The institutionalisation of regulatory domain perception– The case of the UK Financial Ombudsman Service

Sharon Gilad

Introduction

This paper analyzes and explains the domain perception of complaint handlers in the UK Financial Ombudsman Scheme (FOS) – a public organization handling consumer complaints regarding the retail selling of financial products. The FOS's asserted ideology emphasizes that its role is to resolve disputes, according to their individual merits, rather than set general principles for firms' sales practices and future handling of similar complaints (hereafter: the individuality discourse).

The aim of the analysis is to develop a better understanding of an under-researched phenomenon – the institutionalization of bureaucratic collective domain perception. The study of bureaucratic domain perception may be challenged as *a priori* unimportant since perception and ideology do not necessarily match habituated practices. Indeed, the workings of an organization may be decoupled from its normative ethos, just as implementation may diverge from policymaking. However, even if such decoupling takes places, the organization's asserted domain provides a norm against which participants assess, interpret, legitimize and condemn practices. Therefore, domain perception is a phenomenon deserving attention on its own right, in addition to its link to actual practices.

Combining organizational sociology and political science approaches, I develop theoretical predictions about the sources of bureaucratic domain perception, and contrast them with the assumption of prevalent rational choice institutional accounts of bureaucracies. My analysis of the FOS suggests that its individuality discourse developed as a pragmatic strategy, permitting it discretion to respond to complainants' interests, while attaining industry support and legitimacy. This pragmatic strategy was further internalized as the appropriate and taken for granted role for any ombudsman. I further show, however, that the effectiveness of the FOS's individuality discourse diminished in a public and media environment which expected firms to apply the ombudsman's decisions to other transactions and complaints, irrespective of their non-legally binding status.

The institutionalization of domain – theoretical perspectives

In this section I explore the expected determinants of regulatory agencies' domain perception and demarcation. That is, bureaucracies' collective understanding, explanation and justification of their role and the boundaries of their legal mandates. I further delineate three 'ideal type' roles of complaint handling within regulatory regimes. These ideal types will form a basis for my analysis of the domain perception of the FOS in the next section.

Bureaucratic domain perception

Rational choice analyses assume that bureaucrats formulate their interests and agendas independently from the prevalent interests, values and cognitive perceptions of other actors in the environment within which they operate. A classic rational-choice analysis expects bureaucrats to prefer a maximal expansion of budget and tasks, and to exploit their information asymmetry vis-à-vis politicians in attaining these goals (Downs, 1967; Niskanen, 1971; but see Dunleavy, 1991). Current institutional approaches to rational choice – Principal-Agent and Transaction-Costs analyses – assume discretion maximizing bureaucrats, who constantly assess the distance between their 'ideal points' and those of their institutionally empowered principals, and readily exploit their superior information and any opportunity to shirk (McCubbins, Noll and Weingast, 1987; Hammond and Knott 1996; Epstein and O'Halloran 1999). These images of conflict, however, strongly contradict empirical research in organizational sociology, which shows that what organizations strive for is support and legitimacy vis-à-vis their environment, rather than pure material resources, discretion and evasion. It is further insensitive to the empirical phenomenon of organizations' collective institutionalized norms of adequate domain.

Studies in organizational sociology and public administration, whether with reference to organizations' 'interpretative scheme' (Hinings and Greenwood 1988; Greenwood and Hinings 1988), or 'internal identity' (Wilson 1989), reveal that organizations tend to have a collective shared set of norms and beliefs delineating which activities are appropriate (and inappropriate) for the organization to engage in. To grasp what is meant by a collective domain perception, take the following quotation from Tom

Burns's (1977) description of the BBC's conception of its role until the 1960s as that of giving the public 'what it needs' rather than 'what it wants':

> 'The public service rendered the purpose of broadcasting a normative one – that broadcasters were concerned not so much with providing what the public would think informative, educational, or entertaining, but with using broadcasting deliberately to open up new areas of knowledge to the public, to widen and deepen its information about the contemporary world and Western culture, to enlarge its entrainment experience and to fuse, as far as possible, all three endeavours' (p. 136).

