

# Review of ombudsman services: energy

A report for Ofgem

Lucerna partners  
July 2015

## Contents

Executive summary.....	3
1 Introduction.....	6
2 Analysis of data (uphold rate).....	7
3 Ombudsman role and culture .....	18
4 Identification of wider issues.....	24
5 Business Compliance with OSE decisions .....	30
6 Case management and quality assurance .....	33
7 Governance.....	38
8 Recommendations .....	43
About Lucerna .....	45
Appendix A: CEAR criteria – relevant extracts .....	46
Appendix B: ADR criteria - relevant extracts .....	49
Appendix C: Review of case outcomes .....	57

## Executive summary

Lucerna Partners has been commissioned by Ofgem to carry out a **strategic forward looking** review of the Ombudsman Service: Energy (OSE) in the context of the requirements of the new Alternative Dispute Resolution (ADR) Regulations and the Consumer and Estate Agents Redress (CEAR) Act, 2007.

### Context

Over the past three years, the OSE has faced, and responded to, a particularly challenging environment. It has handled a significant increase in case numbers (**71% increase** from 2012/2013 to 2013/14). This initially impacted on its performance against Key Performance Indicators (KPIs) agreed with Ofgem. Considerable management and staff focus have ensured that performance has been restored and is now in line with targets.

### Outcomes for consumers

In working hard to meet its KPIs, the OSE appears to have tackled a high proportion of complaints where **a firm had not reached a view on the outcome** before the case reaches the OSE. This has led to a **persistently high uphold rate** in favour of the consumer. We expect this to be a short-term unusual situation that the firms, the regulator and the ombudsman should seek to resolve.

If so, the OSE case mix may change over the longer term to **fewer, harder cases**. Such a change could have a significant impact on the OSE's resource levels, skills and capabilities and it is not clear that the OSE has considered this scenario in its future planning.

The achievement of meeting its core case handling targets in the context of a very challenging environment reflects the OSE's cultural focus on what it sees as its core aim of **resolving individual complaints**, being independent of the parties.

In moving from old to new case handling systems over the past 12 months, the data the OSE captures about cases and the reporting of that data has changed. Because it does not appear possible to reconcile the two sets of data without manual intervention, there are some concerns about the ability of the OSE to say what has happened to trends over time **in both its own performance and the performance of firms** in handling complaints.

### Wider implications in the energy sector

There is a potentially much wider role for the OSE than the one it is currently focussed on – which involves learning from the people who do complain and using this information to reduce the **causes** of complaints. This would benefit everyone, those who do complain, those who complain initially but do not pursue their claim, and those who do not complain.

While the OSE **agrees it has a wider role** in supporting and promoting best practice in complaint handling, and identifying and acting on **wider systemic issues**, it has not focussed on this, is unsure in the role, and has limited systems and processes to support it.

OSE **has intervened** on some issues where it has identified patterns of behaviour that are of concern, but it has not done so systematically or always captured evidence of this or reported it to Ofgem.

The skills and capabilities to fulfill the OSE core role of complaint handling and the skills and capabilities needed to fulfill this wider role are very different and there is little overlap between them.

Given this, the OSE data systems may not currently capture the complaint data in a way that is **useful for interrogation** to identify wider systemic issues. Nor can it track trends and issues across its historic data and data captured on its new systems. The organization does not have a data strategy that might address these issues.

### Delivering core functions

The OSE is focussed on **its core case-handling** role. In a challenging environment it has steadily improved its performance against its KPIs and timeliness of case handling. Its case handling and quality assurance procedures contain all the elements we would expect.

A lack of clarity about how outcomes for consumers have been recorded in historic and new case systems gives rise to some concern that the OSE may not have the systems, processes or data to properly understand trends shown by its data.

When faced with the challenge of putting in place measures to ensure compliance with its **redress decisions**, the OSE was initially concerned that this strayed into the area of enforcement (perceived as a regulatory role). But having agreed it had a role, it has acted to put in place new procedures to tackle this issue although these are as yet new and their effectiveness is untried.

### Governance

The ADR Regulations, and the CEAR criteria, contain a number of provisions designed to ensure that the OSE governance arrangements are **independent** of the firms that come within its jurisdiction. With some minor areas where policies and procedures could be updated, we saw no evidence that the OSE's governance arrangements were not appropriate in this context.

We did not find evidence that structural issues such as the non-statutory nature of the OSE, the potential for the approval of more than one energy redress scheme, or the nature of the OSE's funding impacted on its independence.

## Recommendations

Our recommendations are set out in section 8 and these are summarised below:

- clarification and agreement between Ofgem and the OSE of the **different roles of an ombudsman and the expectation on OSE for fulfilling these**, and the development of success measures and implementation plans to ensure all roles are effectively delivered
- improved **data management** by the OSE to monitor its own performance and a **data strategy** to identify and collect a wider data set that can be effectively used by the OSE and/or others to **identify wider issues** and act on them to the benefit of all consumers
- the recruitment and application of **key policy and data analysis skills** necessary to deliver on the wider role of an ombudsman scheme to capture the full potential benefits for consumers

# 1 Introduction

Ofgem commissioned Lucerna Partners to carry out a strategic forward looking review of the OSE – the alternative redress system that Ofgem has approved for the UK energy sector. This coincides with the introduction of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations, 2015 that sets out revised standards for such redress schemes.

Ofgem has previously approved OSE as an appropriate redress scheme in the UK under criteria it set out under the CEAR Act, 2007. We reviewed the current operations of the OSE in the context of the original CEAR criteria and the new ADR criteria. Relevant extracts from these are at Appendixes A and B.

Our review included:

- an assessment of data published by the OSE and other ombudsman services;
- an examination of the role and functions of ombudsman services generally as well as a specific review of the OSE functions;
- a review of a small number of cases (circa 15);
- analysis of the detailed data provided to us by the OSE;
- primary interviews with OSE staff at all levels as well as some OSE current and former board members; and
- primary interviews with two energy companies who participate in the scheme as well as discussions with Ofgem.

We would like to thank all those who engaged with us throughout this review and particularly the OSE and its staff for the co-operative, constructive and open nature of their engagement.

The positive response to our enquiries and the desire of the OSE both to inform and learn from this exercise has impressed us.

## 2 Analysis of data (uphold rate)

### 2.1 Key findings

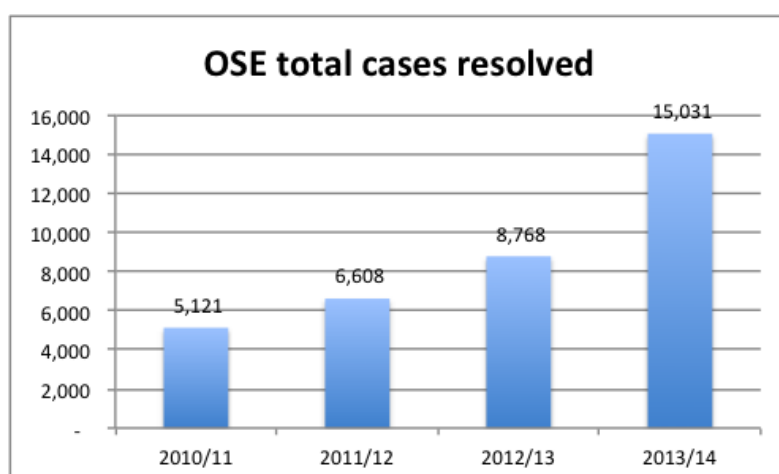
- The OSE appears to have had a **persistently high uphold rate** in favour of the consumer for some time – higher than many other ombudsman schemes although we note that there are some concerns about the available uphold rate data.
- There are a few reasons for this, which **may vary by firm and over time**, but it is possible that a high proportion of complaints seen by the OSE are cases where **a firm has not reached a view on the outcome** before the case reaches the OSE.
- This means that in many cases the OSE may uphold a case by **stating a resolution that a firm agrees with**, and would have proactively offered if it had properly considered the case before it reached the OSE.
- It is likely that the uphold rate reflects the fact that consumers **do experience a change** as a result of going to the OSE - such a change will be to the benefit of those consumers, but the OSE may be doing things a firm would have done if it had looked at the case first, i.e., a high number of cases are not disputed by the firm.
- If this picture changed, and only cases where the firm and consumer are in deadlock reached the ombudsman, the types of cases the OSE would be called on to handle may also change - so the OSE would then handle **fewer, harder, cases**.
- The OSE **does not seem to have considered this scenario in its plans**, or taken steps – working with Ofgem and firms - to **ensure some firms do more** so that it only deals with cases that the firms have genuinely failed to resolve for good reasons, and then planned for possible changes in its own workload.
- Data over the past 12 months produced by OSE using new systems **may** indicate a recent change (a decrease) in the uphold rate but the OSE is unable to reconcile this with historic data, which raises some **concerns about the robustness** of trends shown by the data.
- It is possible that new data reflects an actual change in the pattern of the OSE findings and therefore a **change in outcomes** for consumers – this cannot be confirmed from the data.

### 2.2 Introduction

In this chapter we look at the picture of the OSE's work that is shown by the data it collects on and about its casework. This involved a review of published data (by OSE and other ombudsman services), analysis of detailed data

provided to us directly by OSE, a review of a small number (circa 15) of cases, and a number of primary interviews.

A key characteristic of this data over the past three years is the increase in case numbers the OSE has been handling and resolving year on year. As the chart below shows, the total number of cases resolved increased significantly between 2012/13 and 2013/14 – by 71% - and this came on top of a 32% increase in the previous year. The OSE has been focussed on the operational challenges of the increase in the number of cases, and has been successful in delivering case handling performance against its KPIs (discussed in more detail later).



**Source:** OSE annual reports and OSE clarification of data

The OSE described to us how it has responded to the challenges presented by increasing volumes, including recruiting more staff, moving to new premises and developing new IT systems. This represented a significant operational challenge and the management team of the OSE was proactive in striving to drive up performance so it met the KPIs agreed between the OSE and Ofgem. This challenging environment is an important backdrop to the matters that we comment on in this report.

## 2.3 The 'uphold rate'

### What do we mean by 'uphold rate'?

The 'uphold rate' of an ombudsman scheme is generally understood to be the percentage of cases that the ombudsman resolves in favour of the consumer. For example, the Financial Ombudsman Service sets out its definition of an upheld case on its website – shown in the box below.

The uphold rate for each firm within jurisdiction is a key measure for any ombudsman scheme. Accurate uphold data and intelligent analysis of that data should reveal information about the performance of both firms and the ombudsman scheme. A persistently high uphold rate for a firm should act as a red flag that there may be a mismatch in views between the ombudsman and a firm, which needs to be investigated and the cause found and



corrected. Failure to do so means those consumers who do not reach the ombudsman scheme (usually a much higher number than those who do) may be disadvantaged.

Not all ombudsman schemes provide their interpretation of 'upheld' and so care needs to be taken in comparing uphold rates across services.

The OSE did not have a formal definition of the term 'upheld' in the past, but in the data provided to us for the three year period from 2010/12 to 2013/14 recorded a case as upheld **when a remedy was imposed**. If these remedies are necessary to achieve fairness for the consumer, this would be consistent with a definition of uphold that reflects the **consumer experiencing a change** as a result of the OSE's involvement.

#### The Financial Ombudsman service:

We record a complaint as "upheld" if: We decide that the consumer has been treated unfairly by the financial business – and we tell the business to do something to put matters right.

*Or*

The financial business made the consumer an offer in their final response – but after looking into what's happened, we decide the business should change or increase their offer to put things right fairly.

We record the outcome of a complaint as "not upheld" in cases where: We decide the business hasn't done anything wrong – and we explain to the consumer why we think this.

