains the above-mentioned FOS tardiness in escalating from communication to threatening firms with reporting them to the FSA. It is plausible that the FOS's executives were disinclined to threaten firms with reporting them to the FSA in expectation that this threat was likely to turn hollow if exercised. One team manager put it like this:

> "I could think of one firm that was pushing everything to a final decision [by an ombudsman] and we issued a bundle of decisions in one go, with a covering letter from the ombudsman saying, 'Right, now, if you don't start falling into line, we'll tell the FSA you're not being fair to your customers.' So, we do use it sometimes as a threat…that we will…say to the FSA, 'There's a problem here and they're [the firm] not being fair to their customers, it's causing us a problem, something needs to be done here.' I'm not sure there's a great faith, always, that the FSA is that interested or willing to sort some of the problems out…So…you don't know if it's worthwhile [to report firms]." (M1)

[19] Five similar responses.

Complaint handlers further suggested that threatening firms with reporting them to the FSA was ineffective given firms' uncertainty as to whether resistance to cooperate with informal FOS decisions puts them at risk of FSA enforcement. For instance, an executive explained that it was unclear to firms that they had anything to gain from applying an FOS decision to other complaints:

"For firms, it was always a gamble…There was always the hope [on the firm's side] that…maybe the FSA wouldn't think it was as serious as we did… So, maybe, when it came to the crunch of having to deal with the FSA about it… they might be able to find a way through it or it wouldn't come out...Just because we reported it…didn't necessarily mean that something absolutely terrible was going to happen." (E1)

Moreover, the FOS could not assure cooperative firms that collaboration would not put them at *greater* danger in the future. The manager of an FSA supervision team explained that if a supervisor realised that a firm voluntarily agreed to apply an FOS decision to all its pending complaints at the Ombudsman, the firm would have to explain why it did not follow the same principle when complainants did not insist on an FOS review.[20] Consequently, according to this supervisor, firms had little to gain from voluntary consent to adverse informal decisions:

"If I was a firm, I would be reluctant to accept that [an ombudsman's decision] would automatically apply to all my outstanding complaints [at the FOS], because I know that the FSA would think, 'Ah, there's a systemic issue at this

[20] Five similar responses.

firm,' and then I would come under even more regulatory scrutiny…as a supervisor, you would…think, 'OK, now this firm, there's an admission of guilt, they've accepted that in a number of cases, well, we've got a systemic issue at the firm.'…I would say… [as a firm] I'm incentivised…to fight each case. There's little to gain from early acceptance." (T1)

As a result, the logical option that risk-averse firms faced was to either systematically apply the ombudsman's decision to all similar complaints which reached them (in addition to those that were filed with the FOS) and possibly to all their transactions, or to fight each and every case that reached the ombudsman. In contrast, risk-takers rejected a large proportion of their complaints and 'cooperatively' offered redress once complaints reached the FOS. Firms' choice of strategy was shaped by their assessment of the costs of applying the ombudsman's decision across the board vs. the risk of FSA enforcement if they did not. An ABI official explained this:

> "[Firms] need to take a commercial decision…What's the cost of upholding these cases [in accordance with the FOS's decision] versus what's the risk of not doing it? And, for better or worse, they will make a decision which is based on where they are most comfortable to sit as an organisation." (T7)

4. Passing information to the media

While the FOS could not secure FSA enforcement against uncooperative firms, it could have presumably threatened firms with *naming and shaming* them in the public domain. Given financial firms' sensitivity to adverse publicity, this was likely to be a greater threat than reporting them to the FSA.

In accordance with the expectations of cooperation theory, the FOS (and former ombudsmen schemes) was reluctant to publish general comparative information regarding the number of complaints reaching the FOS and the reversal rate per firm. However, in contrast to the predictions of cooperation theory, the FOS further resisted using naming and shaming as a targeted sanction against uncooperative firms (O5, E2, E5, E6, and E7). From a rational choice perspective, the FOS's reluctance to name and shame uncooperative firms could be explained by reference to the industry's capacity to retaliate by appealing to the Treasury and/or its political executives to curb the FOS's powers. As discussed in section B, the Treasury's review of the FOS's handling of complaints of a systemic nature was prompted by firms' allegations that some of the FOS's decisions, most prominently regarding Dual Variable Rate mortgages, caused them considerable financial and reputation harm. In addition, as elaborated in chapter four, the FOS's reluctance was, at least in part, due to its executives' normative position that naming and shaming firms in the public domain was an inappropriate strategy for an ombudsman.

While not naming and shaming uncooperative firms, the FOS was unable to fully protect cooperative firms against the risk of adverse publicity. Complaint handlers' often noted with contempt the media's, and especially the *Daily Mail*'s, monitoring of their decisions. The power of the media to enforce individual FOS decision upon firms is well illustrated in the case of Dual Variable Rates as discussed in section B above. Consequently, firms were exposed to the risk that accepting an FOS decision in an individual case would result in pressure to offer similar compensation to a larger group of complainants.

In summary, firms' adversarial relationship with the FOS is best understood as a result of the FOS's limited control over the individuality of its decisions. This was due to firms' and the FOS's uncertainty regarding the FSA's inclination to act upon investment mis-selling and the role of the media in politicising individual dispute resolution. In addition, the FOS's failure to attain firms' cooperation was further a result of its own actions. First, firms' uncooperative behaviour may be linked to adjudicators' passivity. Second, it may be related to the FOS's executives' and ombudsmen's consensual ethos and their preference for communication and education over reporting firms' to the FSA or naming and shaming them in the public domain.

Finally, whilst cooperation theory would predict that the FOS would avoid reporting firms as long as they cooperated in handling those cases that reached the ombudsman, the FOS's executives and ombudsmen further expected firms to adequately handle their *own* complaints. This is not to say that they expected firms to apply an ombudsman's decision across the board. However, they were unwilling to be rendered accomplice to firms' strategic rejections of complaints, while upholding those few that reached the FOS. In other words, they did not accept a strategy which overtly tailored complaint handling to consumers' relative persistence.

E. The FOS's role as a buffer to the FSA

The above suggests that firms' uncertainty regarding the FSA's intervention was one reason for their adversarial relationship with the FOS. At the same time, the analysis above demonstrates that the FSA was usually disinclined to act upon information from complaints. Below, I suggest that the FSA's disinclination to intervene may be

explained by reference to both its concern for firms' financial stability, and the benefit of shifting the blame for overburdening regulation to the FOS.

Some FOS executives suggested that the FSA's disinclination to intervene was rooted in internal miscommunication between its leadership and supervision levels (E1; E7). A member of the FOS's Board of Directors suggested that this was the reason for the FSA's slow response to information concerning firms' mishandling of endowment mortgage complaints:

> "The difficulty with the FSA…was because of a sort of reluctance of approach …at supervisory level…the messages from the FSA [senior managers] weren't getting down to that kind of level…communication issues in an organisation the size of the FSA should not be surprising…So, we had to persevere and be patient sometimes, but keep pushing. And I think there were a couple of examples of organisations getting a letter from the FSA at quite senior levels, which did unblock things, but it took a lot of effort on our part to see that through." (E7)

In addition to the above, I suggest that the FSA's stance, and its unpredictability, was inherent in the duality of its roles, which combined prudential and conduct-of-business regulation. These two roles were in tension, since burdening financial firms with large scale compensation for investment mis-selling could put firms' financial stability (i.e. their prudential status) at risk. A notable example is the enormous cost of the industry-wide review of personal pensions mis-selling, which was discussed in chapter two. Had the FSA conducted a proactive review of endowment mortgage mis-

selling, the compensation and administration costs to the industry would have been similarly high. Consequently, one explanation for the FSA's disinclination to intervene in product mis-selling was its concern with firms' financial stability. This was especially the case in an environment of failing stock markets post-September 2001, when the FSA was concerned that insurance firms were undercapitalised (T2). Accordingly, the manager of an FSA supervision team explained that if a firm lost successive ombudsman cases, the foremost concern of its supervisors would be the implication of these decisions for the firm's prudential status. The interviewee explained that the standard response of the FSA would be to require the firm to allocate an adequate sum of money in its accounts to deal with the *risk* of compensation in case consumers complain, rather than to proactively review its past transactions and offer compensation to its customers.

> "As a regulator…where a firm has…had a number of complaints received by FOS in relation to a particular product…and there have been FOS decisions against it; We will…go to the firm and say, 'OK, we've had three [decisions] against you, we're going to extrapolate out, that means that you owe, potentially, whatever it is, £1.5 million compensation to consumers, how are you going to provide for that?'…We do that more on the prudential supervision side of the firm, '[be]cause we're thinking, 'Hang on a minute…if this firm's got thirty complaints and it's got to pay each customer whatever it is, £10,000, well, that's £300,000, how does that affect its financial resources? Would that bring that into breach of its obligations?' So, we do it for that reason….
>
> Q: Why would you only look at it from the prudential side?
>
> A: Well, because that would be our locus, as the supervisor." (T1).