Burns (1977) has linked the above BBC's public service ethos to its need to distinct itself and the services it provided from two other powerful media industries: the press and the emerging film industry. This notion of the BBC as a producer of high culture, in contrast to the popular press and film industries, stood at the centre of the organization's appeal for internal and external political support. This is not to say that all public bureaucracies have a coherent shared perception of their domain.[1] Nevertheless, even in organizations with schizoid domain perception, members are likely to have a shared notion of what their conflicts are, and some consensus about what tasks are within and outside the boundaries of their domain.

There is little body of literature which directly analyzes the determinants of public bureaucracies' domain perception. Nevertheless, theoretical predictions may be formulated by reference to sociological institutional analyses of norms' and cognitive frames' institutionalization within organizations. Applying a socio-institutional perspective we would expect bureaucracies' domain perception to be responsive to either 'regulative', 'normative' or 'cognitive' pressures from their environment (Suchman 1995; Scott 2001). Hence, in contrast to rational choice institutionalism, sociological institutionalism expects legitimacy and support maximizing organizations to strategically conform to, rather than evade, their environments.

A regulative institutional perspective views organizations' relationship with their environments as a pragmatic, instrumentalist, exchange of resources or influence in return for support. Consequently, an organization's domain perception is expected to

[1] In fact, many bureaucracies contain conflict of sub-cultures between department and roles, and their executives may even encourage internal conflict as means of management (Dunsire, 1978). See: Hall et al. (2000) analysis of Oftel's clash of professional micro-cultures, and Burns (1977) description of the diverse professional cultures, which developed in the BBC during the 1960s.

reflect this exchange. In common with rational choice institutionalism, these scholars perceive organizational actors (and collectives) as strategic and manipulative in their interaction with their environments. However, the aim of this strategic action is mobilizing support and legitimacy rather than discretion as such. This approach further differs from the public choice capture theory (Stigler 1971; Pelzman 1976) in its emphasis on organizations' strive for legitimacy, rather than mere materialistic resources. The regulative perspective is best depicted in sociological 'old-institutional' (Selznick 1966) and resource dependence (Pfeffer and Salancik 1978) analyses of organisations' relationship with their immediate environments. Most prominently, Selznick explained the Tennessee Valley Authority's grass-roots doctrine as necessitated by its need to attain the support of local institutions for its existence and its autonomy within the federal government system. Selznick further demonstrated how the TVA's ideology, and congruent structure, resulted in the alternation of its goals from a conservation agency to the presentation of its agricultural constituency.

A normative institutional approach, which is associated with the work of March and Olsen (1989), claims that individuals' actions and perceptions are shaped by what they perceive as appropriate and socially expected from people in their role to do and think. Hence, these scholars would expect bureaucrats' interpretation of their domain to reflect their internalization of societal norms. The obvious problem with this perspective is that it does not specify how such norms of appropriate domain develop in the first place.

Finally, a cognitive institutional approach (Meyer and Rowan 1991; Powell and DiMaggio 1991) emphasizes the role of cognition and taken for granted meanings, rather than either strategic action or values. These scholars would expect organizational domain perception to be mimetic or isomorphic – adopting common perceptions to other similar organizations or associations beyond their immediate task environment. According to this school of thought 'Ideologies define the functions appropriate to a business – such as sales, production, advertising, or accounting; to a university – such as instruction and research in history, engineering, and literature; and to a hospital – such as surgery, internal medicine, and obstetrics. Such classifications of organizational functions, and the specifications for conducting each function, are prefabricated formulas available for use by any given organization'

(Meyer and Rowan 1991, p. 44). Ideologies are described by scholars as 'rational myths' in the sense that participants internalize them not only as normatively appropriate, but also as the taken for granted efficient and effective ways of conducting their work. The notion of isomorphism, however, is not readily applicable to regulatory agencies, which operate with no similar organizations within their specific institutional field or policy community. Nevertheless, on a higher level of abstraction, what these analyses could contribute to our thinking about bureaucratic domain perception is the importance of shared meanings between an organisation and its environment regarding the organization's role as a prerequisite for its legitimacy.

While the above sociological analyses emphasize organizations' conformism and responsiveness to their environment, political scientists have further highlighted public bureaucracies' maximization of autonomy, in the sense of exclusive domain and differentiation from competing agencies. Wilson (1989) suggested that bureaucracies resist taking on tasks, which could put them in turf conflict with other agencies, and tend to define their domain in a way which limits the potential intervention of rival bureaucracies. Carpenter (2001), linking bureaucratic autonomy to legitimacy, similarly claimed that autonomy prevails when agencies can establish a reputation for *distinctive* capability to provide services and when they manage to build and mobilize a set of diverse social networks. Hence, according to this perspective, bureaucracies' interpretation of their legal mandate would aim at securing themselves a distinct and exclusive role. Therefore, rather than being mimetic and isomorphic, bureaucratic interpretation of its domain would aim at distinctiveness from other bureaucracies.