*Or*

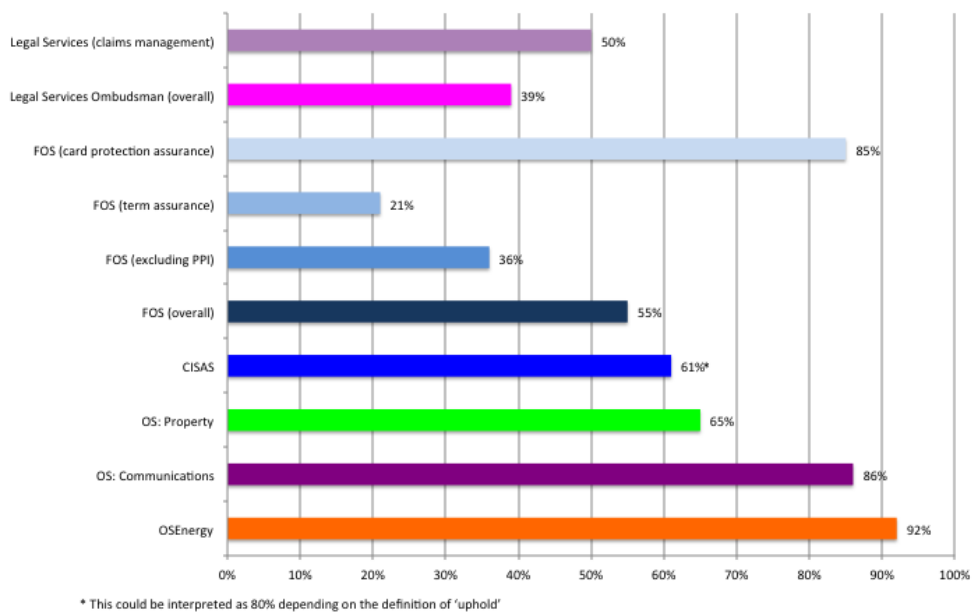
The financial business *has* done something wrong – but before the complaint was referred to us, they made a fair offer to put things right.

The OSE has, over the past year (June 2014 to June 2015), introduced new definitions for use on its new data system (Peppermint). These include definitions of '**upheld**', '**settled**', '**not upheld**' and '**maintained**'. The first two of these categories fit within the description of cases where the consumer experienced a change as a result of the OSE's involvement. The third category is clearly where the consumer's complaint was not upheld.

The final category of 'maintained' is somewhat unclear. OSE could not confirm whether, in 'maintained' cases the consumer experiences a change as a result of the OSE's involvement or not - although it believes that most cases in the "maintained" category will have remedies associated with them, in which case the data from the new system is not out of line with the data from the older case handling system.

### Comparison of uphold rates

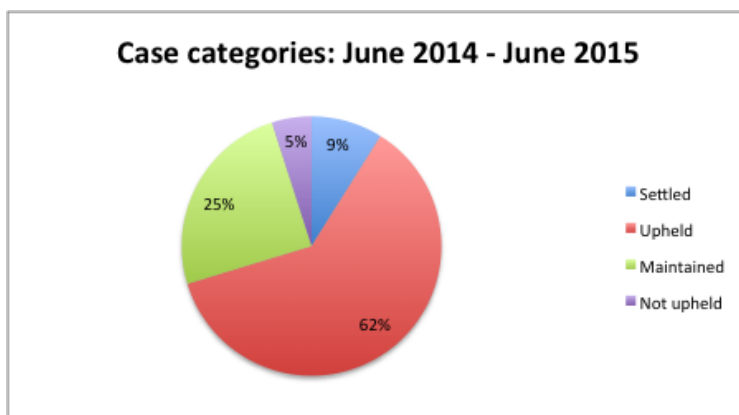
The uphold rate of the OSE was **92% in favour of the consumer** in 2014 (rising from 89% in 2012). When we compare this uphold rate to other ombudsman services we saw that the uphold rate of the OSE is the highest among the sample as shown in the chart below.



**Source:** Annual reports and websites of ombudsman schemes and the OSE

Possible differences in the definition of uphold rates mean that we do need to take care in interpreting this data. For example the Communications and Internet Services Adjudication Scheme (CISAS) shows an uphold rate of 61% whereas this could be shown as 80% if we include cases that the firm has resolved with the consumer after they have been referred to CISAS (this would be consistent with the definition of consumers having experienced a change since submitting their complaint).

Since June 2014 OSE has been collecting data and categorizing cases on its new data system. The OSE is unable to reconcile the two data sets without a detailed manual audit of all cases, so it is currently unable to say whether or not the results are comparable or there has been a recent **change in actual uphold rates**. As mentioned above, while the data may not be far out of line with the old data, but because of the lack of certainty about the new category of 'maintained' cases, the new uphold rate could in theory be anywhere between 71% (upheld + settled) and 96% (upheld + settled + maintained).



**Source:** OSE, June 2015

The OSE has recently published its 2014/15 annual report, which records **96% of cases as having had an award attached** to them, which may imply that the new uphold rate continues to be high and consistent with old data.

The OSE has also recently published data on energy companies, including the number of cases opened and closed and the number of cases that had a remedy associated with them. The overall picture from this published data is also of a **high percentage of cases being upheld**.

We do note that the OSE considers this published data does not contain uphold rates. This is strictly true in that the number of cases shown as closed are not directly associated with the number of cases shown as having remedies attached. But we think this is a subtlety that is likely to be missed by most readers of the data. It is of some concern that the data underlying the publication of company specific results does not appear to be completely understood by OSE and it holds other data that possibly conflicts with it.

It may be the case, depending on the number of cases in the new 'maintained' category where the outcome represents a meaningful change for the consumer, that:

- the new data is broadly consistent with the old data in showing very high uphold rates;
- there may have been a decrease in the uphold rate during 2014/15 due to a change in the nature of the cases; or
- the OSE may have changed how it handled the same types of cases.

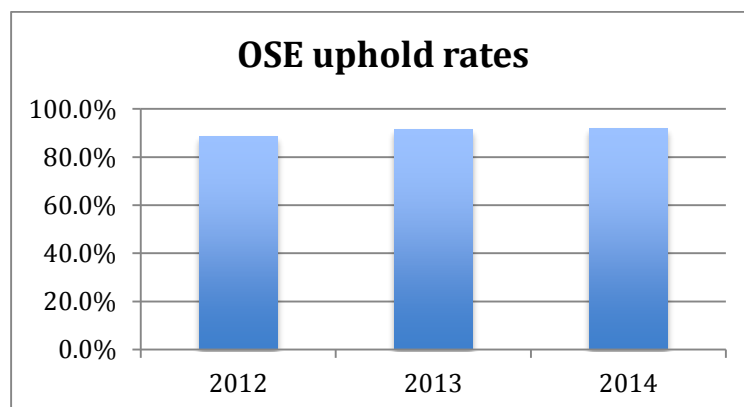
The OSE is currently unable to say what has happened. This raises concerns about the OSE's ability to generate accurate data to monitor trends in how it is handling cases and the information available about complaints handling in the energy sector more generally.

Notwithstanding these caveats, we consider that in any event it appears that the OSE's uphold rate is somewhere between **71% and 96%**, which is high and warranted further investigation to better understand the underlying reasons for it.

In the main, unless we say otherwise, we have used the longer time series of data available from the older case management system in our analysis.

### The OSE uphold rate

While the number of cases resolved by the OSE changed significantly over the past three years as described in chapter 1, the uphold rate has not changed so significantly – it was persistently high across those three years – rising **from 89% in 2012 to 92% in 2014** (we do not think the increase is meaningful, 89% is still extremely high).



Source: OSE

OSE provided a breakdown that shows the high uphold rates have been consistent across energy companies. Uphold rates for the largest seven energy companies in 2014 were in the range of 77% to 98%. Excluding one firm which accounted for only 1% of cases in 2014, the range is **86%-98%**.

## 2.4 Reasons for high uphold rate

There are a number of possible explanations for the historically high uphold rate at the OSE and we explored each of these to assess how likely they were.

### Only good cases reach the OSE

One theory put forward by the OSE was that only those customers who have a particularly **good case** persist through the firm's complaint systems and pursue their case to the OSE and those good cases are then upheld. A recent report<sup>1</sup> for Ofgem estimates that only 5% of those cases that could be referred to the OSE are referred, and satisfaction rates<sup>2</sup> with the resolution of cases that don't reach the OSE are generally low.

We think that only consumers with good cases persist is an unlikely explanation. In our experience of similar schemes, complainants are not best able to judge whether or not an ombudsman is likely to uphold their complaint. And even where a consumer has a complaint that an ombudsman would not uphold there are many reasons why the consumer may still approach an ombudsman scheme. For example they may be disappointed with the firm's response (even if the ombudsman scheme would not require the firm to do more), they may be annoyed with the process of complaining and remain dissatisfied, they may have a desire to see the firm punished (which is an

<sup>1</sup> Complaints to Ombudsman Services: Energy research report:  
[https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/ofgem\\_gfk\\_complaints\\_to\\_ombudsman\\_services\\_energy\\_report\\_2013\\_0.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/ofgem_gfk_complaints_to_ombudsman_services_energy_report_2013_0.pdf)

<sup>2</sup> Complaints to energy companies research 2014:  
[https://www.ofgem.gov.uk/sites/default/files/docs/2014/09/ofgem\\_complaints\\_report\\_final\\_8\\_august\\_2014.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2014/09/ofgem_complaints_report_final_8_august_2014.pdf)

unrealistic expectation), or they may want to know why the problem happened, sometimes to prevent others from experiencing the same problem.

### **Inaccurate data**

#### *Categorisation of 'uphold'*

Another possibility is that the OSE's historic data is inaccurate and it has been recording more cases as upheld than it should. For example, the OSE told us that it categorized all complaints that had an award associated with them as upheld, but sometimes awards can be attached to cases with findings mostly in favour of the company. But the OSE also said that it considers this is unusual and this is unlikely to have a significant effect on the data.

#### *Restatement of actions as remedies*

We also heard from some staff of the OSE that it might be the case that firms are asked to do something when it may not be strictly necessary. For example, specifying that the firm should offer a payment plan when the firm would do so as a matter of routine.

It is quite understandable that the resolution of a matter by the OSE may involve restating the actions to be taken, even though the firm may have already agreed to take these actions (before the case reached the OSE) and if such cases are recorded as "upholds" this would be an error, and may inflate the uphold rate. In this case, however, we would expect firms to make strong objections to the ombudsman as the uphold rates reflect badly on them, but we saw no evidence of this.

It seems, as we discuss below, a large number of cases may have reached the OSE without a firm stating a final position – so it will often be the case that there *is* a change in the consumer's position between the case reaching the OSE and the resolution of the matter, even if the firm is in complete agreement with the resolution proposed by OSE.

So it would be accurate to record these cases as upholds. This is consistent with some cases we looked at, although we stress that we looked at a very small number of cases with the purpose of making sure we understood the nature of the cases rather presenting findings from looking at a sample large enough to be representative.

#### *Reconciliation of old and new data sets*

The OSE has also provided us with data from its new Peppermint system covering the period June 2014 to June 2015 which **may** show a different uphold pattern. If this is true then it might lend weight to the theory that the historic data may not have **recorded uphold rates with sufficient precision**. As we discuss earlier, the OSE has not been able to reconcile the new and old sets of data without a full manual audit of cases, so we consider that there is a possibility that **data is imprecise**. Findings based on this data must be treated with care.

It is also possible that the new data is not accurately recording cases, or it is possible that if the ambiguous category of 'maintained' could be assessed and

allocated more precisely, the uphold rate shown by the new data may be close to the old data. Alternatively there may have been a **real change** in uphold rates between the period up to March 2014 and since July 2014. Such a change would imply different outcomes for consumers. This is relevant to our findings on the identification of wider issues in chapter 4 and case handling in chapter 6.

### Industry wide event

High uphold rates may be related to a difference in position between an ombudsman scheme and firms. For example, it may be that firms have adopted a position, which means they reject a large number of cases on which an ombudsman scheme takes a different view.