The existence of the ombudsman gave the FSA greater autonomy in managing the balance between its dual responsibilities. The FSA could thereby limit its intervention to the most extreme cases. For example, an ombudsman remarked that the FSA was unlikely to act upon information provided by the FOS unless this regarded an industry-wide abuse of consumers:

"The FSA, in their present mood of not wanting to over-prescribe, were not keen to get involved in dealing with more cases than they currently deal with, because they…would see…dealing with complaints as our job, and if those complaints happened to have a knock-on effect for other people, then that may be unfortunate…they don't really want to start [messing] around in individual product decisions of individual firms unless there's some large-scale abuse or something really nasty round the corner." (O5)

Moreover, even with regard to an industry-wide mis-selling – the endowment mortgage case – the FSA relied on the FOS in lieu of engaging in a proactive review. A member of the FOS's Board of Directors explained that there was a tacit understanding between the FOS and the FSA's executives that at times the FSA would be using the FOS to deal with systematic problems, which it did not want to address via regulation. This was the basis for the FOS's expectation, and demand, that the FSA would intervene when the FOS faced firms' uncooperative behaviour.

"Where there were big numbers [of cases] involved and it was a case of general mis-selling…and could have been dealt with by the regulator through a regulatory review, the regulator had chosen not to do that [proactive review] and

therefore, implicitly…almost explicitly, wanted to use the complaints system [i.e. the FOS] as a sort of tool of regulation...And our view was, well, that was OK, providing, when we needed the regulator to intervene to unblock the blockages, that they did so." (E7)

An FSA executive explained, in response to a hypothetical question, that if the FOS did not exist, the FSA would have had to intervene in product mis-selling more frequently.

"Without the ombudsman scheme the regulator would have to do a lot more work upfront. It would have to use its powers to require people [i.e. firms]…to undertake sales reviews of particular categories of sales…through a very cumbersome legal means and you'd probably have a test case every time as to whether what you were doing was proportionate and reasonable." (T3)

However, as the discussion above suggests, intense media coverage of the FOS's rulings undermined its function as means for mitigating the cost of redress and administration following industry-wide mis-sellings. Rather, some of the FOS's individual decisions *de facto* had a wide-scale impact. The Dual Variable Rate mortgage case study, which was described in section B above, was a prominent example. The wide, unintended, impact of the FOS's decision explains why firms – led by the Building Societies Association – appealed to the Treasury for greater FSA intervention in cases of wide-scale mis-sellings. It further explains why firms became uneasy about the ombudsman's power to make decisions that go beyond the boundaries of regulation. Given that the FOS could no longer offer firms the

advantage of individualised and confidential dispute resolution, firms (although not all of them) preferred a process wherein they could negotiate with the FSA on the bulk of cases and on the basis of its risk-based approach. For example, an ABI official explained that the industry demanded that the FOS's decisions be confined to FSA regulations. This demand was at odds with the view that the ombudsman can make decisions which are 'fair and reasonable in all the circumstances of the case' beyond regulatory requirements. Hence, this initiative undermined the consent regarding the FOS's broad discretion.

> "One of the ways that we see ombudsman and regulator work more effectively…in other countries, is the idea of safe harbours…for a company, which means that as long as they have complied with the basis of regulation, they shouldn't then see themselves subjected to any further assessment…to the contrary…That's something that we campaigned to the FSA about, to create safe harbours…it would constrain the ombudsman." (T7)

The FSA, however, was reluctant to assume the greater role, which firms urged it to take. This suggests that the FSA valued having an independent ombudsman with a broad mandate to respond to consumer expectations. While an independent ombudsman could not fully buffer firms from applying its individual decisions to other complaints and transactions, its existence had the advantage of both satisfying consumers with high expectations for risk mitigation, while shifting the blame for overburdening regulation from the FSA to the FOS.

Conclusion

Applications of cooperation theory to the field of regulation predict regulatory-industry cooperation in iterated games. Extension of cooperation theory to the arena of complaint handling suggests that rational firms and complaint handlers would exchange individual and confidential decision making against amenability to informal conciliation. In contrast to these expectations, the data in this chapter suggests that the FOS's relationships with firms in the retail investment regulatory regime were frequently adversarial. This failure of cooperation is best explicated when analysing complaint handlers' interaction with firms as a multi-actor game, involving two additional crucial actors – the FSA and the media. Moreover, the FOS's interaction with firms was further conducted in the shadow of the City's political prominence and its capacity to enlist political support to restrain the FOS's discretion and to reshape its powers.

Firms' adversarial relationship with the FOS was primarily grounded in complaint handlers' inability to control the scope of their decisions. The FOS was on the whole strategic in its reluctance to pass *general* information regarding cooperative firms to the FSA or the media. Nevertheless, firms faced the risk that their agreement to redress individual complainants, while not redressing all other similar complaints and transactions, would be penalised by the FSA. Additionally, firms were exposed to the risk that adverse ombudsman decisions would find their way to the media, thereby generating adverse publicity and pressure to apply individual decisions across the board. Risk-taking firms were willing to engage in a strategy wherein they probably systematically rejected complaints, while voluntarily offering compensation once cases reached the FOS. In contrast, risk-averse firms persistently contested

adjudicators' informal decisions. In addition, firms appealed to the Treasury and its political executives for judicial control and FSA intervention in the handling of wide-scale complaints so as to restrain the FOS's discretion.

In addition to the risk of FSA and/or media 'enforcement', the FOS's own actions contributed to its adversarial relationship with firms. First, the FOS's tendency to standardise its handling of wide-scale complaints exacerbated the conflict with firms. I argued that this standardisation was provoked by the FOS's reaction to media scrutiny of its decisions and by adjudicators' and ombudsmen's anticipation of firms' challenge of their decisions. Second, I have further noted how adjudicators' passivity, on the one hand, and senior executives and ombudsmen consensual culture, on the other, rendered the FOS reluctant to use information from complaints as a means for penalising firms' uncooperative behaviour.

It was further shown that whereas firms were anxious at the prospect of FSA intervention, the FSA supervisors were usually disinclined to step in as a result of information reported by the FOS. While such information may have been integrated into the FSA's risk-rating of firms, it was unlikely to result in a requirement that firms apply the ombudsman decisions to other complaints and transactions. I suggested that the FSA's disinclination to intervene was rooted in the balance between its conflicting concerns for firms' conduct-of-business and financial stability. Moreover, the data seems to suggest that the FSA perceived the ombudsman as a means of managing public demand for protection in the aftermath of regulatory failure. Hence, the existence of the FOS allowed the FSA greater autonomy to avoid public-opinion

responsive regulation. Consequently, its disinclination to act upon information from complaints could be interpreted as an institutionalised rational regulatory strategy.

Last, the data shows that the FSA's disinclination to intervene did not necessarily restrict the scope of the FOS's decisions. Firms still faced media 'enforcement' of the FOS's decisions. However, under these conditions the FSA enjoyed a position wherein firms' criticism (together with the media's praise) was focused upon the FOS.

Conclusion: Third-party complaint handling in the regulation of retail finance

Introduction

The thesis analysed regulatory responsiveness to consumer complaints in the retail investment regulatory regime. Two core questions were examined: (a) What were the determinants of the FOS complaint handlers' responsiveness to consumer complaints, and (b) What was the role of the FOS in the regulatory regime? In addition, the thesis investigated the development of the ombudsman's intra-organisational institutions.

The key hypothesis with which I set out was that adjudicators' micro-level responsiveness was shaped by the FOS's meso-level intra-organisational institutions (i.e. its domain perception, structure and controls). This hypothesis was contrasted with a rational-contextual perspective, according to which complaint handlers' responsiveness is shaped by extra-organisational pressures. I further predicted coherence between the FOS's intra-organisational configuration and its role within the regulatory regime.

Consequently, chapter one delineated four ideal-type third-party complaint handling institutions, assuming consistency between micro-level responsiveness, meso-level intra-organisational institutions and macro-level role.

The case study suggested that the ombudsman was originally designed by the insurance industry as a mechanism for generous *ad hoc* responsiveness to individual complainants in order to buffer calls for systemic change to the insurance law. Due to

internal professionalisation and defensive pressures, the FOS came closer to a consistent system of bureaucratic regulation, which *legally* applied only to those complaints that reached the organisation. A prominent feature of this system was its relative responsiveness to consumer demands when compared with the FSA's risk-based regulation. The FOS's bureaucratic system of regulation was complemented by its 'therapeutic treatment' of consumer grievance over investment loss. In this sense it provided firms and the FSA with an effective pressure-releasing mechanism for the appeasement of the most persistent complainants. Thereby it partly buffered the FSA from consumer demands for increased regulation in the aftermath of regulatory failure and/or market collapse.

Below I summarise what I learnt about the FOS's micro-level responsiveness, meso-level institutions and its role within the retail investment regulatory regime. Section A assesses the extent to which the FOS corresponded to the ideal-type complaint handling models. It shows how, in contradiction with the prediction of coherent ideal types, the FOS developed into a hybrid of the four models. Section B analyses the stability of the ombudsman's domain perception despite profound changes to its structure and control system. Section C seeks to explain the transformation of the ombudsman's intra-organisational structure and controls. Section D analyses the determinants of adjudicators' individual-level responsiveness to consumer complaints. Section E discusses the role of the FOS in the retail investment regulatory regime. Section F assesses the usefulness of the within-case comparative methodology that was adopted in this study. The study's theoretical implications and directions for future research are discussed at the end of each section.