To conclude, theorizing bureaucratic domain perception requires an understanding of what bureaucracies aim for. The above literature affords four possible answers to this question – material resources, discretion, legitimacy and exclusive domain. With regard to legitimacy, socio-institutional theory would suggest that bureaucratic domain perception is responsive to regulative, normative and/or cognitive pressures from its environment. Current literature tends to conceive these mechanisms as independent, rather than entangled and reinforcing.

The domain of complaint handling – ideal types

Before embarking on to the analysis of the FOS's interpretation of domain, it is useful to theorize what roles a complaint handling body could undertake. Deductive theory building, and induction from empirical analyses of ombudsmen and complaint handling in the public and private sphere (Birkinshaw 1985; Edelman, Lande, and Erlanger 1993; Edelman, Uggen, and Erlanger 1999; Hofrichter 1987; Hutter 1997; Nader 1980; Seneviratne 1994), suggest that complaint handling may reflect one of two major types – a regulatory system (or one of its components) vs. individual dispute resolution. The role of complaint handling within a regulatory regime may be further distinguished by the extent to a system is rule- or case-based, and the extent to which the regulator is external or internal to the regulated community. A self-regulatory, case-based system is typical to the regulation of professional occupations, since both judgement and self-regulation are major characteristics of professionalism (Friedson, 2001).

As part of a rule-based regulatory system, regulators utilize and encourage complaints as a source of information about firms' adherence to regulation. For example, Hutter (1997) found that the environmental health officers whom she researched were highly responsive to information generated from complaints. In a case-based regulatory system, regulators regard individual complaints as means for developing general principles (or professional best practice norms) through case law and precedents. Their decisions are public and transparent in order to inform firms and the public. Additionally, regulators may publish comparative statistics regarding complaints, thereby allowing consumers to exercise informed choice in their relationships with firms.

In contrast, in a dispute resolution system, complaint handlers aim to resolve individual cases to the mutual satisfaction of the sides to the dispute, rather than to control firms and generate benefits to consumers or citizens at large. Consequently, complaint handlers tend to reformulate conflict in terms of the sides' problems, needs and interests, rather than systemic problems and general legal rights (Hofrichter, 1987; Silbey and Sarat 1988; Edelman, Lande, and Erlanger 1993). Decisions are likely to be confidential since firms are not expected to apply their principles to future cases.

Equipped with the above theoretical perspectives, the analysis below aims to answer:

(a) How did complaint handlers interpret their role?

(b) What explains complaint handlers' demarcation of their role?

The case study

The Financial Ombudsman scheme

The context of the research is the handling of retail investment consumer complaints by the FOS and by its predecessor – the Insurance Ombudsman Bureau's (IOB).

Since the introduction of the Financial Service Act (1986), the selling of retail investment products (whether by independent financial advisers or staffs working within banks and insurance firms) is subjected to the requirement that investment advice be *suitable* for the client. Advice suitability is understood, within the retail investment community, as entailing a match between the recommended investment product and the adviser's assessment of the customer's financial needs and attitude towards financial risk. Hence, consumer complaints typically challenge the suitability of an advice to buy what turned out to be a low performing investment.

The IOB was established in 1981 as a voluntary scheme by three insurance firms in response to adverse publicity and the Office of Fair Trading's pressure on firms to reform their handling of consumer complaints (Birds and Graham, 1992). It was the first private ombudsman scheme in the UK, which was later replicated in other sectors (Senevirante, 2002). Within few years its voluntary membership embraced most of the insurance industry. Subsequent to the enactment of the Financial Services Act retail investment firms were bound to join the scheme, and their sales and handling of complaints were further subjected to regulation by the Life Assurance and Unit Trust Regulatory Organization. The IOB's operations were financed by firms through levies and case fees. Its structure allowed the insurance industry ample influence, while co-opting consumer representatives. It consisted of two ombudsmen, and their complaint handling assistants, supervised by a Council and a Board of directors. Board members were chief (or deputy) executives of large insurance firms, while the majority of Council members were appointed consumer representatives.