This was the case in financial services, for example, in mortgage endowments where the Financial Ombudsman Service had very high uphold rates<sup>3</sup>. But we would expect these events to be tackled by firms, ombudsman and regulator, critically because those consumers who do not reach the ombudsman do not receive redress they may be due. With agreement between the parties on how the cases should be handled, the uphold rate declines.

We did not see evidence that there is disagreement between firms and the ombudsman on the handling of cases such that would explain the high uphold rates that have persisted over time.

### Firms not considering cases

It may be the case that a high proportion of complaints seen by the OSE have **not first been considered by a firm**. In these cases the OSE understandably “upholds” a case by stating the resolution even if the firm would have proactively done this itself, if it had considered the case.

The first piece of evidence that points to this explanation being likely is the fact that a high percentage of cases do not have ‘deadlock’ letters.

A deadlock letter would normally be sent to the customer after the firm has investigated a case and concluded it cannot resolve it to the customers’ satisfaction. An ‘eight week letter’ is a letter that the firm sends to a customer if, after 8 weeks, it has not resolved the complaint. Some firms are moving to a 6 week period but we use the term ‘8 week letter’ in general as meaning within the specified time period.

As can be seen from the table below, over the past two years, fewer than a quarter of cases that have been referred to the OSE have had deadlock letters.

---

<sup>3</sup> ME report done for FOS and FSA public records

	Deadlock letter	8 week letters
Quarter 1 2013/14	23%	75%
Quarter 2 2013/14	24%	75%
Quarter 3 2013/14	23%	76%
Quarter 4 2013/14	10%	90%
Quarter 1 2014/15	16%	83%
Quarter 2 2014/15	20%	79%
Quarter 3 2014/15	26%	73%

**Source:** OSE quarterly data provided to Ofgem, and OSE clarification

The number of deadlock letters varies by company over time, but it is fair to say that all of the largest companies show a persistent low rate of deadlock letters, with only one regularly issuing deadlock letters in more than 50% of cases referred to the OSE. Another firm also reaches above 50% of cases with deadlock letters but this accounts for less than 1% of total cases.

The absence of a deadlock letter in so many cases may mean that the firms **have not reached a position on the case** in order to decide whether to accept or reject them before the case reaches the OSE.

It is of course possible that some firms **have** looked at the cases but have not been able to come to a conclusion within the eight-week period. If this were true, then we would expect that when the OSE accepted the case and asked the firm for its views, the firms would submit case-files that would explain their attempts to resolve the case during that eight week period and their view on the merits of the case.

However, when we examined the number of cases with case-files submitted we found that the percentage of cases where the firms have not submitted case-files is high and has increased significantly over the past three years. In 2012 73% of cases had case-files submitted by the firms. This dropped to 57% in 2013 and **23% in 2014**.

This picture is not uniform across the seven largest energy companies. Three companies have seen dramatic decreases in the number of case-files submitted in 2014:

- Firm A submitted case-files in 3.9% of cases;
- Firm B submitted case-files in 2.6% of cases; and
- Firm C submitted case-files in 2.7% of cases.

Together these three firms account for **72% of the total cases** accepted in 2014.



This evidence points to a position that the OSE has been considering a large number of cases where a firm has not reached a firm view on the outcome of the case before it reaches the OSE.

We were also told that there are agreements in place between the OSE and some firms about remedies that do not need to be discussed with the firm – in other words the firm has agreed with the OSE that in cases of a certain type, the agreed set of remedies can be imposed without discussion. Agreements exist for the four firms who are submitting the lowest proportion of case-files. This also suggests that some firms have not previously considered cases before they reach the OSE (otherwise they would have already offered the agreed remedy and there would not be an agreement the OSE should do so).

Faced with a significant proportion of cases where the firm has not provided the OSE with any information on its view of the case, and where the firm has an agreement in place about remedies, it is unsurprising that the OSE would impose remedies and uphold those cases. We conclude this is a likely explanation for the high uphold rate, subject to our concerns about the potential for imprecision in the data.

It may be that there is no single underlying driver for a high proportion of cases which have not first been considered by a firm reaching the ombudsman. It may be the case that some firms have experienced a series of exceptional events, for example. It may also be the case that the drivers vary by firm and over time. It is outside the scope of our work, however, to investigate these drivers and to look for the underlying explanations.

## 2.5 Implications and issues

If it is the case that the OSE is routinely considering cases where a firm has not reached a view on the outcome, and is resolving many of these using pre-agreed remedies or the cases are not disputed by the firm, this has implications for the OSE.

Since it is undesirable for an ombudsman scheme to handle cases where the consumer and firm have not reached a deadlock, this picture **should** change – we would not expect this state of affairs to be a stable situation, but one that the firms, the regulator and the ombudsman should seek to resolve. So if the case mix were to change, the types of cases that the OSE is called on to handle is also likely to change – to **fewer, harder cases**.

This would be very desirable as companies would resolve simpler complaints earlier (which is in customers' interest), and the OSE would deal with more complex cases. Such a change could have a significant impact on the OSE's resource levels, skills and capabilities. It is not clear that the OSE has considered this scenario in its future planning.

However, the historic data we examined may not have accurately recorded uphold rates. We note that data from the OSE's new IT systems **may** show a lower uphold rate during the period June 2014 to June 2015 – this may



represent a change in either firm or OSE behaviour. However the OSE has so far been unable to reconcile the historic and new data, and so it has not been possible to tell whether there has been a real change in uphold rates and therefore in outcomes for consumers or whether either the old or new data may be inaccurate. So it remains a possibility that the high uphold rate is **because of imprecise recording of case outcomes**.

The focus of the OSE and the available data may be skewed by the picture of a high volume of cases that should have been easily resolved by the firms. This may mean that the **value of the information** that can be derived from the OSE's historic data may be limited in terms of lessons to be learned about where matters could be improved for consumers. This is relevant to our findings on the identification of wider issues in chapter 4.

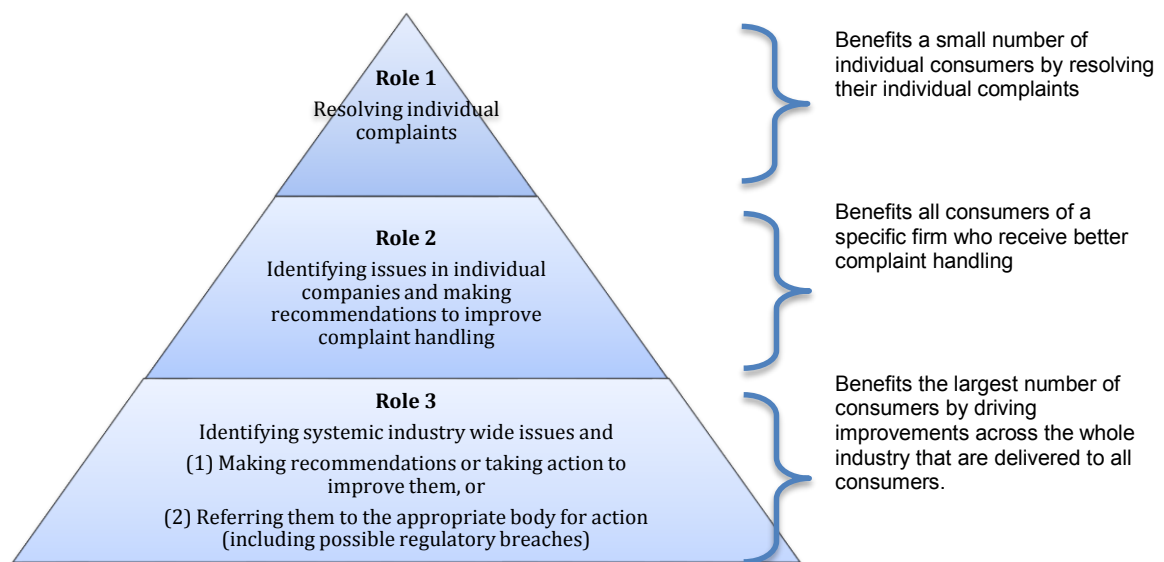
### 3 Ombudsman role and culture

#### 3.1 Key findings

- The OSE has a culture that is focussed on what it sees as its core aim of **resolving individual complaints**, being independent of the parties.
- Systems and processes are set up with this aim in mind, KPIs are clearly focussed on the delivery of the individual complaint handling service, and staff skills and capabilities are geared towards **delivering a complaint handling function** efficiently and effectively.
- While the OSE **agrees it has a wider role**, it has limited systems and processes to support other roles.
- The OSE is focussed on meeting its KPIs and delivering its core case-handling service – it does not, however, have a **clear vision for its role** outside of that.

#### 3.2 Introduction

In this chapter we explore the OSE’s role and culture and the implications of this for its delivery. To do this we first set out three distinct and separate roles that an ombudsman service **may** fulfill – these are described in the diagram below.



*Ombudsman role*

#### Role 1: resolving individual complaints

Probably the most obvious and clearly defined role of an ombudsman scheme is the resolution of individual complaints. This aspect of the role is well defined in international and UK literature and is often described as the

'primary' or 'main' role of an ombudsman as is evident from this quote from the Ombudsman Association website.

*"The [Ombudsman] Association will only give recognition to Ombudsman's Offices whose **primary role is to handle complaints by individuals** about maladministration, unfair treatment, poor service or other inequitable conduct by those subject to investigation."*

Clearly this role delivers a direct benefit to each individual consumer who complains and has their complaint upheld. This is a small percentage of all consumers, and where firms have incentives to respond to their consumers and handle complaints efficiently, it is right that only a small percentage of all complaints should be referred to an ombudsman.

Of course, where firms are not responsive to consumers, it is desirable that the ombudsman has capacity to accept a higher percentage of total complaints, extending the number of consumers that have access to, and benefit from, redress.

As mentioned earlier, a recent report for Ofgem estimates that, in the energy sector, only **5% of those cases that could be referred** to the OSE are actually referred. And those complaints that could be referred to the Ombudsman are in turn only a percentage of the total complaints in the energy sector.

Encouraging people that have a problem to complain – and making sure they have access to an effective ombudsman if their problem is not resolved – is of course very important. But it does provide benefits to only a limited set of consumers.

## **Role 2: improving complaint handling in firms**

The second role an ombudsman may play is to improve earlier complaint handling by the firms by identifying issues within companies complaint handling processes. For example it might spot patterns in how a firm is handling particular types of complaints and make recommendations on changes to procedures to address these. Or it might identify best practice in complaint handling and share it between the firms.. Or, it could simply report data to a regulator for the regulator to take action about any failings in earlier stages of complaint handling.

Improving complaint handling within firms benefits all consumers who complain – which is a significantly larger number than those who refer their complaint to the ombudsman. The Ombudsman Service's Consumer Action Monitor report published in January 2015 states that there were **7.3 million complaints about energy services in 2014**.

### Role 3: identifying systemic industry wide issues

The third role is one where there is considerable overlap between the role of an ombudsman scheme and the role of a regulator. It would be impractical to task only an ombudsman scheme with the identification of systemic industry wide issues, so this must be a role that is either duplicated by both regulator and ombudsman, or somehow divided between them. Without clarity, it seems an obvious area for misunderstandings and gaps to arise.

The role involves learning from the people who do complain and using this information to reduce the **causes** of complaints. This benefits everyone, those who do complain, those who complain initially but do not pursue their claim further with the ombudsman, and the millions of people who do not. So it has the potential to deliver the greatest consumer benefit of all three roles.

Total number of energy customers Q1 2015	49.2million	Potentially impacted by <b>role 3</b>
Total complaints to energy firms in 2014	7.3million	Potentially impacted by <b>role 2</b>
Total complaints to Ombudsman in 2014	26,760	Potentially impacted by <b>role 1</b>

Average OSE award (i.e. consumer detriment corrected)	£111
Total compensation paid in 2014	£1.2 million

If, by driving improvements in firm complaint handling (**role 2**), 1% of those who complain to energy firms had their complaint settled at the average award of £111 then a further **£8million** would have been delivered in consumer benefit.