A. Hybridity of third-party complaint handling models

Chapter one delineated four ideal-type complaint handling institutions in regulatory regimes. It assumed coherence between complaint handling agencies' individual-level responsiveness, intra-organisational institutions and their macro role. The assumption of internal coherence is integral to the ideal-type methodology, which is a common tool of analysis in social science research. In addition, the prediction of coherence between micro-level responsiveness and organisations' meso-level institutions is congruent with a common, although by no means universal, tendency in political science research to effectively treat bureaucracies as coherent actors (e.g. Scharpf, 1997, Ch. 3). It is further consistent with one prevalent perspective in institutional organisational sociology, which suggests that members of organisations aim for coherence between their interpretative scheme, structure and operation. Assuming coherence between complaint handling agencies' intra-organisational configuration and their macro role rested on a supposition that their internal operation would reflect the accepted logic of complaint handling in their environment.

In contrast, the analysis in the former chapters has shown how the ombudsman's configuration developed to combine the four ideal types. Since its inception the ombudsman shifted from a *fairness* model of complaint handling towards a *professional* model. In addition, it underwent increased bureaucratisation of adjudicators' decision making and 'proceduralisation'[1] of their interpersonal interaction with complainants. That is, towards a hybrid combining the *bureaucratic* and *therapeutic* models of complaint handling. However, these changes resulted in an amalgamated configuration, rather than a full shift from one model to another.

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[1] See chapter one for my usage of the term 'procedural bureaucracy' and its contrast with machine and professional bureaucracies.

Below I recapitulate how the ombudsman resembled and differed from each of the ideal-type third-party complaint handling models:

1. Fairness devoid of public allocation of blame

The IOB (and to an extent the FOS) resembled the fairness model inasmuch as complaint handlers articulated their role in terms of *ad hoc* individual dispute resolution. Yet, from its inception, the ombudsman's configuration diverged from the fairness model in its emphasis upon informality and confidentiality, rather than public attribution of blame.

Chapter three has shown how the IOB's basic structure in its early days epitomised that of an *independent referee.* That is, an individual who was deliberately recruited from outside the industry. The IOB's mandate was broad, allowing the ombudsman to make decisions according to what he *individually* perceived as 'fair and reasonable in the circumstances of the case'. The ombudsman's judgment of what is 'fair and reasonable' was constructed in a discourse with consumer and firm representatives on the IOB's Council. The ombudsman's decisions reflected this discourse and his moral judgments of firms' and complainants' motivations and credibility. However, both consumer and firms' representatives on the IOB Council and Board resisted the application of adverse ombudsman decisions to other complaints and transactions.

To a degree, the above model was carried over to the FOS. Chapter four showed how complaint handlers articulated their handling of cases in terms of *individual* and *subjective* judgment, and thereby as distinct from both judicial and regulatory functions. It further depicted complaint handlers' perception that their decisions do

not bind firms in their handling of similar complaints and transactions. Chapter seven has shown that adjudicators' micro-level decision making, with regard to non-persistent firms and non-salient issues, was guided by heuristics about the credibility or deservingness of complainants. Thus, complaint handlers understood their role in terms of *ad hoc* subjective judgment, and under certain conditions their decisions seemed to actually resemble a habituated version of moral judgment.

However, the IOB's preference for informality and confidentiality, rather than for public attribution of blame, diverged from the fairness model even in its early days. These notions were salient in the FOS's delineation of its domain. Thus, the IOB, and thereafter the FOS avoided *naming and shaming* firms. Additionally, as elaborated below, while complaint handlers' perception of their domain as *individual* dispute resolution remained intact, between 1981 and 2004 the ombudsman's structure and practices were profoundly transformed.

2. Professionalism without learning

Over time the ombudsman's structure evolved from that of an *independent referee* towards a *two-tier professional bureaucracy*, consisting of adjudicators and ombudsmen.

With the increase in caseload, decision making was gradually delegated to an expanding cadre of ombudsman assistants. The ombudsmen handled only those cases, which assistants failed to bring to an end.

In the FOS, the ombudsmen's assistants – now named adjudicators – were predominantly recruited from within the industry's sales and complaint handling occupations. The ombudsman's mandate of '*fair and reasonable*' was effectively interpreted by these professionals in terms of '*advice suitability*'. While the conceptual framework of advice suitability was shared by the ombudsman, the FSA and the industry, the FOS's interpretation of this concept tended to be more responsive to consumer grievance.

In accordance with the professional model, *ombudsmen* had an expectation that firms learn from their decisions and voluntarily apply them to similar complaints. Consequently, the ombudsmen published anonymous examples of their previous decisions. The FOS provided firms with training and a telephone helpline to discuss cases in confidence. In the face of variance in firms' handling of endowment mortgage complaints, the FOS further provided large firms with confidential statistics benchmarking their decision reversal rates against their peers. Ombudsmen and executives were inclined to interpret firms' resistance as misconceptions, calling for proactive communication with (and education of) firms. In contrast, this consensual communication was detached from *adjudicators'* daily experience, in which some firms persistently disputed their decisions. Adjudicators perceived firms' resistance as a cynical attempt to mitigate and delay compensation. Adjudicators tended to adopt a passive approach to their interaction with firms and accepted the latter's entitlement to resist informal conciliation even when analogous complaints were previously examined by an ombudsman.

3. Bureaucratisation with no legal enforcement

Faced with increasing caseload, resistant firms (and thereby the risk of judicial review) and intense media scrutiny, the FOS's management and ombudsmen fought over the balance between the quantity and quality of adjudicators' decision making. This resulted in increasing efficiency and enhanced consistency of decision making. Yet, on the macro level, this bureaucratisation was divorced from the FSA's risk-based regulation. Bureaucratisation resulted in an independent system of FOS regulation. This system afforded higher level of responsiveness to consumer demands when compared with FSA regulatory requirements, but it was legally enforceable only to those complaints that reached the FOS.

While ombudsmen enjoyed extensive autonomy in the handling of complaints, the FOS's management subjected adjudicators' case handling to a variety of controls. Adjudicators were required to close at least their targeted amount of cases per week and their performance towards their target was closely monitored. Additionally, in reaction to external criticism and internal concern with the adverse effect of targets, the monitoring of adjudicators' decision quality was formalised. In certain high volume areas – Endowment Mortgages – and media salient domains – Split Caps, Equitable Life complaints and Dual Variable Rate mortgages – the processes of decision making were eventually altered and adjudicators' discretion was constrained by explicit criteria. Finally, I have shown how adjudicators embraced ombudsman guidance when challenging firms' risk-rating of their funds and when handling systemic problems regarding Precipice Bonds and the selling practices of InsuranceOne.

However, the above processes of bureaucratisation diverged from the bureaucratic model of complaint handling in two significant ways. First, the bureaucratisation of the FOS's complaint handling was segregated from FSA regulation. The FSA's regulations provided little guidance for complaint handlers to follow. Moreover, the FSA did not require firms to apply ombudsman decisions to other cases and its supervisors were usually disinclined to act upon information from complaints when the FOS brought it to their attention. Second, as elaborated in the next sub-section, complaint handling by the FOS was marked by its focus on managing consumer expectations and attaining their satisfaction.

4. Therapeutic discharge of cases

In addition to the construction of an independent system of increasingly bureaucratic regulation, the FOS had to manage the gap between its operation and consumers' media-driven expectations for redress. Complaint handlers perceived *communication* of their decision to the complainant, rather than simply arriving at their decision, as the core challenge of the complaint handling process.

The FOS engaged in systematic sampling and rigorous analysis of the drivers behind consumer satisfaction (and dissatisfaction) with its complaint handling process. The conclusions drawn from this analysis were fed back into the design of complaint handlers' interaction with complainants.

In addition to controls on quantity and quality of adjudicators' decision making, their interpersonal interactions with complainants were closely monitored. The goal of this monitoring was to maximise complainants' satisfaction with the complaint handling

process when complaints were rejected. To boost consumer satisfaction, adjudicators were required to keep complainants informed of the progression of their case. The complaint handling process was computerised, alerting adjudicators to which type of letters they had to send out on what day and dictating a 'personalised' form of communication. Adjudicators were encouraged by their managers to talk to complainants over the phone, to empathise with their frustration and to endure their displays of dissatisfaction. They avoided negative judgments of credibility, which could have wounded complainants' feelings. Complainants' venting of anger and frustration was effectively treated by adjudicators as integral to the complaint handling process.

Allocation of complaints across units and the level of teams' targets followed, in addition to assessment of the complexity of the case, managerial expectations of firms' and complainants' expected amenability to adverse decisions. Thus, allowing adjudicators to put more effort into their interaction with complainants (and firms) when these were expected to be harder to satisfy. In order to decrease the percentage of ombudsman reviews, the option of an ombudsman decision was explicitly suggested to complainants only if they manifested clear resistance to the rejection of their complaint. As a result, ombudsmen's reviews were effectively limited to resistant firms and to the most persistent (or relatively well-informed) complainants.