The FOS was formed in 2000, in the merger of five separate ombudsmen schemes, including the IOB. The creation of a unified ombudsman scheme to the financial industry was integral to the creation of an independent regulatory agency – the

Financial Services Authority (FSA) – as a single regulator of the industry. The FOS's board is nominated by, and accountable to, the FSA. Its powers stem from the Financial Services and Markets Act, 2000 (FSMA). All firms are obliged to join the scheme. Like the IOB, it is also financed by the financial industry through levies and case fees, the level of which is yearly authorized by the FSA. The FOS's legal mandate, as set in the FSMA, determines 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 financial ombudsman rules further prescribe 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."

The above mandate closely mirrors the IOB's terms of reference, which asserted that the ombudsman should assess 'what would be a solution …which would be fair and reasonable in all the circumstances' in light of the insurance contract, any applicable law or judicial decision, regulations and the general principles of good insurance and investment business practices. 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' This term was not adopted into the FOS's legal mandate.

The FSMA prescribes that a complaint against a financial firm should be first submitted to the firm for its decision. A complainant, who is dissatisfied with the firm's decision, may request its consideration by the FOS. According to informal assessments up to 10% of financial transactions result in complaints, and about 5% of complaints to firms subsequently reach the FOS. Therefore, the number of complaints that reach the FOS is small in comparison to the volume of financial transaction and complaints to firms. The FOS operates a two-tier complaint handling process. The majority of complaints (90%) is handled informally by lower level employees (adjudicators), who have no formal legal authority. Firms and consumers may then challenge informal decisions by requesting their review by an ombudsman. Only ombudsmen have formal authority to require firms to compensate complainants. By

the end of the research period, the FOS employed over 400 adjudicators but only 20 ombudsmen, resulting in its dependence on both consumers and firms accepting adjudicators' informal decisions and forgoing appeals for an ombudsman's review.

The IOB and the FOS both experienced constant increase in the incoming volumes of complaints and expansion of staffs. During 2000, when the FOS was established, it handled 25,000 complaints and comprised 390 employees. By 2005 it handled over 110,000 complaints and employed a staff of 900 people. A large proportion of these complaints regarded industry wide problems, most prominently the sale of endowment mortgage policies.[2] In comparison, the IOB, at its pick, in 1994, handled 8,500 cases and its personnel headcount amounted to 83.

Data sources and methodology

The article involves a systematic case study, which traces the current FOS's domain perception to its historical roots in the early days of the IOB. Given the similarity between the FOS's and IOB's formal mandates, the historical tracing of complaint handlers' interpretation of domain allows me to study the organizations' domain perception, while holding their terms of mandate constant. Data includes contemporary and archival data as follows: (a) Interviews (40), observation, documents, and a random sample of 150 complaint files – all carried and gathered during a participant observation research at the FOS, conducted between November 2003 and December 2004; (b) The responses of 100 financial firms and industry associations to a Consultation Paper which was jointly issued by the FOS and the FSA, as part of the Treasury's two year review of the FSMA in July 2004. This examined the relationship between the FOS and the FSA with regard to complaints manifesting systematic problems, and the need for an appeal mechanism to challenge ombudsmen's decisions (hereafter: the Consultation Paper); (c) Annual Reports and unpublished internal documents of the IOB.

From professional self-regulation towards dispute-resolution

[2] Endowment mortgages were a popular life assurance device for financing house purchases in the UK, peaking at 83% of the mortgage market in 1988. As a result of market decline as of 1993 most of these policies are today unlikely to yield an amount large enough to repay the mortgages, which they were intended to cover.

The IOB and the FOS's domain perception do not neatly fall within the ideal types referred to above. Nevertheless, the ideal types are a useful construct against which to assess these organizations' domain perception and its shift over time. As revealed below, the IOB, in its early days, tended to perceive (and assert) its role as akin to the professional self-regulation ideal type, in which individual decisions are a contribution to an accumulating arsenal of professional principles of best practice. Over time, the IOB and subsequently the FOS were more inclined to refer to their task in terms of a dispute resolution model, or more accurately as a subjective professional judgement. Coupled with the above notion of complaint handling as subjective judgement were three principles: (a) That complaint handlers enjoy a broad discretion to make decisions beyond legal requirements and cost-benefit constraints, (b) That previous FOS decisions to not bind its handling of future cases, and (c) That unlike regulations or court precedents, complaint handlers' decisions do not oblige firms in their handling of similar complaints and transactions. The data indicate that the identity shift from professional self-regulation to individual dispute resolution is related to complaint handlers' strive for discretion and legitimacy vis-à-vis the industry and exclusive domain vis-à-vis the FSA.