If by identifying and driving improvements that affect just 1% of **all consumers (role 3)** detriment estimated at £111 per consumer were avoided, a then a further **£55million** in consumer benefit would be delivered.

Breaking this third role down, it has at least three components:

- collecting information from individual cases in a way that **facilitates the interrogation** of that data for root causes so that action to address those causes can be identified and taken and making this data available to others who have an interest in it;
- interrogating the information to **identify the root causes/patterns** and publicising or communicating any trends or concerns to other agencies or bodies who could take action;
- identifying concerns and **initiating action** to address those concerns directly with the industry

All three aspects of this role involve different skills and capabilities to role 1 and, to a lesser extent, role 2. And as mentioned earlier, there is considerable overlap between the role of the ombudsman and regulator in responsibilities to tackle the causes of complaint within an industry.

It is not straightforward to map a single model for an ombudsman scheme onto the three roles – and there seems to be much variation between schemes. For example, the Financial Ombudsman Service appears to have a clear boundary with the FCA, where the FCA expects to take a leading role in any significant intervention that is aimed at addressing poor performance by a financial firm<sup>4</sup>. Whereas the remit and boundaries of the Public and Health Service Ombudsman is not as clear cut (in a more complex landscape of regulators and government departments)<sup>5</sup>.

There is also no clear consensus about what the role of an ombudsman *should* be within the UK ombudsman scheme community – some believe ombudsman should be active in roles 2 and 3 and this is the unique strength of ombudsman schemes, some believe that their role is to enable and facilitate others fulfilling roles 2 and 3, and some that an ombudsman should simply be an adjudicator in a dispute between parties<sup>6</sup>.

It seems to us that it is critical that roles 2 and 3 are fulfilled, but there are clearly different ways this can be achieved providing the overall landscape and boundaries are clear. Clear expectations, clarity of purpose, definitions and measures of success are critical – an ombudsman scheme fulfilling all of roles 2 and 3 is likely to require different skills, capabilities and even powers than a scheme limited to role 1.

The implications of this for the OSE role are considered in more detail in chapter 4.

### 3.3 The OSE role

The OSE faces the same challenges as all ombudsman services in defining how it works across these three roles and the balance of its effort in each area.

As we set out earlier, ombudsman schemes generally have as their primary focus role 1, with varying responsibilities for roles 2 and 3. The description of an ombudsman in the box below, which is an extract from a fuller description by the Ombudsman Association, reflects this common focus.

---

<sup>4</sup> The Financial Ombudsman Service website: “our relationship with the FCA”.

<sup>5</sup> Better to Serve the Public: Proposals to restructure, reform, renew and reinvigorate public services ombudsmen. Robert Gordon 2014.

<sup>6</sup> The future of ombudsman schemes: drivers for change and strategic responses, Queen Margaret University, 2013.

The institution of the ombudsman, first created in Sweden more than 200 years ago, is designed to provide **protection for the individual where there is a substantial imbalance of power**.

**They are neutral arbiters** and not advocates nor “consumer champions”.

**Ombudsman schemes resolve complaints. They are not regulators**, though some of their decisions may be seen as precedents and have wider effect.

Ombudsman scheme **procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business**.

The need to be independent and to be seen as impartial between the consumer and the firm is often a key feature of the culture of an ombudsman. We saw this at the OSE where there is a strong culture of being very careful not to show favour to either side.

In line with this culture, the OSE is set up to efficiently and swiftly resolve individual consumer complaints; its systems and processes are designed with this in mind, its core skills and capabilities are aligned with it, and its KPIs are

very clearly focussed on it.

**Strategic Aim 3: To use our unique knowledge of consumer/provider relationships to the benefit of consumers, business and the economy**

- To use our expertise to help improve customer service and reduce the need for regulatory intervention.
- To demonstrate the economic value of treating customers well
- To inform the policy making agenda, building on a new research and analysis function.

The OSE does acknowledge roles 2 and 3, in one of its five strategic aims (see across). But it has not focussed on these roles to the same extent as role 1.

As a result its systems, procedures and KPIs are not well aligned with roles 2 and 3. And the skills and capabilities needed to fulfill roles 2 and 3 are not the same as those for role 1.

However, we did note that through relatively informal processes the OSE has succeeded in establishing productive dialogue with firms in some specific cases, and has engaged directly with firms to try to improve their complaint handling. We consider this in more detail in chapter 4.

The organisation is also uncertain about the role it should play particularly in relation to role 3 where we heard some caution about how challenge to the firms would be received especially given the OSE’s core belief that it should not behave as a regulator and it should maintain its impartiality and independence from the parties.

We also heard from senior management that this type of work is not currently 'funded' through case fees and that they have concerns as to how it should be funded if the OSE were to expand its role

### 3.4 Implications and issues

Uncertainty about how it might carry out roles 2 and 3 is likely to make the OSE cautious about stepping into territory that it considers might overlap with a regulatory role – particularly around who should 'take action' to improve matters. It will also be concerned that this could be perceived to be in conflict with the **culture of impartiality** that is central to its ethos and operations.

Organisations set up and staffed to deliver individual complaint handling may not have the **processes, systems or skills** to undertake these wider roles and there may be little overlap between the skills needed for role 1 and those needed for roles 2 and 3.

We see that the KPIs for the ombudsman are firmly geared towards individual complaint handling – it is much more difficult to develop KPIs for roles 2 and 3 and to measure these objectively.

Chapter 4 looks more closely at the role of the OSE in identifying wider issues.

## 4 Identification of wider issues

### 4.1 Key findings

- The OSE agrees that its role **should** include the identification of wider systemic issues, and actions to resolve such issues.
- Given its uncertainty about this aspect of its role (as described in chapter 3), these **functions are not yet well developed**. For example:
  - The role, while acknowledged in the strategic aims and goals of the organisation, is not linked to any KPI's or outcomes.
  - The activities do not seem to have been planned into the organisation's business plan, being described by the OSE as 'unfunded'.
  - The processes for interrogating the OSE data to identify wider issues rely largely on own initiative action by a small number of informed individuals.
  - The value of the information that can be derived from the OSE's data may be limited in terms of lessons to be learned (as described in chapter 2).
  - The OSE's data system may not yet capture the data in a way that lends itself to the identification of wider systemic issues.
- OSE states it has intervened to promote best practice having identified patterns of behaviour in some companies but it has **not always captured evidence of this or reported it systematically** to Ofgem.

### 4.2 Introduction

In this chapter we look at what the OSE has been tasked to do in relation to the identification of wider systemic issues in the sector and taking action to improve things for consumers. We explore the degree to which this is happening in the energy sector, having particular regard to the lack of clarity generally in the ombudsman community about these roles.

### 4.3 The OSE's remit

The OSE's remit is described in two sets of documents – its own company documents such as its Articles of Association and Terms of Reference, and the legislation and associated documents under which Ofgem has approved it as an alternative redress scheme in the energy sector.

The most relevant documents for this chapter are listed across. All

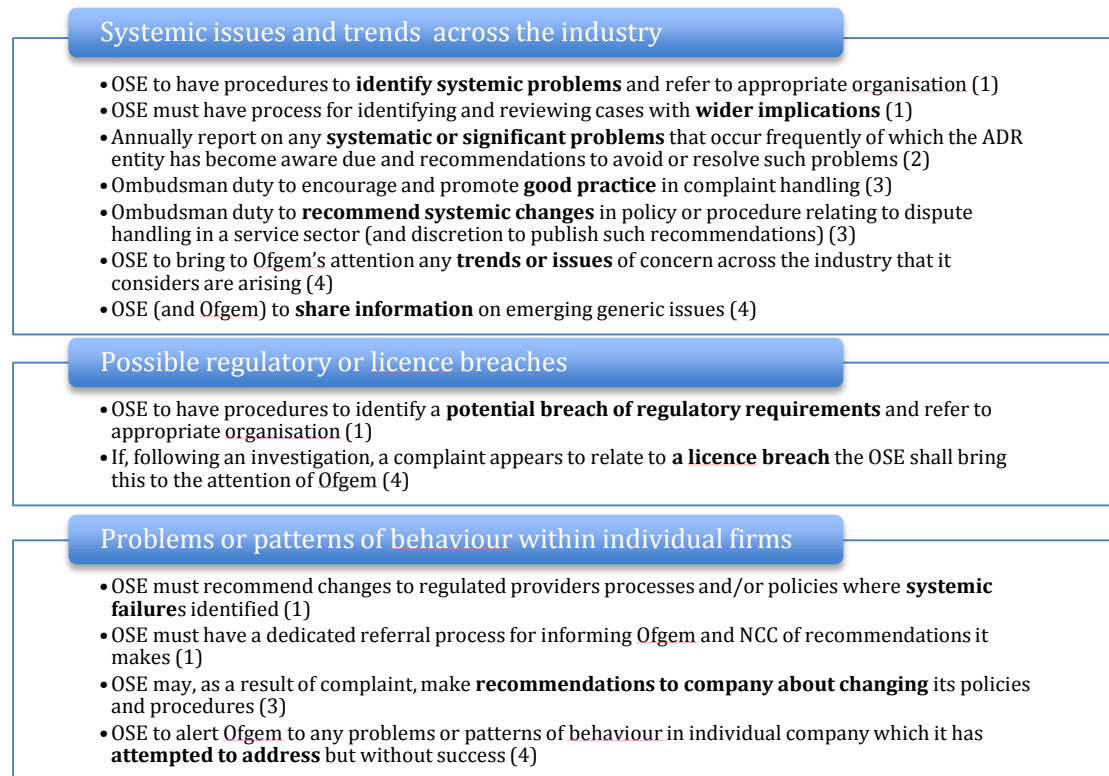
#### Source documents

- (1) Approval criteria for redress schemes in the energy sector (CEAR Act 2007), Criteria 3(p) and 3(q)
- (2) Alternative Dispute Resolution Regulations, Schedule 5: Information to be included in an ADR entity's annual activity report
- (3) Ombudsman Services Terms of Reference, paras 7.4, 8(d) and 8(g)
- (4) Memorandum of Understanding between Ombudsman Services and Ofgem, paras 5.7, 7.2 and 7.3



of these documents set out various elements of roles 2 and 3 of an ombudsman as described in chapter 3 and the expectations on the OSE in relation to these.

The figure below summarises the provisions in the various documents that describe the role that the OSE is tasked with.



We have split this role of identifying wider issues (described as roles 2 and 3 in chapter 3), into three subsets based on the OSE's functions:

1. Identifying problems or **patterns of behaviour within individual firms** and making recommendations to the firm to address these. As well as making such recommendations the OSE is required to **report** all such recommendations to Ofgem (under the CEAR criteria) and also to specifically report where it has sought to address problems with a firm and has failed to do so (under the MoU with Ofgem).
2. Identifying potential **breaches** of regulatory requirements and referring them to the appropriate body for action, explicitly bringing to Ofgem's attention any complaint that raises the possibility of a firm having breached its licence. The CEAR criteria explicitly require the OSE to have **procedures in place** to do this.
3. Identifying **systemic problems and wider issues** – once again the CEAR criteria require the OSE to have procedures in place to do this. The OSE also has duties in its terms of reference to recommend systemic changes to dispute handling policies and procedures across the sector and it has the discretion to publish those recommendations.

4. Under its MoU with Ofgem it must bring these wider issues and trends to Ofgem's attention. The OSE also has a self-imposed function of promoting **best practice** in complaint handling (OSE Terms of Reference).

These functions make it clear that there has been an expectation that the OSE will fulfill a considerable part, if not all, of roles 2 and 3 as described in chapter 3. This expectation continues under the new ADR Regulations, which require regular reporting on systemic issues and recommendations made by the ombudsman to address such issues.