In conclusion, the FOS articulated its *domain* in terms of individual, confidential and informal assessment of fairness (or dispute resolution). Yet, in practice, complaint handlers' decisions were framed within the relatively ambiguous professional discourse of 'advice suitability'. The consistency of complaint handlers' judgment of

suitability increased as a result of the professionalisation of complaint handling and internal standardisation in the face of a high volume of complaints, extensive media coverage and resistant firms. Adjudicators' autonomy was constrained by the monitoring of the quantity and quality of their decisions and of their interpersonal interactions with complainants. This bureaucratisation was independent of FSA supervision of firms and enforcement of regulations. When compared with the FSA's risk-based discourse, the FOS's interpretation of 'suitability' tended to be more responsive to consumer grievances. Thus, the FOS developed into an independent system of regulation, which further managed incompatible consumer expectations. Yet, this regulatory system had no legal implications beyond those complaints that reached the ombudsman.

The expectation of coherent ideal types was therefore found to be a poor match to reality in this case. Yet, as the above analysis demonstrates, the ideal types were nevertheless a useful tool for making sense of the ombudsman system, both to characterise the hybrid configuration it represented and to characterise its change over time.

The study of third-party complaint handling institutions as part of regulatory regimes, despite their prevalence, is evidently lacking and calls for comparative research. In the UK alone, there were thirty-eight third-party complaint handling bodies in 2006, nineteen of which handled matters regarding the private sector.[2] The application of the proposed typology to other cases may enable better analytical comparative studies of the role of these institutions in their respective regulatory regimes.

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[2] Source: British and Irish Ombudsman Association website.

B. Negotiating accepted domain

The preceding chapters documented the discrepancy between complaint handlers' internalised perception of their domain as individual dispute resolution (or what I termed *'the individuality discourse'*) and the professionalisation and standardisation of their actual operation. Such divergence is at odds with the expectation that organisation members will aim for coherence between their interpretative scheme, organisational structure and operation. It further challenges the assumption that organisational culture serves as a *guide* to behaviour in loose structures (e.g. Kaufman, 1960; Heclo and Wildavsky, 1974; Wilson, 1989). Rather, the case study suggests the possibility of a gap between organisation members' internalised and accepted perception of their role and their actual habituated practices.

The thesis demonstrated increasing mismatch between the FOS's discourse of individuality and complaint handlers' consistent and increasingly standardised management of systemic complaints. In spite of this *de facto* consistency and standardisation, complaint handlers' articulation of their domain as individualised handling of complaints, coupled with notions of informality and confidentiality, remained intact. Moreover, the discourse of individuality conflicted with complaint handlers' everyday experience of large-scale systemic complaints. This is not to say that the FOS's individuality discourse had no association with (and bearing for) practice. Chapters four and eight have shown how, following negotiation with firms, the FOS individualised not only its rhetoric, but also, to an extent, its actual assessment of complaints wherein it disagreed with firms' risk-rating of their funds. Chapter six has further shown how complaint handlers' decision making, with regard to complaints against non-persistent firms, relied upon heuristics to the assessment of

complainants' credibility. Finally, chapters four and eight have depicted the association between the FOS's disinclination to *name and shame* firms and its domain perception. Yet, understanding complaint handling as a subjective judgment of what is 'fair and reasonable in the individual circumstances of the case' would miss increasing professionalisation and bureaucratisation. If complaint handlers' decision making was consistent overall and increasingly standardised, why did they profess and believe that it was individual and subjective?

One way to explain the discrepancy between complaint handlers' domain perception and their practices is to invoke the idea that organisations are resistant to change, especially when it pertains to their core beliefs (e.g. Greenwood and Hinings, 1988; Laughlin, 1991). In this case, while the ombudsman's recruitment base, structure and controls utterly changed, complaint handlers were allegedly attached to their core belief in the individuality of complaint handling. A related explanation would be that complaint handlers preferred a heroic portrayal of themselves as autonomous judgment makers with *indeterminate* discretion. Yet both of these explanations, while perhaps containing some truth, ignore the evidence that both the IOB and the FOS invoked the individuality discourse in the face of *external* criticism.

An alternative hypothesis would be that organisations borrow accepted scripts from their institutional field – in this case the ombudsman's professional community – to increase their legitimacy, while maintaining a gap between professed and actual practices (e.g. Meyer and Rowan, 1991; Powell and DiMaggio, 1991). However, as explained in chapter four, the ombudsman professional networks did not present the IOB or the FOS with a coherent and decisive model of what it means to be an

ombudsman. The ombudsman field was not fully institutionalised and therefore could not provide them with deep-rooted myths. Besides, the focus upon organisations' adoption of ideas from their professional networks would unduly underestimate IOB and FOS reliance upon the support of their local task environment.

The explanation that was proposed in chapter four emphasised the strategic value of the individuality discourse. This discourse embodied the ombudsman's tacit exchange with the industry on behalf of consumers. Originally this entailed broad discretion for the ombudsman as an *individual* to respond to consumer grievances against the confidentially and limited scope of his decisions. Over time, however, the individuality discourse developed into an exchange, which aimed to enable complaint handlers as *professionals* to interpret 'advice suitability' according to what they perceived as professionally adequate, in contrast to the industry's 'tick-box approach'. Hence, it was not *subjective* judgment that complaint handlers were seeking, but *professional* autonomy to interpret 'advice suitability' their own way. The fact that the FOS tended to reverse firms' decisions in over 30% of the complaints that reached it is evidence in itself for its distinct standards of 'suitability'. Moreover, it should be remembered that, by definition, consumers who carried their complaint all the way to the FOS had higher expectations than the average consumer. Therefore, in order to satisfy *these* complainants, the FOS *had* to adapt its standards to their higher expectations. The individuality discourse and the FOS's commitment to confidentiality were intended to allow firms a choice of whether or not to apply these higher standards to other complaints and transactions.

Additionally, the thesis has demonstrated how the ombudsman's emphasis upon the individual scope, informality and confidentiality of its dispute resolution was associated with its search for exclusive and legitimate domain in a crowded institutional space. When comparing itself with the civil courts, the FOS accentuated the low cost, swiftness and informality of its dispute resolution. When comparing its role with that of the FSA, the FOS emphasised the individuality of its decisions. As explained in chapter four, by acknowledging the limited scope of its decisions the FOS mitigated the scope for conflict and the need for coordination with the FSA. More broadly, by distinguishing its role from that of both the courts and the FSA, the FOS aimed to carve for itself a legitimate, albeit restricted, independent domain within the retail investment regulatory regime.

While all case studies are distinct, the FOS's need to balance between the expectations of consumers and its reliance upon the support of firms is characteristic of regulatory agencies. What the analysis here proposes as a hypothesis for future research is that regulatory agencies' domain perception is likely to embody their implicit bargain with firms *on behalf of consumers*.[3] Such bargains set the boundaries for regulators' autonomy to constrain industry practices. In addition, chapter four has shown that while the discourse of individuality, confidentiality and informality was not universal to the ombudsmen professional community, it was shared by some other similar agencies. Consequently, this case study may reveal how this discourse developed as an implicit bargain between some ombudsmen and their environments in the face of similar constraints.

[3] Implicit bargains have been studied in other contexts. For analysis of bargains in the context of public servants' relationship with their political executives, see: Hood (2001) and Hood and Lodge (2006).

C. Institutional adaptation to external disturbances

Analysis of the development of the FOS's intra-organisational institutions highlighted the case study's contribution to the research on organisations and institutional change. It is often claimed that organisations and institutions are prone to inertia. A prevalent theoretical approach to organisational change suggests that organisations are unlikely to undergo major *voluntary* changes in the face of external disturbances (e.g. Laughlin, 1991; Greenwood and Hinings, 1988, 1993). Historical institutionalism in political science similarly proposes that institutions' development is path-dependent with rare occasions of abrupt change (e.g. Baumgartner and Jones, 1993). Yet both organisational sociologists and historical institutionalists have highlighted *colonisation* (Laughlin, 1991) or *conversion* (Pierson, 2004; Thelen, 2003) as likely forms of profound organisational and institutional change. Colonisation/conversion typically describe a process whereby an organisation or an institution comes to be dominated by a previously marginal group, resulting in the transformation of its goals and operation.

What is evident about the financial ombudsman as an institution was the constant change it underwent between 1981 and 2004. To reiterate, as described in chapter three, the ombudsman's recruitment base was altered from the legal profession to the retail financial industry. Additionally, towards the end of 2002, professional managers – i.e. the Service and Operation managers – took over the managerial role of the Principal Ombudsmen, limiting the latter's domain to a technical policy role. Regular ombudsmen were cut off from their previous influence upon the recruitment and promotion of adjudicators and managers. As elaborated in chapter five, adjudicators' (but not ombudsmen's) work was subjected to targets, quality assurance and

monitoring of their interaction with complainants. In the prime casework area – the handling of endowment mortgage complaints – individual adjudication was replaced with new procedures for the negotiation of bulk cases. The practical goals of complaint handling were altered from *ad hoc* moral judgment towards a focus on case closure, attaining the *right* decision and consumer satisfaction. That is, from a fairness model and an *independent referee* structure towards a hybrid of the bureaucratic, professional and therapeutic models. What were the drivers of these changes and how were they achieved? To what extent were they driven by external vs. intra-organisational factors?