In the first few years of its existence IOB boasted its capacity to discern trends in firms' complaints and to establish general principles and guidelines. The IOB's annual reports explicitly referred to the organization as a self-regulatory mechanism, and included a summary of general principles, which were drawn out of the organization'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[3]:

> '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)

[3] The IOB annual reports are of special interest since they were drafted by the Ombudsman, and further commented upon by IOB's Board of directors (which consisted of firms' executives) and its Council (which had a majority of consumer representatives). Hence they manifested a consensus between the different participants in the regulatory arena.

Three years later, in his annual reports of 1985 and 1986, the same Insurance Ombudsman, invoked the individuality discourse, when protesting against insurance firms' use of his assertion of general principles in previous annual reports as a basis for authoritative rejection of complaints. He wrote:

> 'There have been *complaints* that my annual reports are sometime used by loss adjusters and claims personnel as authority for turning down claims. I have myself seen correspondence in which past pronouncements of mine are being cited and argued over as if they were precedents in the law courts. Certainly I have expressed views on points of principle and on procedures and practice generally, sometimes illustrating the point by reference to cases I have decided. *However there is one enormous difference which is being overlooked when decisions of mine are quoted. 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 disaffected 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 original appeal to the individuality discourse pertained to the ombudsman's interest in preserving his discretion in adjudication of future complaints. It was motivated by the ombudsman's responsiveness to 'complaints' – most probably criticism by consumer representatives on the IOB's Council – rather than abstract strive for discretion and shirking.

Few years later the discourse of individuality was again invoked by the ombudsman, this time in response to industry criticism. In contrast to its previous practice to assert general principles in its annual reports, as of 1991 the IOB resorted instead to summaries of individual cases (Since 1994 the IOB, and subsequently the FOS, issued a separate publication, in which the details of individual cases were conveyed.). The insurance ombudsman at the time explained this change, revealing a contention over IOB's practice and 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 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 this ombudsman explains his shunning away from general principles as inherent to what it means to be an ombudsman ('an ombudsman must to what an ombudsman must do'). That is, appealing to a normative logic of appropriateness. Nevertheless, contemporaneous documents suggest that this normative conceptualization of the ombudsman's role reflected a pragmatic response to industry criticism stemming from the IOB's Board of Directors. In a meeting between 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 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.'

The Board's dissent to general application of the IOB's decisions is equally captured in a letter sent by an executive of a large firm (who was an industry nominee to the IOB's 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:

> 'The point usually arises with me is that I become most concerned when a decision appears to be one which can be applied many times in the future in similar cases. As I said before in connection with [the executive's own firm] 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.'

That said, it should be emphasized that IOB's Board strong resistance to the ombudsman's declaration of general principles, and even to the publication of his individual decisions, may be attributed to the fact that they perceived the ombudsman

at the time to be anti-industry. In fact, the 1991 annual report followed three years of fierce row between this Ombudsman and the IOB's Board. Thus, it was not consistency and precedents as such which the Board (and the industry) resisted to. Rather, it was *adverse* precedents which the industry was unwilling to accept. Hence, forgoing the declaration of general principles in his annual reports, and conceding to the individualized nature of his decisions, was the ombudsman's way of alleviating this escalating tension.

Thirteen years later, in 2004, the formal manifestation of the FOS's domain perception, as stated in the Consultation Paper, described it in terms of a dispute resolution mechanism par excellence:

> 'FOS is a dispute-resolution mechanism for handling individual cases, which provides an alternative to the courts for consumers.'

This perception of the FOS as a dispute resolution mechanism was frequently distinguished, in interviews and formal documents, from the FSA's regulatory role. The Consultation Paper further explained that the FOS, in its handling of individual cases, has broader discretion than the FSA:

> "FOS decides cases on the basis of a firm's conduct in a specific set of past circumstances. It is required to decide the outcome on the basis of what the ombudsman considers fair and reasonable in the circumstances. It has a wider discretion than the FSA because Ombudsmen can take account of more than compliance with rules and guidance."