#### 4.4 How the OSE carries out this role

In our discussions with OSE it became clear that, while senior management agree that the OSE should carry out these functions, there is some uncertainty about how it should do so and what is involved. This uncertainty arises from, amongst other things, the desire to protect the core role and value of impartiality and independence that is at the heart of the OSE's complaint handling function (see chapter 3).

It is also fair to say that the OSE has been very focussed on its core role of individual complaint handling where it has face considerable operational challenges. Its operational focus on meeting those challenges (which it has done successfully, having restored performance against its KPIs) may have taken up a lot of management focus in the recent past.

As a result, the activities that might be needed to underpin these functions do not appear to have been planned into the business plan. As previously noted there is a concern that these activities are 'not funded' under the fee structure of the OSE.

#### Measuring progress in identifying wider issues

Because the OSE has been very firmly focussed on what it sees as its core role of resolving individual complaints, its processes, systems and data collection have been set up to support that role. Its KPIs, agreed with Ofgem are all clearly directed at complaint handling and it has made significant progress in meeting them recently as is shown by its report to Ofgem on performance for the first three months of 2015.

### KPI was achieved in all areas for Energy.

This was achieved against a backdrop of increasing contacts into our Enquiries team and the second highest ever case accepts in the Energy Sector driven mainly through Scottish Power and npower.

Energy	December	January	February
% of calls answered ≤ 2 mins	87%	78%	84%
% of calls answered ≤ 5 mins	98%	95%	98%
% of correspondence responded to ≤ 10 working days	100%	100%	100%

% of PCs ≤ 6 weeks	99%	99%	98%
% of PCs > 8 weeks	0.3%	0.2%	0.2%

% of cases closed by MAS	79%	86%	87%
--------------------------	-----	-----	-----

Source: OSE

These types of KPIs are well-understood and widely used to measure case handling activity – most ombudsman services have a similar suite of measures. And these are the measures agreed between Ofgem and the OSE for assessing performance. It is not surprising therefore that the OSE has focussed very much on hitting these targets and on the systems and processes needed to do so.

It is considerably more difficult to develop KPIs to measure performance in identifying and addressing wider systemic issues and trends. Similarly, it is more difficult to develop the processes and procures to identify those wider issues. Because no measures were agreed for this function between Ofgem and the OSE against which to assess performance, the OSE may not have focussed as much on them notwithstanding the fact that they are within Ofgem's expectations of what the OSE should deliver.

### Processes to identify wider issues

There is an emphasis in the CEAR criteria on the need for **procedures and processes** to identify wider issues and a **dedicated referral system** to report on them to Ofgem.

The OSE does have regular team meetings of investigation and enquiry officers to discuss cases but the focus of these is mainly on the quality of the case handling (see chapter 6). To identify wider issues and trends, the OSE relies on relatively informal processes. It depends on the initiative of a small number of key individuals, particularly the energy relationship manager, to actively investigate and question enquiry and investigation teams to identify trends and issues. We also heard that other individuals sometimes take the initiative to ask questions about cases to see if there are patterns occurring.

The OSE pointed to the changes it has made over the past 12 months to improve its capability in this area including:

- doubling the Ombudsman team from four to eight and introducing the new role of ‘technical experts’ to support the Ombudsman team;
- appointing a new four-person management information team;
- appointing two new senior Directors with a remit to improve efficiency, data strategy, systemic insights and change and continuous improvement; and
- appointing new relationship managers so that one is solely focussed on the energy sector.

The OSE provided us with some examples of where it has acted on the intelligence gleaned from this process to promote best practice having identified behavior in individual firms that caused it concern. Chief among these was the issue of inconsistencies in back-billing practices across firms where in the first half of 2015 the OSE held individual workshops with three firms as well as a wider industry workshop, to promote consistency and best practice.

But it does not have a formal system for recording these issues. It generally (though not always) updates Ofgem during regular bilateral meetings, but it does not have a dedicated referral system in place.

### OSE case data

As described in chapter 2, the focus of the OSE and its available data, may be skewed by the picture of a high volume of cases that should have been easily resolved by the firms. If this is true, the volume of these cases may be ‘swamping’ any other meaningful information that might be within the data. This may mean that the **value of the information** that can be derived from the OSE’s data may be limited in terms of lessons to be learned about where matters could be improved for consumers.

Second, in moving to its new system (Peppermint), the OSE does not appear to have considered how to ensure that it can **track trends and information** across historic and new data. As mentioned in chapter 2, new definitions of outcomes are not clearly mapped between the old and new systems so it is not possible to tell whether changes seen in data from the new system are because of changes in how the data is recorded, or some other underlying issue that might affect consumers. This may reduce the value of the information that can be derived from the OSE’s data even further until sufficient data is held on the new system.

And the new OSE data systems may not capture data in a way that lends itself to the identification of systemic issues. The new system is designed to improve how the OSE handles complaint handling and case data, but it is not clear that in designing the system it took into account its role in identifying wider systemic issues.

When we asked about future plans for data management we heard that while the OSE recognizes that a **data strategy** is desirable it does not currently have such a strategy in place. It has started to focus on developing its management information with a view to considering its data strategy.

#### 4.5 Implications and issues

The interpretation and expectations of the OSE and Ofgem as to how the OSE might carry out the function of identifying wider issues, reporting on these, and potentially taking action to improve things **may be quite different**.

A combination of the strong focus of the OSE on fulfilling its core role (and in meeting the operational challenges associated with the recent rapid rise in case numbers), and the absence of any KPIs or measures around the identification of wider issues, may mean that the OSE has been **less focussed** on this role than Ofgem would like.

The OSE is **unsure about its role** in these areas, how far it should carry out these functions before it would stray into the territory of a regulator, and does not consider these functions are currently funded.

The **skills and capabilities** to fulfill the OSE core role of complaint handling and the skills and capabilities needed to fulfill this wider role are very different and there is little overlap between them. Given the OSE's focus on its core complaint handling it may not have the skills to carry out the wider role in the way Ofgem might expect.

The OSE's new data system (Peppermint) may not currently capture the complaint data in a way that is useful for interrogation to identify wider systemic issues. The OSE does not appear to have put in place processes to enable it to **track trends over time** across historic and new data – which may **reduce the value of the data** further during the transition to the new system. The organization does **not have a data strategy** that might address these issues.

## 5 Business Compliance with OSE decisions

### 5.1 Key findings

- OSE agrees that it **does have a responsibility** for putting in place measures to ensure compliance with its redress decisions.
- New processes have been put in place to:
  - **monitor compliance** with redress decisions – by contacting customers directly to confirm whether the redress has been provided within the timescale (28 days); and
  - **incentivise compliance** with redress decisions by charging the company £100 each for two subsequent delays of a further 28 days each and then opening a new case if redress has still not been provided.
- The identification of overdue redress implementation necessarily spans the old and new data systems leading to a need for manual reconciliation issues and **concerns about accuracy** – this should resolve over time as new systems take over.

### 5.2 Introduction

This chapter examines the role of the OSE in ensuring that businesses comply with its decisions and the systems and processes it has put in place to do this.

The OSE has the power to impose remedies that may be financial, non-financial or both. For example it might require a firm to make a financial settlement to put things right (e.g. a rebate to compensate for overbilling) or a financial settlement to reflect the distress and inconvenience suffered by the customer and/or a non-financial settlement – e.g. an apology.

### 5.3 The OSE's remit

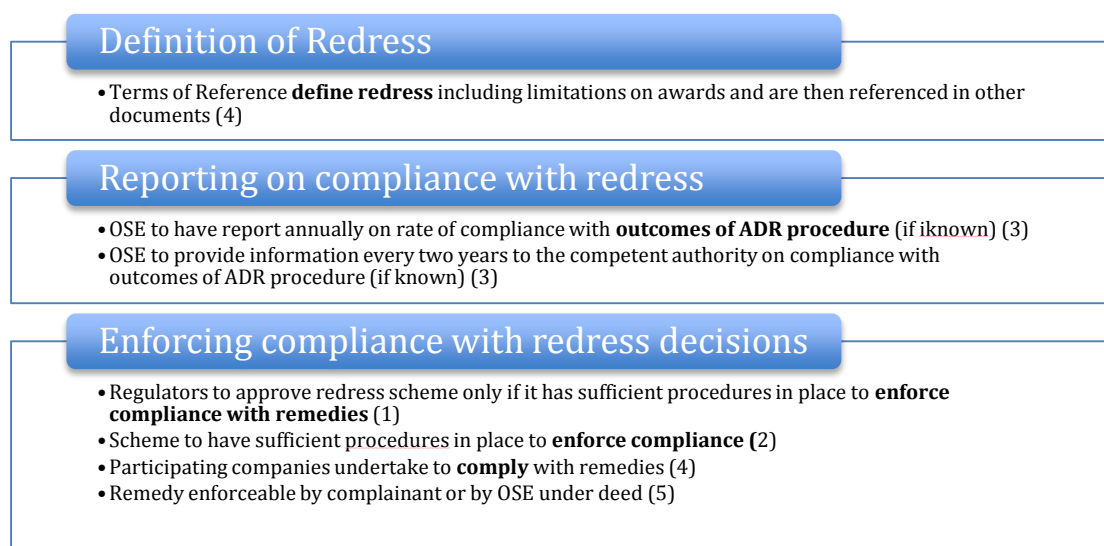
In this area, the OSE's remit is set out in a suite of documents that are listed in the box opposite.

The OSE told us that it had previously taken the view that its role did not extend into ensuring compliance with decisions as this was closer to an 'enforcement' role which might be carried out by a regulator. This view is consistent with the cultural issues described in chapter 3 and a concern that the ombudsman should take care not to be perceived as compromising its independence from the parties.

#### Source documents

- (1) Consumer and Estate Agents Redress (CERA) Act, 2007, section 47(3)(a)
- (2) Approval criteria for redress schemes in the energy sector (CEAR Act 2007), Criteria 3(o)
- (3) Alternative Dispute Resolution Regulations, Schedules 5 and 6: Information to be included in an ADR entity's annual activity report and its biannual report to the competent authority
- (4) Ombudsman Services Terms of Reference, paras 7.3 to 7.8, 8(1)(a) and 11(1)(d)
- (5) Deed poll (signed by participating companies), paras 2 and 3.

However, having reviewed this position the OSE agrees it does have a role in this area – that role is described in various places and is summarized in the diagram below.



### 5.4 How the OSE carries out this role

The OSE has published a new policy on remedies which involves charging companies for overdue remedies, and if remedies remain outstanding then opening a new case against the company for failure to implement a remedy, with an associated case fee. It is outside the scope of this review to assess the

effectiveness of the policy in ensuring remedies are delivered on time, and it is also early in the new process to be able to see the effects of it.

We reviewed the new processes and procedures that the OSE has put in place to deliver its new policy around ensuring remedies are implemented. These are set out in clear process maps and appear appropriate, including the steps we would expect to see. The remedies implementation team has also been increased in size to tackle a current backlog in outstanding remedies and to ensure this function is carried out efficiently going forward.

The OSE is currently migrating from an old data system to its new Peppermint data system. Many of the cases where there are outstanding remedies therefore span the two systems. To address this the OSE has sensibly put in place a manual reconciliation process between the systems until such time as all outstanding remedy cases are on the new systems. This reconciliation is focussed on identifying cases with outstanding remedies and the dates so as to facilitate the issuing of the charges set out in the new remedies policy.

We did hear concerns from one company about the accuracy of the data at this stage but this was attributed to the newness of the process and the issue of legacy systems and manual reconciliations. These issues should be resolved as the new systems take over.

## 5.5 Implications and issues

The OSE has put in place **new systems and processes** that are designed to ensure OSE remedies are implemented by the firms, and to take action if this is not the case.

The fact that the work necessarily spans two systems and needs manual reconciliation gives rise to some **concerns about accuracy**, but we would expect this to diminish as the new systems take over.