Chapter five suggested that the FOS's introduction of a target and bonus system was stimulated by a combination of an external contingency (its swelling caseload) and an internal structural feature (its budgetary reliance upon the number of cases closed). This focus upon *swift* closure of cases entailed attaining complainants' cooperation and a reduction of the number of ombudsman reviews. In a media-exposed regime, attaining consumer cooperation required attention to the psychology of complaint handling as a therapeutic process. I propose that these changes in focus and goals were facilitated and shaped by the 'colonisation' of the ombudsman by retail financial professionals. Given the prevalence of control via targets and incentives in the industry, adjudicators were amenable to this form of control. Additionally, it is plausible that given adjudicators' sales background, a client-focused communication approach to complaint handling was natural for them.

Yet, what was noteworthy about the above transformation, and thereby deserves special attention, was the buffering of the ombudsmen (and to a lesser extent veteran

adjudicators) from its impact. As explained in chapters three and five, ombudsmen were not subjected to targets and their salary was equivalent to that of the five Service Managers. Additionally, the increase in targets was mainly borne by the new Assessment and Endowment Mortgage units, whose personnel were recruited from outside the FOS and internally from among administrators and consumer consultants. In contrast, the targets of veteran adjudicators in the 'investigation' teams remained relatively stable. The isolation of the ombudsmen (and veteran adjudicators) not only enabled change by mitigating their likely resistance, it also rendered the FOS's focus on quantity susceptible to future change as a result of pressure from this privileged group, who operated under different circumstances and maintained dissimilar evaluation criteria. Thus, the isolation of the ombudsmen kept the FOS in balance, by institutionalising the conflict between managers' concerns with quantity and ombudsmen's focus on quality. Chapter five showed how the ombudsmen used the opportunity of external criticism and the internal exposure of consumer abuse by members of one team to regain some of their control over the quality of adjudicators' decision making, thus tilting the balance between quality and quantity controls.

Thus, this study contributes to the institutional adaptation literature in proposing the likely provision of some form of shield to powerful groups during a process of colonisation/conversion. Since colonisation and conversion processes typically involve capture of an organisation or institution by a previously marginalised group, buffering of the former elite is likely to be part of this process. I suggest that the importance of such buffering is in its opening of organisations and institutions to subsequent change in the next round. If this is the case, rather than manifesting internally homogenous ideal types, public bureaucracies are more likely to embrace a

greater degree of variety over time. The idea that bureaucracies are kept under control through the balancing of their internal contradictory forces – known as *collibration* – has been developed by Dunsire (1978, 1991). The thesis adds to this theory a detailed case analysis of a historical process through which such collibration came to be institutionalised.

D. **Individual-level responsiveness to consumer complaints**

This section summarises the thesis findings with regard to the determinants of adjudicators' micro-level responsiveness to complaints, as reflected in the outcome of their decisions and in their interpersonal interaction with complainants. I argue that whereas the shaping of adjudicators' decision outcomes embodied a combination of the bureaucratic, professional and fairness models, their interpersonal interaction with complainants resembled the therapeutic model. I further assess the extent to which complaint handlers' behaviour can be explained as a strategic response to external pressures in search of support and conflict mitigation.

The conclusions below should, of course, be treated with great caution inasmuch as they draw upon the limited statistical analysis in chapter six. The sample upon which this analysis is based was small (N=143). Important parts of the analysis were restricted to an even smaller sub-sample (N=58). The sample was not representative of the FOS's work as a whole, since it was drawn from the work of 12 adjudicators, two teams and certain broad product categories. It is with these limitations in mind that the conclusions should be read.

1. Micro-level standardisation

Chapters six and eight have shown how external pressures – firms' resistance and high-profile media coverage – made adjudicators inclined to appeal for, and to strictly follow, ombudsmen's formal guidance regarding firms' particular products. Hence, standardisation was prompted by external pressures. Yet, in contrast with the rational-contextual hypothesis, this response resulted in the intensification of complaint handlers' conflict with firms.

The use of formal standards as a means for the exertion of *top-down* intra-organisational control in *machine bureaucracies* is well documented. It is also acknowledged that external control renders organisations more centralised and formalised. That is, the need to give account to external actors, upon which the organisation is dependent, results in centralisation and formalisation of control (e.g. Mintzberg, 1979, 1983).

Previous studies have further shown the tendency for *bottom-up* consistent response to similar cases in decentralised *professional bureaucracies* (e.g. Emerson, 1983; Gilboy, 1991; Lloyd-Bostock, 1992). These studies suggested that reliance on *de facto* precedents and experience emerges under high workload and time constraints since it makes decision making more efficient.

In the FOS context, the tendency for standardisation in response to systemic complaints was puzzling for a number of reasons. First, as suggested above, standardisation was incongruent with complaint handlers' perception of their domain. Second, the data suggests that it was often team managers and adjudicators who

appealed for an ombudsman's guidance. Thus, standardisation was frequently driven from the bottom up. Third, while ombudsman guidance assisted adjudicators' decision making, it would be incorrect to conclude that it simply rendered their work more efficient. Rather, in cases where ombudsmen's guidance was issued, adjudicators tended to collect more information and firms were highly likely to request an ombudsman's review. If anything, as chapter eight demonstrated with regard to the FOS's risk-rating of firms' funds, standardisation caused complaint handlers' interaction with firms to be more adversarial. Adjudicators' workload *may* explain their reliance on labelling and heuristics (see below), but not their appeal for ombudsmen's formal guidance.

Chapter eight suggested that standardisation, beyond the case of endowment mortgages, was driven by complaint handlers' motivation to avoid blame and not only by efficiency considerations. Standardisation was induced by complaint handlers' expectation of firms' resistance and/or by media attention to the FOS's handling of complaints of a systemic nature regarding one or a few firms. Under these conditions, adjudicators anticipated firms' appeal for ombudsman review if the complaint was upheld and they wanted to commit the ombudsmen to their position in advance. Standardisation was also self-reinforcing. It aggravated firms' resistance and therefore fortified adjudicators' strict following of ombudsmen guidance in order to prevent firms' allusion to exceptions to challenge the FOS stance. Similarly, ombudsmen operated under the assumption that a judicial review was likely in these wide-scale complaints, and they were therefore eager to avoid inconsistent decision making that would expose the FOS approach to greater scrutiny. Finally, executives anticipated political and media scrutiny of the FOS and therefore wanted to be able to explain the

logic of the organisation's decision making. Hence, it would seem that standardisation was driven by a combination of bottom-up and top-down defensive pressures.

This discussion brings to mind Merton's (1952) deductive explanation for organisations' tendency towards bureaucratisation. Merton proposed that among the advantageous consequences of standardisation for members is "the *defensibility of individual action*…Simple categories rigorously applied to individual cases without regard for personal features can only be challenged at a higher level of the hierarchy" (March and Simon, 1958, p. 39). However, according to Merton, such rigidity and insulation put bureaucrats in tension with clients, which thereby drives their demand for further hierarchical guidance to defend their individual actions. The main difference between Merton's model and my analysis, however, is that Merton projected that all organisations were prone to bureaucratisation. The above analysis, in contrast, shows how bureaucratisation was restricted to cases wherein the FOS faced a hostile environment.

2. The effect of targets and gaming

Chapter six delineated a utility theory model, which predicted that targets would amplify *rational* complaint handlers' responsiveness to those firms and complainants that were most likely to resist their adverse decisions. Data analysis has shown that the target system created an *incentive* for adjudicators to reject cases when faced with resistant firms and non-persistent complainants. And indeed, during the research period, systematic rejection of complaints in one team was detected and acted upon by FOS executives. In contrast, adjudicators' decisions, in the sampled teams, were *unresponsive* to resistant firms and aggressive complainants.

One way to explain these findings is to point to the internal balance of the FOS's target and incentive scheme. As explained in chapter five, the FOS executives tailored the level of targets to their expectations of firms' and consumers' relative amenability to adverse decisions. The alignment between adjudicators, team managers and Service Managers' targets and bonuses resulted in the latter's receptiveness to teams' requests for adaptation of their targets. Additionally, the intensive quality assurance monitoring and the risk of an ombudsman's review rendered 'gaming' risky for adjudicators. In addition, however, it is probable that adjudicators were not all equally motivated by pecuniary incentives. It should be recalled that the adjudicators whose cases were sampled for this research were perceived by their team manager as experienced and talented employees. Most of them coached other members of staff. While these adjudicators, in interviews, acknowledged that the target system, under certain conditions, created an incentive to reject complaints, they perceived such action as deviant and unprofessional.

3. The pervasiveness of labelling

In contrast with the predictions of the rational utility model, when faced with a non-standardised decision environment, complaint handlers' decision outputs and information gathering seemed to be shaped by their 'labelling' of firms and complainants, rather than by strategic response to the intensity of external demands.