The above suggests that complaint handlers' domain perception, as developed over time, reflects a pragmatic exchange between their broad discretion to make decisions which go beyond law and regulations, and the narrow legal scope of their decision to the individual case. This idea is depicted in the following extract from the Insurance Ombudsman's testimony before the Treasury and Civil Service Select Committee regarding financial services regulation in 1994 (as well as in his article: Farrand, 2000):

> 'The discretionary element to make a decision that is just [i.e. fair and reasonable], the decision of Solomon almost, on the individual merits of the case, without necessarily setting precedents is something which is inherent in the ombudsman concept' (IOB annual report, 1994, p. 60).

While the above analysis implies a pragmatic exchange, complaint handlers (especially low level employees) were more likely to perceive the individuality discourse in cognitive terms. They perceived the discourse of individuality as intrinsic to the nature of complaints and complaint handling as individual and impossible to standardize. For example, a recently appointed ombudsman 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:

> 'Q: how do you keep consistency between different ombudsmen in your endowment mortgage area?
> A: we have mortgage endowment meetings and sort of emails of issues, but I'd say there isn't consistency, perfect consistency, because so much of it is subjective. I mean in mortgage endowment it's very much 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 you know it's very subjective'

Having said that, in response to an inflow of over 50,000 endowment mortgage complaints during 2004, the FOS established a standardized method for handling these complaints. A separate mortgage endowment unit was created, in which cases were assessed according to standardized criteria, with each case summarized on one row of an Excel file. Similarly, with regard to few other areas of mass complaints a procedure of Lead Cases (de-facto precedents) was introduced. In addition, ombudsmen sometime issued detailed guidance to adjudicators with regard to firm specific products, which were regarded as problematic. However, the discourse of individuality nevertheless prevailed. A manager in the endowment mortgage unit explained apologetically:

> 'The reason, really, for [using] the [Excel] spreadsheets, it's not trying to come up with a quick and dirty way of making decisions. It's not a tick box type thing. You still have to make the individual judgement in each case. It's just trying to be a more efficient way of expressing a view [on the case]…They [the adjudicators] still have the same amount of ability to make a judgement in the cases and they have the autonomy to make that decision. What is different is the actual complexity of the cases they're dealing with.'

Similarly, an internally procured audit of the FOS, conducted by an external team, reflected complaint handlers' concern 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).

In conjunction with emphasizing the subjective judgmental nature of their decision making, complaint handlers were reluctant to say that their decisions either create a precedent or bind firms' handling of similar cases. For instance, an adjudicator explained the inadequacy of invoking a previous ombudsman's decision in order to persuade a firm to settle a case:

> 'It's difficult, I think, to use other people's [adjudicators] cases to say to a firm, "The ombudsman decided against you on this and, therefore, I'm going to decide against you on this, as well," because it's just not the, it's not, because they're actually not the same complaints, really.'

Again, it's noteworthy that this adjudicator's explanation is articulated in cognitive, rather than pragmatic, terms ('because they're actually not the same complaints').

To sum up, I have shown that complaint handlers' interpretation of their domain shifted over time from a self-regulatory to a dispute resolution model. This shift reflected an implicit trade-off between their broad discretion regarding individual cases, and limited coercive impact of their decisions upon firms' selling practices and handling of complaints. It further differentiated the role of the FOS from that of the FSA. However, whilst the discourse of individuality institutionalized, the number of complaints rapidly increased and the IOB and subsequently the FOS developed expertise and better capacity to identify trends in firms' complaints. Internally both organizations aimed to respond to wide scale complaints in a consistent and efficient manner. Consequently, for the discourse of individuality to persist it had to be normatively and cognitively institutionalized. The data indeed suggests that complaint handlers, especially adjudicators (in comparison to ombudsmen and executives) normatively and cognitively internalized the individuality discourse as inherent to the nature of complaints and complaint handling.

Handling conflict – a thick description

In order to further examine the proposition that the individuality discourse developed in an attempt to preserve complaint handlers' discretion, mitigate tension with the industry and differentiate the FOS from the FSA, it is instructive to analyze specific cases where the FOS encountered major conflict with firms regarding its domain. The following is an example from my complaints case sample[4].