The OSE's initial reluctance to carry develop these procedures may be related to the **cultural issues** discussed in chapter 3; on reviewing and accepting its responsibilities it has acted positively to change this.

It is possible, in line with findings in chapter 2 that the new systems and processes are not capturing the data needed to be able to interrogate the **causes** of the overdue remedies in firms (as opposed to the existence of the overdue remedies). If this is the case then the **value of the information** that can be derived from this data may be limited in terms of lessons to be learned about where matters could be improved for consumers.



## 6 Case management and quality assurance

### 6.1 Key findings

- There is an appropriate focus, including by senior management, on managing performance through tracking and meeting **suitable KPIs**.
- In the context of a rapidly growing caseload, the OSE has demonstrated **steady improvement** in its KPIs and timeliness of case handling.
- Case handling procedures contain all the elements we would expect – and while there is no overall case handling manual, process documentation, training materials and on the job supervision appear good.
- There is an appropriate focus, including by senior staff, on **examining quality** with an adequately sized team in place (circa 24 people) sampling approximately 5% of cases.
- The quality team examine a wide and suitable set of factors and there is evidence of appropriate feedback to individuals and managers.
- Data from the new case handling system (Peppermint) may indicate a change **in outcomes** for consumers over the past 12 months, but the OSE does not appear to have systems or processes to identify whether this is the case or, if so, the reason for the change.

### 6.2 Introduction

This chapter looks at the OSE's **processes and systems** for **case handling and quality assurance**. We did not carry out an audit of the substantive handling of cases by the OSE although we looked in depth at a small number of cases (circa 15) to inform our view of processes and systems and their suitability for the types of cases being handled.

We also looked at the quality assurance systems and processes and reviewed the quality assurance log, which sets out the findings of the quality process by individual cases. But we did not undertake an audit of the **outcome** of cases.

In doing this we were aware, as mentioned in chapter 1, of the considerable operational case handling challenges the OSE has handled over the past couple of years.

### 6.3 The OSE's remit

Handling and resolving consumer complaints is the core function of the OSE and has been its primary focus. Unlike some of the other functions described earlier in this report there is no ambiguity around this role.

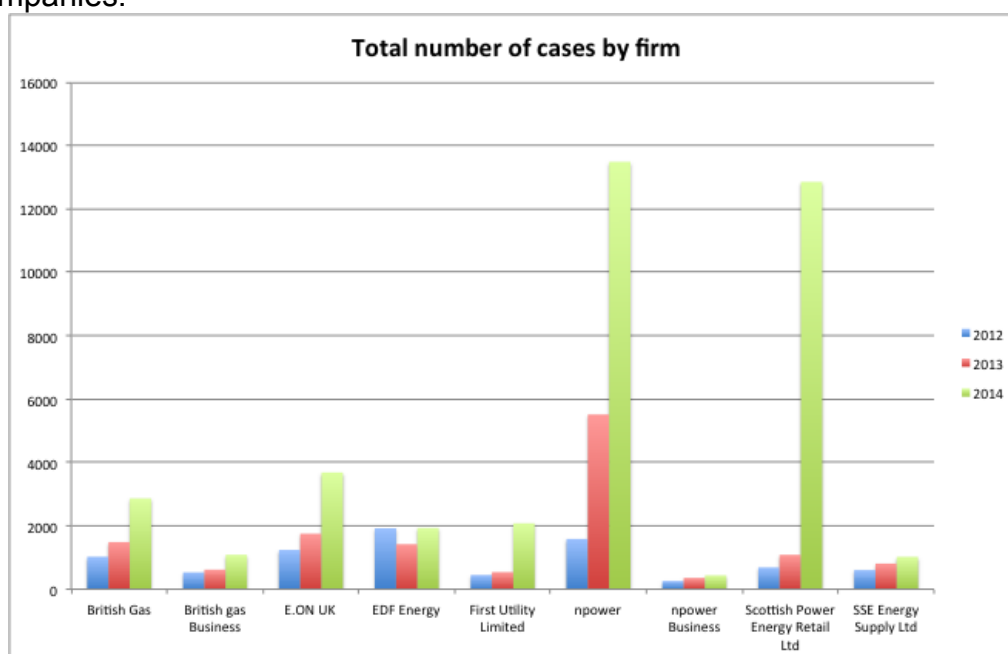
Indeed as described in chapter 3, the OSE is firmly focussed on this as its core role and consequently it places great emphasis on its values of independence and impartiality, with a strong culture of being careful not to show favour to either side.

## 6.4 How the OSE carries out its case handling role

### Case volumes

As mentioned earlier, in carrying out its core role of resolving individual consumer complaints, the OSE has faced considerable challenges because of a sharp growth in the number of cases referred to it. As is shown in the chart in chapter 1, there was a **71% increase** in cases resolved in 2013/14 over 2012/13 - and this came on top of a 32% increase in the previous year. The total number of cases resolved in 2013/14 was **15,031** (cases handled were recorded as 26,760).

This increase has been driven by sharp increases in complaints about two companies (npower and Scottish Power) with smaller increases in other companies.



Source: OSE

### Performance against KPIs

In the light of this challenge, the OSE's performance against casework KPIs initially deteriorated. But the OSE has since made steady progress in **restoring performance** and is now regularly meeting its KPIs on timeliness of initial response and end-to-end case handling. This has been driven through appropriate senior management and board focus on performance and the tracking of suitable KPIs.

## Case handling procedures

The OSE case handling procedures are documented in well set-out flow documentation showing how cases progress through the system. The procedures contain all of the elements we would expect to find. For example, we saw appropriate **triage** of cases, **early resolution** processes in place, and good **guidance** to case handlers on bringing parties to an agreement.

We noted that there is no overall case-handling manual in place, but we do not place a lot of weight on this. We saw appropriate induction for new case officers and consider that this, along with adequate on the job training, local supervision and communication may be sufficient to ensure good processes and quality.

## Case reviews

We undertook a review of a small number of cases so that when we considered the case handling processes and procedures, we could form a view on whether they were appropriate for the types of cases the OSE is handling. A summary of the review of cases is in Appendix C.

## 6.5 Implications and issues

We found no significant issues in the case management procedures – they are appropriate for the types of cases handled.

The issues we identified around case management are set out in chapter 2 where we express a view about the types of case being handled and a concern as to whether the OSE could react to a case load that was much more difficult. This is an issue around **skills and capabilities** rather than case management.

A second set of issues arose late in our review when we were provided with data from the new OSE case handling system that **may** imply that there has been a change in outcomes for consumers. The OSE does not appear to have identified such changes (if any). This may have implications for the quality of outcomes for consumers.

## 6.6 How the OSE carries out quality assurance

### Capacity of quality team

Alongside the increase in volumes, the OSE has increased its quality assurance team and strengthened its quality assurance processes. The quality team now comprises approximately **24 people** in total and it samples **at least 5% of cases**. We consider this adequate for the number and type of cases being handled.

## Quality factors being considered

Our review of the quality assurance process showed that the team is examining a suitably wide range of factors. For example they check:

- that relevant **facts** are properly identified and summarised;
- that the **outcome** is fair, reasonable and consistent with policies;
- spelling, plain English, **style and tone**;
- **efficiency** in resolution;
- appropriateness of **communication**.

There is well-documented guidance to the quality team on what to assess in each of these areas organized around the headings in the diagram below.

Area	Pass	Recommendation	Action Required
Process / Investigation			
Recommendation / Decision			
Written Communication			
Telephone Communication			
Overall Assessment			

Source: OSE

We did hear a concern that the quality process may be too heavily focussed on style and tone rather than the quality of the substantive decision. We noted that the quality team has developed a 'partnering' agreement with the ombudsman team, so that the two teams can work together, with the ombudsman focussing on setting standards for case decisions. The ombudsman team has also been increased from four to eight over the past year and a new role of 'technical expert' has been introduced to further support the Ombudsman team.

## Feedback and development

Importantly, there is evidence of appropriate feedback to individuals on cases they handle, as well as regular wider discussions on aspects of quality with all case and enquiry officers. There is also a focus by senior staff on making sure that failings are tackled.

## 6.7 Implications and issues

We found **no significant issues** with the quality assurance process – once again these are appropriate for the types of cases handled.

A number of factors recorded and tracked by the quality team do show meaningful data on findings from the quality review. However, these are mainly around style, tone and case handling.

We were unable to tell from the available data, what were the themes on the outcomes of the case findings without looking at the individual records. This suggests that the quality controls may not be adequately informing the OSE about **outcome failures**.

This concern is heightened by the fact that recent data from the OSE's new case system implies **there may have been** a change in outcomes for consumers over the past 12 months. But the OSE told us it could not tell if this was the case without a full manual audit – which underpins the concern that the quality process may **not be sufficiently focussed on outcomes** and identifying whether any changes in trends represent a quality concern or have an alternative explanation.

## 7 Governance

### 7.1 Key findings

- Against the criteria under the CEAR Act and the ADR Regulations (which are focussed largely on the independence of the Board and the Ombudsman), we did not find significant concerns.
- During our review we identified that some governance documentation may need to be **updated** to align fully with the ADR Regulations – the OSE has since informed us that these updates have been made.
- We did not find evidence that structural issues such as the non-statutory nature of the OSE, the potential for the approval of more than one energy redress scheme, or the nature of the OSE’s funding impacted on its independence; our findings in relation to the OSE’s role and culture are set out in chapter 3.

### 7.2 Introduction

During each aspect of our review as described in the previous chapters, we took into account the governance arrangements within the OSE. We also considered the overarching governance requirements on the OSE as an approved alternative redress scheme (in the context of the CEAR criteria and the ADR criteria - see Appendixes A and B) to identify whether there are any issues of concern. This chapter summarises the outcome of that exercise.

### 7.3 The requirements on the OSE

The governance requirements on the OSE are focussed on ensuring **independence** of the OSE from the parties that are within its jurisdiction.

The overarching requirement to be independent is in both primary legislation and in the ADR Regulations, with additional detail about how this should be ensured contained in the CEAR criteria published by Ofgem.

The OSE has various provisions in its Articles of Association and Terms of Reference that reflect how it is meeting these requirements.

The source documents are listed in the box over and the diagram below summarises the key provisions in these documents (this is not a comprehensive list of all provisions).

#### Source documents

- (1) CEAR Act, 2007, section 48(2)(a) and (b)
- (2) CERA criteria 1.3(a)-(h)
- (3) ADR regulations, Schedule 3, sections 3 and 4
- (4) OS Articles of Association, paragraphs 12, 14, 18, 20-23, 58-62, 63-65 and 66-72
- (5) OS Terms of reference, paras 2.14, 4 and 15
- (6) Memorandum of Understanding with Ofgem, para 3

## Transparency

- Publish the jurisdiction, powers and method of appointment of the Ombudsman (2) (3)

## Independence

- Requirement that the scheme is **independent** in order to be approved by Ofgem (1) (6)
- The **body appointing** the Ombudsman and to whom the Ombudsman is accountable to be independent of those subject to investigation (2) (4)
- the Ombudsman's **term of office and remuneration** must be sufficient to ensure independence (2) (3)
- The governing body to have a **majority of independent members** with limited tenure and be responsible for approving any terms of reference or changes to the ToR (2) (4)
- The independent Ombudsman has the power to decide whether or not a complaint is within the scheme's jurisdiction (2) (3) (4)

## Fairness and conflicts

- The governance and fee structure shall not have a disproportionate effect on any particular group of members (2)
- Ensure any conflicts are identified and addressed by a procedure allowing for transfer of complaints in cases of conflict (3) (4)

## 7.4 The OSE governance arrangements

### Board structure and membership

Having changed its governance structure, the OSE now operates under a very standard governance model with a Board comprising a majority of non-executive members and, currently, one executive member (the Chief Ombudsman and Chief Executive). The Chair and the non-executives are appointed through a standard process, and the Articles of Association explicitly provide for independence from the firms subject to the jurisdiction of the OSE.