As elaborated in chapter one, the pervasiveness of labelling has been shown in a number of previous ethnographic studies of 'street-level bureaucracies' and inspectorates. This thesis similarly shows how labelling was associated with responsiveness in the context of complaint handling. The combination of qualitative

and quantitative methodology enabled better analysis of the conditions under which labelling seemed to occur.

Chapter six has shown how firms' persistence was broadly equated with adjudicators' tendency to engage in more intensive investigation and to uphold consumer complaints. Yet, the micro-mechanism involved in engendering this outcome differed across the two teams researched. In team A, complaints against the most persistent firm were treated bureaucratically. That is, once an ombudsman 'approved' that a trend in complaints was *a priori* unsuitable, adjudicators tended both to collect more information and to uphold the complaints. However, in the absence of such guidance, adjudicators tended to collect less information and to accept the firm's stance. It should be restated that, overall, team A's upholding rate was higher than the FOS average and that a higher percentage of its upheld cases were appealed to an ombudsman. In team B, firms' persistence was associated with adjudicators' general tendency to gather more information. Intensive investigation was associated with a greater tendency to uphold complaints. Hence, firms' persistence was equated with adjudicators' perception of certain firms as generators of *a priori* deserving complaints. Yet, adjudicators' decisions whether to uphold or reject these complaints were more individualised and based on their investigation. On the whole, team B's upholding rate was similar to the FOS average, as was the percentage of its upheld cases that were appealed to an ombudsman.

To sum up, in team A, adjudicators' handling of complaints against the most persistent firm was shaped by standardisation, rather than moralistic labelling. In team B, labelling was *directly* associated with adjudicators' tendency to collect more

information and only indirectly with a tendency to uphold the relevant complaints. I propose that the intervening variable that could explain these differences is the more hostile environment faced by team A, which resulted in adjudicators' greater reliance upon guidance rather than their individual judgment. In contrast, in team B, information gathering was guided by adjudicators' previous experience regarding firms' credibility. Yet, their actual tendency to reject or uphold was more varied and dependent on the conclusions drawn from their specific investigation. That said, it is restated that the above conclusions are vulnerable to reliability problems. It is possible that team B was as equally guided by ombudsmen-specific guidance as team A, but that this was not evident from the files.

Adjudicators' *relational distance* to firms was found to have no effect upon their decision making. That is, larger firms and those firms with which the FOS had frequent interaction were not treated leniently when compared with small firms and IFAs. If anything, interviews suggests that adjudicators were more sympathetic to the resistance of IFAs, while critical of large firms' resistance to adverse decisions.

The statistical analysis in chapter six further suggested that adjudicators were disinclined both to collect information and to uphold complaints by 'aggressive' complainants. This tendency was restricted to complaints against non-persistent firms and it was more pronounced under higher targets. These findings strongly disagree with the expectations of the rational utility model. I suggested, on the basis of interview data, that adjudicators may have equated consumer persistence with media-driven high expectations for redress and with a 'compensation culture'. Hence, it would seem that when adjudicators had no *a priori* reason to distrust firms, their

investigation and decision outputs were shaped by heuristics for complainants' credibility.

Finally, when handling complaints against non-persistent firms, adjudicators were more likely to uphold complaints filed by complainants of high socio-economic status (professionals and managers). This tendency was restricted to teams with higher targets. Socio-economic status had no effect upon adjudicators' tendency to gather information. I have further shown that socio-economic status was associated with adjudicators' tendency to rely upon logos, rather than pathos, in their communication with complainants. Unlike the above, these findings seem compatible with the rational utility theory model. However, it is also possible that adjudicators perceived educated complainants as more reliable. This interpretation is supported by the fact that adjudicators tended to reject complaints by 'aggressive' complainants even when they were of high socio-economic status. These findings partly coincide with Serber's (in Nader, 1980) ethnography of a complaints department of the Policy Service Bureau (PSB) in the US, which regulated insurance companies. He found that "the calm, articulate…middle-class complainant received Bureau attention over the excited or hysterical…complainant" (*Ibid,* p. 34).

In conclusion the above suggests that complaint handlers' micro-level responsiveness was shaped by their previous experience with firms and heuristics for complainants' credibility. However, there is an alternative explanation to these findings, which should be acknowledged. It is possible that the measured heuristics – i.e. complainants' aggressiveness and socio-economic status – in fact correlate with the validity of complaints. That is, I cannot refute the possibility that 'aggressive

complainants' indeed generate 'unworthy' complaints, whereas high-socio economic groups generate 'worthy' complaints.

4. Emotional labour

The thesis has demonstrated complaint handlers' attempts to humanise the complaint handling process and the centrality of consumer satisfaction in FOS discourse, controls and practices. Chapter five showed the fusion of consumer satisfaction and decision quality in FOS quality assurance procedures. Chapter seven proceeded to analyse adjudicators' practices in interacting with complainants whose complaints were rejected. I demonstrated how the FOS's default writing style, as shaped by its standard decision format and auto-text, emulated personalised and informal communication with complainants. I have further shown how adjudicators used rhetorical strategies to secure complainants' confidence in their decisions. Additionally, the case study revealed complaint handlers' attempts to manage what they perceived as unrealistic consumer expectations and their awareness to the emotional drivers of complainants' dissatisfaction. Adjudicators were expected to communicate with complainants over the phone, rather than simply correspond with them by post. They were encouraged to display empathy and sympathy with complainants' grievances. In their interaction with complainants they avoided credibility findings, which could agitate complainants. Furthermore, complaint handlers endured complainants' displays of frustration with firms, with their unsuccessful investments and with the complaint handling process. Finally, I have shown how ombudsmen's review, rather than further correspondence with an adjudicator, was effectively limited to those complainants whom *adjudicators* believed could not be satisfied by other means. Hence, review by the ombudsmen was

transformed into a mechanism for satisfying the most persistent complainants from within the FOS's clientele. I therefore proposed that while the *content* of adjudicators' decision making involved a hybrid of the bureaucratic, professional and fairness complaint handling models, their *interaction* with complainants came closer to the therapeutic model.

The FOS's efforts to attain consumer satisfaction, rather than to simply dispose of complaints, were at odds with the findings of two previous studies, which touched upon regulatory third-party complaint handling. To reiterate, Hall and colleagues (2000) study of Oftel found that complaint handlers focused upon the discharge of complaints by whatever means. Serber (in Nader, 1980) found that the Policy Service Bureau was unconcerned with attaining the satisfaction of any but the most persistent complainants, i.e. those of middle- to upper-class socio-economic status groups. Nader's (1980) summary of Serber's findings portrays an antithesis to the centrality of consumer satisfaction in the FOS's discourse and practices: "[The Policy Service Bureau] exhibits a syndrome of bureaucratic inertia and accommodation to the needs of the insurance industry…the bureau discourages many consumers from pressing their complaints by giving them lengthy forms to fill...bombarding them with technical explanations or simply failing to answer their complaint letters" (*Ibid,* p. 19). What was common to Oftel's complaints department and to the Policy Service Bureau was that they were both marginal and isolated units within regulatory agencies. Serber, in particular, documents the Policy Service Bureau's severe lack of resources, which resulted in complaint handlers' sole focus discharge of cases.

What was the origin of the FOS's distinct ethos and practices of consumer satisfaction? The pressure created by the target system to close cases coupled with complaint handlers' belief that the media constructs excessive consumer expectations for services and redress, go some way to explain the FOS's concern with complainant satisfaction. This would suggest that complaint handlers believed that cases could not be concluded without due attention to complainants' emotional needs. Swift closure of cases was facilitated if complainants could be convinced that their complaint had been seriously assessed by independent professionals. Yet, what was striking about the FOS was its attempt to satisfy *all* complainants, while undoubtedly investing *more* in satisfying the more persistent (i.e. those complainants who were hardest to satisfy). Surely, many cases could have been easily closed by intimidating complainants or delaying answering their letters and phone calls, but such strategies were not part of the FOS toolkit.

From a rational choice perspective, the FOS's avoidance of such intimidation strategies could be explained by reference to media monitoring of its decisions and interaction with complainants. However, I suggested that the FOS's fervour for consumer satisfaction cannot be explained *only* in rational choice terms. Rather, it was deeply ingrained in complaint handlers' perception of their role and of its distinction from that of the civil courts. It was related to their pejorative perception of legalism and formalism. It was shaped by complaint handlers' client-service (or sales) ethos. Ultimately, I propose that the FOS's obsession with consumer satisfaction was related to complaint handlers' need for a positive image of the public value of complaint handling.

5. Institutional vs. rational-contextual micro-level responsiveness

The thesis has demonstrated the value of an intra-organisational institutional perspective in explaining complaint handlers' micro-level responsiveness. As evident from the above discussion, three factors *directly* shaped the variance in adjudicators' decision outputs and information gathering: (a) Organisational-based professional knowledge regarding what constitutes suitable advice: while complaint handlers and the industry shared the conceptual framework of advice suitability, the FOS's interpretation tended to be more liberal and oriented towards consumer grievance; (b) Standardisation of response to systemic complaints; and (c) Localised heuristics regarding the credibility of firms and complainants. The micro-strategies of complaint handlers' interaction with complainants were equally shaped by intra-organisational factors, including the computerised management of adjudicators' written communication, individual coaching, quality assurance checks, etc.