In 2002 the FOS identified a trend in complaints regarding the marketing of few 'single premium bonds' as low risk, which according to normal practices, as understood by the FOS[5], should have been marketed as high risk products. In order to achieve internal consistency, few ombudsmen centrally analyzed 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 few instances, reported resisting firms to the FSA, but the latter decided that it was unable to intervene, and that there was no clear regulatory breach.

In response to firms' resistance, the FSA's reluctance to intervene, and following negotiations with firms, the FOS conceded that it can 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 making assertions regarding 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.

An 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, this normative stance was justified on the pragmatic basis of the adverse financial and reputation consequences of challenging firms' risk rating of their funds. The guidance stated:

[4] Data is based on 17 cases in my case sample in addition to interviews.
[5] There is no uniform, authoritative, risk scale. Rather, each firm creates its own scale. The FOS had its own internal guidance regarding funds' risk ratings.

> 'The role of FOS is to consider individual complaints and not to over rule 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.* If we become concerned that there was an inappropriate risk rating applied by a firm in relation to a particular fund we would report this formally to the FSA …' (my emphasis)

An ombudsman explained the essence of the controversy as regarding the normative remits of complaint handling vs. regulation:

> 'As far as the [firm's] fund is concerned we can't say what kind of risk it is. That's not our job. We can't do it. We do sometime, but we shouldn't and all we can say is whether it was suitable or not …
> 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
> Q: so basically you focus on the risk attitude of the consumer
> A: of the consumer yes, both of them obviously but from the consumer is the important bit because *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, so we are changing things and that's not what we are there to do. So that's why we try to avoid it' (my emphasis).

While the above interviewee focused on the adequate domain of the FOS, another ombudsman 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 all to their past sales:

> 'If we say this fund is not this risk, then they [the firms] come across a problem that we're saying that to them, issuing hundreds of decisions to them, and the FSA 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. So that's the way - I can see that that's the way they're approaching it. So, we've obviously generated a way, now, where they can say, "Well, that's for that particular person, that's not that our risk ratings are wrong." '

According to the above ombudsman (and other interviewees), the compromise did not change the outcome of complaint handlers' future decisions. Rather it allowed them to reach the same result in a way which was less painful for firms, since it did not directly apply to the latter's transactions and other complaints. However, as the next section demonstrates, the effectiveness of the individuality discourse in generating a pragmatic *modus vivendi* diminished in a political and normative environment, which expected the FOS to internally handle cases consistently and firms to apply the FOS's decisions beyond the individual case, irrespective of their legal status.

Limits to the pragmatic exchange

As the data below exposes, for the pragmatic exchange to be effective it had to be normatively accepted by participants in the broader environment. Subsequent to a number of FOS's pro-consumer Lead Decisions and ombudsmen's risk rating of few firms' funds (as discussed above) firms protested to the Treasury. This resulted in initiation of the Consultation Paper referred to above.

An ombudsman explained that the background to the Consultation Paper was firms' perception that they were compelled to apply adverse FOS decisions to all similar complaints and transactions, resulting in major financial implications. This idea also came up in a large number of firms' responses to the Consultation Paper. The ombudsman related this perception to financial firms' sensitivity to adverse publicity. The ombudsman referred as an example to the FOS's decisions against banks and building societies regarding Dual Variable Rates.[6]

> 'The larger a firm is…and the more they value their reputation, the less likely they are to ignore a decision and say that they're not going to apply it across the board….Some applied the ruling to all their customers - whether they'd complained or not - who were in a position of those that had complained to us….But, I think those who felt they had either a moral or reputational responsibility to do so, smarted even more, because that really looks like regulation, if they feel they have a responsibility to comply with whatever we direct and apply it to all of their customers then, obviously, that would feel like regulation to them.'

[6] This refers to the practice of some banks and building societies to offer low rate mortgage interest to new customers, while locking current customers into higher interest rates.

An executive, in a different context, explained the importance of a case not setting a precedent and its resolution outside the public sphere as intertwined conditions for effective dispute resolution:

> '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 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 a little bit like any forum of dispute resolution – it's always better behind closed doors, and this has nothing to do with us being a secret organisation, it's got everything to do with respect for the private details of both parties.'