### Appointment of the Ombudsman

The Ombudsman is appointed by the Board and the Board is charged with ensuring that the Ombudsman has the appropriate skills and expertise to fulfill the scheme's requirements.

### Conflicts of interest

The OSE has several provisions relating to potential conflicts of interest. First, the Articles of Association require transparency of all Board members' interests and set out the rules around where a conflict may arise (e.g. by requiring that the relevant Board member may not vote on matters where a conflict exists).

Second, the Articles also require transparency of the Chief Ombudsman's interests but do not contain the detailed policy about what rules apply if a conflict arises.

Finally the OSE has a conflict of interest policy that applies to all employees. During our review we identified that the policy set out how to identify a conflict

and required all employees to raise such an issue with their manager but **did not set out the rules or procedures** to be followed in the event of a conflict arising. The OSE has since update this policy to address this.

## 7.5 Structural characteristics of the OSE

During our discussions a small number of issues were raised about the establishment and structure of the OSE, and whether these have the potential to affect the independence or effective operation of the OSE. We did not find evidence to suggest that this was the case and our comments on these issues are summarized in the table below.

Structural characteristic	Potential concern	Comment
Non-statutory status of the OSE	The absence of a statutory backing may place the OSE on a less robust footing with the industry.	While the OSE was not established by statute, it does have legislative backing to rely on in the form of the CEAR act, and (should it be approved) the ADR regulations.
Funding directly from the industry	Because the OSE relies on revenue from cases to fund operations, it could be less likely to tackle the industry on difficult issues.	Most Ombudsman Services are funded by case fees – there is no evidence that this impacts independence.  There is some evidence that the OSE is reluctant to undertake wider work because such work is 'not funded' through existing case fees (see chapter 4). But the OSE does have the power to amend its business plan and case fees if it considers this appropriate or necessary.
Potential for a competitor scheme to be approved by Ofgem	The potential to lose the energy complaint handling business could incentivise the OSE to focus on other sectors in an attempt to diversify risk – potentially reducing focus on the energy sector.	We did not see evidence of this happening. When we talked to staff at the OSE they were aware of the potential for another scheme to be approved and we consider that they responded appropriately with the desire to deliver good performance.

### Non-statutory status

The OSE is described as a 'non-statutory' ombudsman scheme, meaning it was not established by legislation. A question was raised as to whether this could affect the governance, independence or effectiveness of the OSE.

First, notwithstanding that the OSE was not set up under statute, it has been approved to operate under statute (the CEAR Act, 2007), so it does have statutory backing for its operations. Should it be approved under the ADR Regulations it will have further statutory backing.

Second, we did not see evidence that this status affected the culture of independence in the OSE or led to a culture or approach that is fundamentally different from other ombudsman schemes. Our findings on the culture of the OSE are explained further in chapter 3.

### Funding model

The OSE is funded through case fees charged to the firms for whom it handles complaints. This method of funding via the industry that is within the ombudsman's jurisdiction is common across most ombudsman schemes and



we did not see evidence that this **source** of funding affects decision-making or the culture within the OSE.

The OSE has the discretion to change the **structure and levels** of charges under its Articles of Association and related documents if it considers this appropriate, and it has done so more than once as illustrated in the table below.

Funding structure	Comment
Original funding structure <ul style="list-style-type: none"> <li>• 10% of forecast company fee paid upfront as 'subscription'</li> <li>• 90% of funding collected through invoicing on receipt of cases</li> </ul>	While the majority of funds were collected ex-post, the cost of resourcing up to handle complaints was ex- ante (e.g. recruitment and training), leading to a mismatch of resources and case volumes that affected performance.
Revised funding structure <ul style="list-style-type: none"> <li>• 40% of forecast company fee paid upfront as 'subscription'</li> <li>• 60% of funding collected through invoicing on receipt of cases</li> </ul>	The funding structure was changed to ensure a greater percentage of the revenues necessary to run the ombudsman service were collected up front.  But concerns remained that firm forecasts were very different from actual case volumes.
Revised funding structure <ul style="list-style-type: none"> <li>• Large companies to forward buy forecast case numbers at set case fee</li> <li>• Under-forecasted cases to be charged at a higher fee</li> </ul>	This new funding structure is designed to ensure both adequate resources for the OSE and to incentivise firms to submit accurate forecasts to assist in planning.
Revised funding structure <ul style="list-style-type: none"> <li>• Introduction of fees (£100) for monitoring and pursuing overdue remedies</li> </ul>	This charge has been introduced to fund the activities involved in 'chasing' overdue remedies (considered further in chapter 5)

We did hear from the OSE that it considered some of the wider functions involved in identifying wider systemic issues were 'unfunded' in the current model, but as noted above, the OSE has the discretion to change this. We considered this in more detail and set out our findings in chapter 4.

### Potential competitor schemes

We heard a range of views around the potential impact of competition between ombudsman services. Under the CEAR Act, Ofgem could approve a second (or more) ombudsman scheme in the energy sector, creating direct competition **in the market** between the new scheme and the OSE.

Ofgem can also withdraw approval of a scheme, so in theory Ofgem could approve a new scheme and withdraw approval from the existing scheme, which could be considered a form of competition **for the market**, although this does not appear to be the model envisaged in the CEAR Act.

We heard on the one hand that the existence of only one ombudsman may allow that scheme to be more robust with firms (e.g. by publishing complaint data by firm) as it does not have to be concerned about losing members to a rival scheme. On the other hand we heard a concern that the absence of a competitor may lead to a lack of incentives on the OSE to operate efficiently.

It is outside the scope of this review to assess the different potential models for competition between or for ombudsman services. However, we did not see evidence that the current arrangements for the OSE (currently the single approved scheme in its sector with the potential for other schemes to be approved) had a negative impact. When we met with staff within the Ombudsman they were aware of the potential for competitor schemes and we considered that they responded appropriately to this incentive.

## 7.6 Implications and issues

We found **no significant issues** with the governance arrangements of the OSE in the context of the (relatively limited) CERA and ADR criteria. We considered that some governance documentation, e.g. the conflicts of interest policy, might need to be updated but we note that during our review, the OSE has reviewed and updated these.

We did not find evidence that structural characteristics such as the non-statutory nature of the OSE or the nature of the OSE's funding impacted on its governance or independence and we consider that the OSE staff responded appropriately to the potential for the approval of more than one energy redress scheme.

Our findings in relation to the OSE's role and culture are set out in chapter 3.

## 8 Recommendations

### 8.1 Introduction

Our review has been strategic and forward looking in the context of important new developments in the alternative dispute resolution field. Our recommendations are based on the high level review of the evidence we have described in this report and are not focussed on detailed operational issues.

The recommendations are aimed at driving the effective delivery of all three roles of an ombudsman as described in chapter 3. As we say in that chapter, we consider that the delivery of the wider roles, beyond the pure individual complaint handling, has the potential to drive significant benefits for all consumers - those who do complain, those who complain initially but do not pursue their claim to the ombudsman, and those who never complain.

Our recommendations fall into three broad categories – those around the clarification of the **ombudsman role** in the energy sector, those relating to the **management and use of data** and those around **capability and skills**.

### 8.2 Ombudsman role

1. Ofgem and the OSE should together **clarify and agree** their understanding of the definition of the three roles of an ombudsman as we have described them in chapter 3 and there should be clarity about the expectations on the OSE and how its role interacts with Ofgem's role.
2. If the OSE is to take a more active part in roles 2 and 3:
  - it will need to do substantial work to develop an **implementation plan** to ensure effective delivery of that role, including ensuring the relevant activities are 'funded', communicating with firms, and identifying and filling capability gaps;
  - there should be clear KPIs and **measures of success** for all three roles and these should be reported on transparently;
  - Ofgem and the OSE should put in place effective mechanisms to **manage the relationship** between them in a way that ensures together they contribute to the effective delivery of consumer redress in the energy sector and capture the wider benefits of learning from consumers who use the OSE.

### 8.3 Data strategy

3. The OSE should significantly **improve the collection and reporting of basic data** so that it can better monitor its own performance including tracking performance and understanding trends.

4. A new **data strategy** should consider what wider data set the OSE could collect that would enable it to meaningfully identify and comment on wider issues that may affect consumers in the energy sector.
5. The data strategy should address how OSE can make the most **effective use of its data**, for example, how it uses the data itself, how it shares the data with affected parties and how the data might underpin regulatory action by Ofgem where necessary.
6. The OSE should consider the potential benefits in **greater transparency of its data**, making the data available to others who might be able to use it to deliver improvements and benefits for consumers.

#### 8.4 Capabilities and skills

7. The effective delivery of ombudsman roles 2 and 3 as we describe in chapter 3 is crucially dependent on having the right **policy skills** and the right **data analysis and management skills** in place - which may be different from those required for role 1. Acquiring and developing these skills should be a key part of any implementation plan.
8. The OSE should factor into its planning its own ability to influence – through improvement to **earlier stages of complaint handling** in the firms – the number and type of cases it receives.
9. The OSE should ensure that its quality controls apply equally to monitoring the outcome of cases (joining up with the results of better data analysis) to **track its own performance better**.

## About Lucerna

### We are a consultancy specialising in regulation and public policy

We advise on strategy, competition, consumer and public policy, and on regulation – whether that’s rethinking the regulation of a sector or helping with an immediate and urgent matter. We help firms identify their best regulatory strategies, and present their best case. We help regulators secure the best value for consumers and taxpayers. And we help consumer groups get their voice heard, and policy makers make the right decisions.

#### For this report, contact:

Regina Finn

[regina.finn@lucernapartners.com](mailto:regina.finn@lucernapartners.com)

07771 901892 or 0207 1935927

#### Trading and registered address:

Lucerna Partners Limited The Tower Cottage, Harrow Park, Harrow, Middx  
HA1 3JE

Company registration number: 8347324

[www.lucernapartners.com](http://www.lucernapartners.com)

## Appendix A: CEAR criteria – relevant extracts

The Consumer Estate Agents and Redress Act 2007 (CEAR Act) appointed Ofgem as the body to approve redress schemes in the energy sector. In 2008 Ofgem set out the criteria (the 'CEAR criteria') that it would use in assessing and approving redress schemes. The OSE applied for and was approved as the redress scheme for the energy sector.