This is not to say that contextual factors were unimportant in shaping adjudicators' micro-level responsiveness. Yet, the FOS's response to such contextual factors was not merely strategic as suggested by the rational-contextual hypothesis. As explained above, the internal standardisation of adjudicators' decision outputs was instigated in response to firms' anticipated resistance and media scrutiny of the FOS's decisions. However, I showed that this standardisation resulted in intensification, rather than mitigation, of conflict between complaint handlers and their environment. The management of adjudicators' interaction with complainants was similarly tightened in response to a perception that complainants' expectations for redress were driven by the media. Yet, I proposed that the very endeavour to attain consumer satisfaction was primarily driven by the FOS's domain perception.

E. The FOS's role in the retail investment regulatory regime

Drawing upon current literature and the empirical evidence in the previous chapters, it is possible to draw two broad opposing visions of the role of third-party complaint handling schemes in regulatory regimes. One, which is the prevalent portrayal of third-party complaint handling schemes, is their representation as mechanisms for voice and accountability. Consequently, the complaint handling process is perceived in terms of an 'account model' (Lloyd-Bostock and Mulcahy, 1994), wherein complainants call firms to account. The bureaucratic, professional and fairness models all adhere to this concept in different manners. The third-party complaint handling body facilitates the accountability process by either enforcing rules upon firms, instigating their learning from complaints or via public allocation of blame and redress. The second, less prevalent, explanation is what I termed the *therapeutic* model, wherein third-party complaint handling effectively functions as a 'cooling off' or pressure-releasing mechanism for the most persistent complainants. The macro-impact of complaint handling in the therapeutic model, is in containing consumer dissatisfaction outside the public sphere.

1. The FOS as a buffer to consumer dissatisfaction

Chapter two suggested that the viability of the FSA's risk-based regulation entailed managing consumer expectations for increased regulation in the event of failure. The data in the previous chapters lends some support to the hypothesis that the FOS *de facto* buffered firms and the FSA risk-based approach from consumer demand for increased regulation in the aftermath of frequent retail investment scandals.

In the first instance, it should be recognised that the FOS, by definition, handled the dissatisfaction of the most persistent complainants (from within those whose complaint was rejected by firms), i.e. those who carried their complaint all the way to the ombudsman. Thus, while adjudicators were not *individually* responsive to the most persistent complainants, it should be recalled that the FOS's clientele as a whole was unrepresentative of consumers' general stamina for pursuing complaints. This unrepresentative group enjoyed the FOS's relatively liberal interpretation of what constitutes 'advice suitability', its extensive investment in interpersonal communication and its focus upon consumer satisfaction. Yet, as discussed in section A above, the FOS was inadequate as a system of accountability given the narrow legal application of its decisions and its aversion to public allocation of blame. Accordingly, I suggested that the FOS served as a means for confidential and legally restricted generous responsiveness to the most persistent complainants. As such it was specially suited to contain consumer dissatisfaction outside the public sphere.

Chapter eight has also referred to the inclination of some firms to use the ombudsman as a mechanism for sifting and thereafter redressing the most persistent complainants. Thus, these firms adopted a strategy whereby they rejected complaints, but offered redress to those complainants who filed a complaint with the FOS.

Chapter eight has further highlighted the FSA's usage of complaint handling as an alternative to regulatory intervention and its disinclination to require firms to grant general redress when provided with information from the FOS regarding complaints of a systemic nature. The FSA's reliance on complaint handling for the management of systemic problems entailed limiting redress to those consumers who manifested

higher expectations from the regulatory regime. Consequently, the FSA enjoyed greater autonomy to avoid intervention in response to public demand for increased regulation inasmuch as this contradicted its risk-based assessment or its interpretation of an event in light of its regulations.

Going beyond the FOS, the case study highlights the role of highly responsive *individualised* third-complaint handling as a buffer to consumer collective action and public demand for increased regulation. In fact, during the writing of this chapter, the Energy Retail Association established a new Energy Supply Ombudsman after the consumer body – Energywatch – filed a collective 'super complaint' to the energy regulator Ofgem (Brignall, 2006). However, the next section suggests that restriction of FOS decisions to individual cases (and therefore its function as a buffer mechanism) was undermined by firms' aversion to regulatory and publicity risk.

2. The transformation of the ombudsman's role by its environment

Chapters six and eight have shown firms' frequent resistance to accept adjudicators' informal decisions when these were part of a larger trend of similar cases. Such resistance was at odds with the FOS's assertion that its decisions did not bind firms' handling of similar complaints and transactions, and its general respect for confidentiality. Chapter eight suggested that firms' adversarial relationships with the FOS in these instances were primarily a consequence of the ombudsman's limited control over the individuality and confidentiality of its decisions. This was due to both the firms' and the FOS's uncertainty regarding the FSA's inclination to act upon the FOS's interpretation of complaints as indicating a breach of regulations and the role of the media in politicising individual dispute resolution. Under these conditions risk-

averse firms found themselves in a position where they had to either self-enforce the FOS decisions to all their similar complaints (and possibly their transactions), or fight each and every case once it reached the FOS. Consequently, such risk-averse firms called for greater integration between the FOS's handling of complaints and the FSA's risk-based regulation. Essentially, what these firms demanded was a bureaucratic system of complaint handling, wherein the adjudication of complaints would be subjected to risk-based regulatory rules. Such calls were resisted by both the FOS and the FSA. Response to such demands would have resulted in a full transformation of the role of the ombudsman in the retail investment regulatory regime from a fairness model to a bureaucratic model.

It is noteworthy that it was primarily *some* firms' risk-aversion and reputation sensitivity that instigated their conflict with the FOS. In contrast, risk-takers were probably willing to adopt a strategy wherein they differed between their internal complaint handling and those cases that reached the FOS. Understanding this variance in firms' response to FOS decisions was beyond the scope of the current research. The few interviews which I conducted with industry participants regarding their perceptions of the FOS and of their obligations to apply its decisions to other complaints and transactions suggest that this is a rich field for future research.

F. Methodological directions for future research

The thesis employed a distinctive and rarely-used methodology, which combined non-participant observation, including interviews and archival research, with systematic sampling of files.

This distinctive methodological approach produced theoretically meaningful advantages. The combination of discourse analysis of interviews and both qualitative and quantitative analysis of files highlighted the disagreement between complaint handlers' discourse of individuality and their consistent (and even standardised) approach to systemic complaints. If such a discrepancy between domain perception (or interpretative scheme) and habituated practices is common, the proposed methodology is a vital tool of analysis.

Additionally, the conduct of interviews and observations generated hypotheses and operationalisation of variables, which were grounded in participants' understanding of their operation. For example, the measurement of complainants' expected persistence according to the number of letters written to the firm was rooted in interviewees' articulation of their expectations about complainants.

The micro-analysis of complaint files has shown that while extra-organisational factors – firms' resistance and media publicity – were important in shaping the FOS's response to complaints, these were further mediated by intra-organisational factors. The methodology employed allowed close tracing of such micro-processes of responsiveness to consumer complaints, which are lacking in current political science and public administration literature.

Yet, the above analysis suggests some limitations, which can be mitigated in future research. Above all, the small size of the sample undermined confidence in some of the statistical conclusions. Additionally, ideally the results of the statistical analysis should have been discussed with interviewees in order for them to assess the validity

of the findings. This was not feasible in this case since the interviews were conducted before I finalised the statistical analysis of the data.

This thesis has contributed to the study of third-party complaint handing in regulatory regimes. It delineated a typology, which can inform future studies of similar organisations. It challenged the common representation of third-party complaint handling institutions as mechanisms for voice and accountability, and assessed their possible role in managing consumer expectations for redress and risk-mitigation. It furthered our knowledge of the micro-mechanisms that shape street-level bureaucratic responsiveness, distinguishing between intra-organisational and contextual factors. In addition, it contributed to the scholarship about the development and change of intra-organisational institutions. Finally, it provided rich empirical description of retail investment complaint handling. I hope that this investigation was not only rigorous and compliant with the professional expectations of the social science academic community to which I belong, but also fair, reasonable and empathetic to the research subjects.

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Appendix A

Sources of data about the Financial Ombudsman Service

Chapter one surveyed the main sources of data, which were used in this study. This appendix further elaborates my data sources about the FOS (beyond direct observation and interviews). As explained in chapter one, I was granted access to the FOS's intranet and email circulation. This enabled collection of the following data:

Analyses of consumers, firms and employees' satisfaction: The FOS published regular updates on consumer satisfaction with its services and, although less frequently, analysis of firms and employees' satisfaction surveys. In addition, the intranet provided me with access to a number of internal research papers, which analysed the causes of variance in consumers' satisfaction with the FOS services.