Explaining complaint handlers domain perception – summary of findings

In this section I summarize the determinants of complaint handlers' domain perception as revealed from the above analysis.

The subject matter of complaints

One possible explanation for the FOS's individuality discourse is that standardization of complaint handling is impossible or meaningless. That is, assessing advice suitability is inherently particular, since it entails the matching of an investment product to the risk profile of an individual complainant.

While this explanation is compelling, the following counter arguments should be considered: First, the complaints that reached the FOS were largely part of some firm or industry wide trend, rather than individual, one-off, cases. Therefore, complaints were hardly inherently individual. Second, it was the FOS's (and previous ombudsman schemes) and the FSA's disinclination to develop case law and precedents, which reinforced the uniqueness of complaints. Thus, decision making regarding investment complaints is particular because it was never standardized. Third, the subject matter of complaints is no more individual than that of judicial decisions. Both are contextual. However, while judges legitimize their decisions as derivatives of general rules and previous precedents, complaint handlers legitimize theirs on the basis of their sole application to the merits of the individual case. Hence,

it is not the inherent nature of the subject matter which distinguishes complaint handling from judicial decision making, but the different domain perceptions of judges and complaint handlers.

Maximizing discretion and legitimacy vis-à-vis consumers

The discourse of individuality, or avoidance of standardization, may be explained as means for maintaining the ombudsman's flexibility of discretion. Had the FOS (and its predecessors) established an authoritative case law, this would have been used by firms to reject complaints and block consumers' access to the ombudsman scheme. Such case law would have further constrained complaint handlers' responsiveness to those cases which reach them. Therefore, avoiding the development of case law and construing decisions in individual terms supported complaint handlers' discretion autonomy vis-à-vis firms, and consequently the organization's reputation for independence and effectiveness as an effective protector of consumers' interests.

Mitigating conflict and maximizing legitimacy vis-à-vis firms

In addition to maintaining complaint handlers' discretion, there is ample evidence to show that the discourse of individuality was intended to limit the financial implications of- (and thereby to mitigate firms' resistance to-) adverse ombudsman decisions. However, as the number of complaints escalated, the FOS was more likely to standardize its decision making of bulk complaints for the sake of internal consistency and efficiency. Hence, while still formulating its decisions in individual language, it nevertheless standardized its response to large scale complaints. At the same time, firms faced intensive media scrutiny. Media and public expectations of firms to apply FOS decisions to other complaints and transactions, irrespective of their non-legal precedent status, jeopardized the effectiveness of the pragmatic exchange as reflected in the individuality discourse.

Striving for exclusive domain

The individuality discourse is further related to the FOS's strive for exclusive domain. 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 has previously, explicitly or implicitly, took a position. For example, as shown above, the FOS was in a position where is

assessed firms' risk rating of their funds, while these were previously authorized by the FSA. 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 (although did not fully prevent) the scope for jurisdictional conflict between the FOS and the FSA and the need for coordination between them.

Additionally, and related, only by limiting its declared role to individual judgement of complaints, and distinguishing this role from regulation, could the FOS cast for itself a legitimate, albeit restricted, independent domain within the retail investment regulatory regime.

Conclusion – disentangling pragmatic, normative and cognitive pressures

Above I demonstrated that the notion of individuality reflected a pragmatic exchange allowing the ombudsman broad discretion with narrow financial implications, and as a response to the crowding of the regulatory space.

The above account is compatible with Wilson's and Carpenter's expectations that bureaucracies aim to differentiate themselves from (rather than mimic) other organizations in their environment.

My analysis is opposing to the classic rational choice illustration of bureaucrats as pure materialists and discretion maximizers. Rather it is congruent with the expectations of a regulative institutional approach that organizations' domain perception would be moulded so as to secure the organization with both resources and legitimacy of its environment. It should be emphasized that unlike capture theory accounts, the FOS's discourse of individuality, while being responsive to firms' financial interest, aimed to enable the ombudsman scheme to be more responsive to consumers, albeit only to those who filed a complaint with the organization.

Finally, the above case study demonstrates that for a pragmatic exchange to be viable in needs to be normatively and cognitively accepted by the immediate and broader environment of an organization. Hence, in an environment of rising public and media

expectations of the retail investment industry, the FOS's discourse of individuality was no longer fully effective in attaining firms' cooperation and support.

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