Complaint files: The FOS's complaint files were both computer- and paper-based. A computer program, to which I was given access, enabled me to search and collect information regarding both ongoing and archived complaint files. In addition, I ordered the sampled paper-based files from the FOS's archive.

Email communication: I received any general email communication that was sent to the FOS's staff.

Employees Committee Forum: Minutes from the meetings of the FOS's forum of employees' representatives and their discussions with the Executive Team.

Firms' directory: A dataset, which detailed the composition of financial groups and firms, including their status (i.e. providers of financial products, IFAs or tied-agents).

Human resources documents: Information regarding the FOS's internal pay-structure and its criteria for employees' appraisals; The FOS's policies regarding professional development for its staff; Internal vacancy announcements; News about new appointees and internal promotions.

Incentive scheme: Decisions regarding teams' and units' six-month targets and changes to the FOS bonus scheme for the period 2003 to 2004.

Individuals' case handling reports: The intranet provided updated reports about each adjudicator's performance. This included: The number of open cases; The number of cases that the adjudicator closed since the beginning of the target period; Variance in the 'age' of the adjudicator's files; The ratio of cases closed by an ombudsman vs. due to the adjudicator's informal decisions; Variance in the type of products handled by the adjudicator; The names of the five firms that had the largest number of complaints against them within the adjudicator's caseload.

Internal guidance: The FOS's intranet comprised a large variety of guidance to adjudicators and team managers. These included: Ombudsmen's general guidelines to the handling of key financial products; Guidance regarding adjudicators' management of their caseload and relationship with complainants; Direction to mangers and adjudicators about the criteria for quality assurance checks.

Media highlights: Daily highlights from the press regarding the FOS's operations and/or retail financial services.

Ombudsmen meetings reports: Minutes from the ombudsmen's forum meetings and their discussion of key policy issues.

Organisational charts: Updated charts of adjudication teams and support units.

Reviews: Internal communication regarding the FSMA 2 Year review and the FOS's Board's initiation of an internal review of the FOS's operations.

Staff monthly briefing: A monthly briefing, which communicated to employees the statistics regarding case-closure and the average time-to-closure as well as a summary of the recent activities of each unit within the organisation.

Standard paragraphs: Ombudsmen-authorised auto-text paragraphs, which were commonly used by adjudicators when writing decisions.

Talks and presentations: Power-point files, which documented internal talks by senior staff to employees.

Telephone directory: This included the name, position, desk number, telephone number and a picture of every member of staff.

Appendix B

Interviews sample

During the research period I conducted forty-seven formal interviews within and outside the FOS. Interviews were taped (except in four cases)[1], transcribed and analysed using data analysis computer software (Atlas ti). In addition, some of my informal conversations with complaint handlers were documented in my field notes and are listed below inasmuch as I relied upon them in the text.

Adjudicators (FOS)

1. A1 Formal interview
2. A2 Formal interview
3. A3 Formal interview
4. A4 Formal interview
5. A5a Formal interview
   A5b Informal conversation
6. A6 Formal interview
7. A7 Formal interview
8. A8 Informal conversation
9. A9 Formal interview
10. A10 Formal interview

Team managers and assistant team managers (FOS)

11. M1 Formal interview
12. M2 Formal interview
13. M3 Formal interview
14. M4 Formal interview
15. M5 Formal interview
16. M6 Formal interview

Ombudsmen (FOS)

17. O1 Formal interview
18. O2 Formal interview
19. O3a Formal interview
    O3b Formal interview

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[1] Two interviews were not taped due to technical failures. In another two cases the circumstances were unnameable for recording.

20. O4 Formal interview
21. O5 Formal interview
22. O6 Formal interview
23. O7a Formal interview
O7b Formal interview
24. O8 Formal interview

Executive (FOS)

25. E1 Formal interview
E1a informal conversation
E1b informal conversation
26. E2 Formal interview
27. E3 Formal interview
28. E4 Formal interview
29. E5 Formal interview
30. E6 Formal interview
E6a Informal conversation
E6b Email communication
30. E7 Formal interview

Support units (FOS)

31. S1 Formal interview
32 S2 Formal interview
33. S3 Formal interview
34. S4 Formal interview

Other Participants

35. T1	FSA	Formal interview
36. T2	FSA	Formal interview
37. T3	FSA	Formal interview
38. T4	FSA	Formal interview
39. T5	Treasury	Formal interview
40. T6	IOB	Formal interview
41. T7	ABI	Formal interview
42. T8	Insurance claims assessor	Formal interview
43. T9	BIOA	Formal interview
44. T10	BIOA	Formal interview
45. T11	Compliance consultant	Formal interview

Appendix C

Unpublished Internal Communication of the Insurance Ombudsman Bureau

In addition to secondary literature and to the IOB's and the PIAOB's annual reports, the historical tracing of the ombudsman's development relied upon a private archive of unpublished documents to which I was granted access. This archive comprised original documents and communication between the IOB's Ombudsman, Board and Council. Below I record the nature of these documents.

Date	Nature of document
14 November 1980	Nomination letter addressed to the first IOB ombudsman.
28 August 1985	Minutes of the Council's meeting.
21 April 1986	Communication between a member of the Council and the Council's Chairman.
1 May 1986	Communication between a member of the Council and the Council's Chairman.
27 April 1988	Minutes of a meeting between the Board and the Council.
7 June 1988	Minutes of a meeting between the Board and the Council.
16 June 1988	An assistant ombudsman's employment contract.
30 September 1988	Communication between the Chairman of the Board and the Chairman of the Council.
4 September 1988	Guidance note to the ombudsman's assistants.
10 December 1988	Appointment letter addressed to the second IOB ombudsman.
13 March 1989	Minutes of the Council's meeting.
17 January 1990	Minutes of the Council's meeting.
6 February 1990	Minutes of a meeting between the Chairman of the Board and the Chairman of the Council.

16 February 1990	Communication between the Ombudsman and a member of the Board or Council.
23 February 1990	Communication between the Ombudsman and a member of the Board or Council.
14 March 1990	Minutes of the Council's meeting.
21 March 1990	Minutes of the Council's meeting.
8 May 1990	Minutes of the Finance Committee's meeting.
23 May 1990	Minutes of the Council's meeting.
5 June 1990	Communication between the Ombudsman and the Chairman of the Board.
22 June 1990	Communication between the Chairman of the Board and the Chairman of the Council.
20 August 1990	Renewal letter of the ombudsman's appointment.
19 September 1990	Minutes of the Finance Committee's meeting.
23 October 1990	Minutes of a meeting between the Board and the Council.
7 November 1990	The Ombudsman's letter to the Council.
14 November 1990	Minutes of the Council's meeting.
21 November 1990	Communication between the Chairman of the Council and the Chairman of the Board.
22 November 1990	The Board Directors' anonymised comments on the Ombudsman's draft annual report.
9 January 1991	Minutes of the Council's meeting
1 March 1991	Minutes of a meeting between the Chairman of the Board and the Chairman of the Council.
4 June 1991	Minutes of a meeting between the Chairman of the Board and the Chairman of the Council.
10 June 1991	Communication between the Chairman of the Council and a Council member.
31 July 1991	Minutes of a meeting between the Chairman of the Board and the Chairman of the Council.

September 1991	Analysis of the division of labour between the Council, the Board and the ombudsmen.
25 November 1991	Communication between a Council member and the Council's Chairman.
23 December 1991	The Ombudsman's correspondence with a firm's executive.
23 January 1992	Minutes of a meeting between the Board's Chairman, the Chairman of the council and their head administrators
April 1992	Appraisal of the Ombudsman's performance and discussion of his reappointment.
23 April 1992	Communication between a member of the Council and the Council's Chairman.
1 May 1992	Communication between a member of the Council and the Council's Chairman.
15 May 1992	Minutes of meeting between the Council's Chairman and the Ombudsman.
30 July 1992	Reappointment letter to the Ombudsman.
28 January 1993	Report on a survey of firms' satisfaction with the IOB.
31 January 1993	Communication between the Chairman of the Council and the Chairman of the Board.
9 February 1993	Minutes of the Board's meeting.
27 May 1993	Communication between a member of the Council and the Council's Chairman.
25 June 1993	The Ombudsman's memorandum to the Council.
21 December 1993	Communication between the Chairman of the Council and the Ombudsman.
18 April 1994	Communication between the Chairman of the Council and the PIA.
24 April 1994	Communication between the Chairman of the Council and the PIA.

27 April 1994	Communication between the Ombudsman and the Chairman of the Council.
10 May 1994	Communication between the Chairman of the Council and the Ombudsman.
11 May 1994	Minutes of the Council's meeting.
19 May 1994	Communication between a member of the Council and the administrative manager.
20 May 1994	Communication between a member of the Council and the Council's Chairman.
1 June 1994	Letter of a private consultant to the Council and the Ombudsman.
1 June 1994	The Chairman of the Council's memorandum to the Council's members.
1 June 1994	Minutes of the Council's meeting.
27 June 1994	Communication between the Council's Chairman and the Ombudsman.
5 July 1994	The administrative manager's memorandum to the ombudsman's assistants.
No date	Council members' declarations of their conflicting interests.