In undertaking our review of the OSE, Ofgem asked us to have regard to the following criteria in particular:

### Relevant scheme criteria - governance

(scheme criteria 1)

- a. the jurisdiction, powers and the method of appointment of the person responsible for the scheme must be publicised,
- b. those appointing or terminating the appointment of the person responsible for the scheme must be independent of companies that are subject to investigation (this does not exclude their minority representation on the body which is authorised to appoint or terminate),
- c. the person responsible for the scheme must be appointed for a period of office for sufficient duration to ensure the independence of their actions and must not be removable from their duties without just cause,
- d. the person responsible for the scheme must be required to report to a body or person independent of those subject to investigation (this does not exclude their minority representation on that body). The body or person must also be responsible for safeguarding the independence of the person responsible for the scheme,
- e. any terms of reference for a scheme, or changes to the terms of reference, must be agreed by a body or person independent of those subject to investigation (this does not exclude their minority representation on that body),
- f. there must always be a majority of independent members on any Body or Council which appoints the person responsible for the scheme,
- g. there must be a limited tenure for members of the Body or Council,
- h. the person responsible for the scheme alone has the power to decide whether or not a complaint is within the scheme's jurisdiction,
- i. the governance arrangements and fee structure of the scheme shall not have a disproportionate effect on any particular group of members,

## Relevant scheme criteria - businesses compliance with decisions

(scheme criteria 3)

- o. there must be a set of procedures for enforcing its decisions and the scheme's rules,

## Relevant scheme criteria - case management/performance

(scheme criteria 3)

- f. decisions must be made that are based on what is fair in all the circumstances, having regard to principles of law, good practice and any inequitable conduct or maladministration. This must also include having regard to any regulatory requirements and codes of practice. All evidence must be clearly documented and analysed by the Ombudsman. Natural justice and fair procedure must be observed, including appropriate opportunity to comment on facts, conclusions or outcomes. Conclusions must be evidence based and decisions and recommendations must flow clearly from the analysis,
- g. *decisions must take account of the nature of the issue and the effect it has had on the complainant. Redress must take into account of any maladministration that has occurred and take account of the hardship or injustice suffered as a result. Proportionality is key, whereby the process and resolution is appropriate to the complaint,*
- j. a reasonable period of time must be allowed for the complainant to consider whether they want to accept the provisional conclusion,
- k. the scheme must be adequately staffed and funded in such a way that complaints can be effectively and expeditiously investigated and resolved and to allow the Ombudsman to function impartially, efficiently and appropriately,
- l. the scheme must have, or have within a short period of time, the appropriate expertise to resolve energy disputes,
- m. the scheme must have objective targets for reaching decisions and dealing with enquiries against which it and others can assess its performance and put in place arrangements for assessing its performance against these targets,
- n. periodic quality assurance monitoring must be carried out,

## Relevant scheme criteria - identification of, and action on, regulatory and wider issues

(scheme criteria 3)

- p. the scheme must recommend changes to regulated providers' processes and/or policies where systemic failures are identified in order to promote improved service. This must include a dedicated referral process for informing Ofgem and the new NCC<sup>7</sup> that recommendations have been made,
- q. the scheme must have procedures to identify a potential breach of regulatory requirements and systemic problems within the industry and refer these to an appropriate organisation, such as Ofgem (to determine whether or not there has been a breach) or the new National Consumer Council. This must include a process for identifying and reviewing cases with wider implications,

(scheme criteria 4)

- f. information requested by the Authority or the NCC must be provided where the information is required to assess the performance of the redress scheme, its ongoing compliance with the criteria it has been approved against or the performance of regulated providers
- g. agreements such as a Memorandum of Understanding or similar must be entered into with other organisations as appropriate

---

<sup>7</sup> Now Citizens Advice



## Appendix B: ADR criteria - relevant extracts

The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the 'ADR Regulations') confirm Ofgem as the competent authority approve redress schemes in the energy sector. In undertaking our review we had regard to **relevant** criteria in the ADR Regulations. This appendix sets out relevant extracts from the ADR Regulations.

### **SCHEDULE 3 Regulation 9(4)**

**Requirements that a competent authority must be satisfied that the body meets**

#### **Alternative dispute resolution services offered by the body**

1. The body—
  - (a) offers alternative dispute resolution services in relation to a domestic dispute or cross- border dispute brought by a consumer against a trader;
  - (b) is not formed for the purpose of dealing only with one particular domestic dispute or cross-border dispute;
  - (c) does not offer alternative dispute resolution services in relation to a domestic or cross- border dispute in circumstances where an ADR official responsible for the dispute is either employed or remunerated directly by a trader who is a party to the dispute.

#### **Access to the ADR entity**

2. The body—
  - (a) maintains an up-to-date website which provides the parties to a domestic dispute or cross- border dispute with information regarding the alternative dispute resolution procedure operated by the body;
  - (b) provides the information referred to in sub-paragraph (a) to a party on a durable medium, if a party requests it;
  - (c) ensures that its website enables a consumer to file an initial complaint submission and any necessary supporting documents online;
  - (d) permits the consumer to file an initial complaint submission by post, if the consumer wishes;
  - (e) enables the exchange of information between the parties via electronic means or, if a party wishes, by post;
  - (f) accepts disputes covered by Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes(a).

#### **Expertise, Independence and Impartiality**

3. The body—
  - (a) ensures that an ADR official possesses a general understanding of the law and the necessary knowledge and skills relating to the out-of-court

- or judicial resolution of consumer disputes, to be able to carry out his or her functions competently;
- (b) appoints each ADR official for a term of office of sufficient duration to ensure the independence of that person's actions and provides that no ADR official can be relieved of his or her duties without just cause;
- (c) ensures that no ADR official discharges his or her duties in a way that is biased as regards a party to a dispute, or the representative of a party;
- (d) remunerates an ADR official in a way that is not linked to the outcome of the alternative dispute resolution procedure;
- (e) where it appoints more than one ADR official, ensures that an ADR official, without undue delay, discloses to the body a circumstance that may, or may be seen to—
  - (i) affect the ADR official's independence or impartiality; or
  - (ii) give rise to a conflict of interest with a party to the dispute which the ADR official is asked to resolve;
- (f) ensures that the obligation to disclose a conflict of interest is a continuing obligation throughout the alternative dispute resolution procedure;
- (g) ensures that in circumstances where its ADR officials are employed or remunerated exclusively by a professional organisation or business association, the body has a ring-fenced budget at its disposal which is sufficient to enable it to carry out its functions as an ADR entity;
- (h) ensures that where the operating model of its alternative dispute resolution procedure is to have a collegial body of representatives of both professional organisations or business associations, and consumer organisations, its ADR officials comprise an equal number of representatives of consumer interests and trader interests.

### **Conflict of interests procedure**

- 4.** The body has in place the following procedure in the event that an ADR official declares or is discovered to have a conflict of interest in relation to a domestic dispute or cross-border dispute—
- (a) where possible, the ADR official is replaced by another ADR official to handle the particular dispute;
  - (b) if the ADR official cannot be replaced by another ADR official—
    - (i) the ADR official must refrain from conducting the alternative dispute resolution procedure, and
    - (ii) the body must, where possible, propose to the parties that they submit the dispute to another ADR entity which is competent to deal with it;
  - (c) if the dispute cannot be transferred to another ADR entity, the body—
    - (i) must inform the parties to the dispute of the circumstances of the conflict of interest,
    - (ii) must inform the parties to the dispute that they have the right to object to the conflicted person continuing to handle the dispute, and
    - (iii) can only continue to deal with the dispute if no party to the dispute objects.

## Transparency

5. The body makes the following information publicly available on its website in a clear and easily understandable manner, and provides, on request, this information to any person on a durable medium—
- (a) its contact details, including postal address and e-mail address;
  - (b) a statement that it has been approved as an ADR entity by the relevant competent authority once this approval has been granted;
  - (c) its ADR officials, the method of their appointment and the duration of their appointment;
  - (d) the name of any network of bodies which facilitates cross-border alternative dispute resolution of which it is a member;
  - (e) the type of domestic disputes and cross-border disputes which it is competent to deal with, including any financial thresholds which apply;
  - (f) the procedural rules of the alternative dispute resolution procedure operated by it and the grounds on which it can refuse to deal with a given dispute in accordance with paragraph 13;
  - (g) the language in which it is prepared to receive an initial complaint submission;
  - (h) the language in which its alternative dispute resolution procedure can be conducted;
  - (i) the principles the body applies, and the main considerations the body takes into account, when seeking to resolve a dispute;
  - (j) the preliminary requirements, if any, that a party to a dispute needs to have met before the alternative dispute resolution procedure can commence;
  - (k) a statement as to whether or not a party to the dispute can withdraw from the alternative dispute resolution procedure once it has commenced;
  - (l) the costs, if any, to be borne by a party, including the rules, if any, on costs awarded by the body at the end of the alternative dispute resolution procedure;
  - (m) the average length of each alternative dispute resolution procedure handled by the body;
  - (n) the legal effect of the outcome of the dispute resolution process, including whether the outcome is enforceable and the penalties for non-compliance with the outcome, if any;
  - (o) a statement as to whether or not alternative dispute resolution procedures operated by it can be conducted by oral or written means (or both);
  - (p) the annual activity report required to be prepared under regulation 11(2).

## Effectiveness

6. The body—
- (a) ensures that its alternative dispute resolution procedure is available and easily accessible to both parties irrespective of where they are located including by electronic means and non-electronic means;
  - (b) ensures that—

- (i) the parties to a dispute are not obliged to obtain independent advice or be represented or assisted by a third party although they may choose to do so;
- (ii) the alternative dispute resolution is available free of charge or at a nominal fee for consumers;
- (c) notifies the parties to a dispute as soon as it has received all the documents containing the relevant information relating to the dispute constituting the complete complaint file;
- (d) notifies the parties of the outcome of the alternative dispute resolution procedure within a period of 90 days from the date on which the body has received the complete complaint file except that, in the case of a highly complex dispute, the body may extend this period but must inform the parties of this extension and the expected length of time that it will need to conclude the alternative dispute resolution procedure.

## **Fairness**

### **7. The body—**

- (a) ensures that during the alternative dispute resolution procedure the parties may, within a reasonable period of time, express their points of view;
- (b) provides a party to a dispute within a reasonable period of time, upon request, with the arguments, evidence, documents and facts put forward by the other party to the dispute, including a statement made, or opinion given, by an expert;
- (c) ensures that the parties may, within a reasonable period of time, comment on the information and documents provided under paragraph (b);
- (d) informs the parties that they are not obliged to retain a legal advisor, but that they may seek independent advice or be represented or assisted by a third party at any stage of the alternative dispute resolution procedure;
- (e) notifies the parties of the outcome of the alternative dispute resolution procedure on a durable medium and gives the parties a statement of the grounds on which the outcome is based.

### **8. Subject to paragraphs 9 and 10, in relation to an alternative dispute resolution procedure which aims at resolving a dispute by proposing a solution, the body ensures that the parties—**

- (a) have the possibility of withdrawing from the alternative dispute resolution procedure at any stage if they are dissatisfied with the performance or operation of the alternative dispute resolution procedure;
- (b) before the alternative dispute resolution procedure commences, are informed of their right to withdraw from the alternative dispute resolution procedure at any stage;
- (c) are informed, before agreeing to or following the proposed solution—
  - (i) that they have a choice as to whether or not to agree to, or follow, the proposed solution;
  - (ii) that their participation in the alternative dispute resolution procedure does not preclude the possibility of them seeking redress through

- court proceedings;
  - (iii) that the proposed solution may be different from an outcome determined by a court applying legal rules; and
  - (iv) of the legal effect of agreeing to, or following the proposed solution;
- (d) before expressing their consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect.

**9.** Paragraphs 8(a) and 8(b) do not apply to the body in respect of a party who is—

- (a) a trader; and
- (b) obliged, under an enactment or under the rules of a trade association to which the trader may belong, to participate in an alternative dispute resolution procedure.

**10.** Paragraph 8 does not apply to the body in respect of a party who is—

- (a) a trader; and
- (b) obliged, under an enactment or under the rules of a trade association to which the trader may belong, to accept the solution proposed by the body if the consumer accepts the solution.

## **Legality**

**11.** In relation to an alternative dispute resolution procedure which aims at resolving a dispute

by imposing a solution on the consumer, the body ensures that—

- (a) in a situation where there is no conflict of laws, the solution imposed by the body does not result in the consumer being deprived of the protection afforded to the consumer by the provisions that cannot be derogated from by agreement by virtue of any enactment;
- (b) in a situation involving a conflict of laws—
  - (i) where the law applicable to the sales contract or service contract is determined in accordance with Article 6(1) and (2) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations **(a)** the solution imposed by the body does not result in the consumer being deprived of the protection afforded to the consumer by the provisions that cannot be derogated from by virtue of the law of the member State in which the consumer is habitually resident;
  - (ii) where the law applicable to the sales contract or service contract is determined in accordance with Article 5(1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations **(a)** the solution imposed by the body does not result in the consumer being deprived of the protection afforded to the consumer by the provisions that cannot be derogated from by virtue of the mandatory rules of the law of the member State in which the consumer is habitually resident.

**12.** For the purposes of paragraph 11 “habitual residence” is determined in accordance with Regulation (EC) No 593/2008 **(b)**.

## **Grounds to refuse to deal with a dispute**

**13.** The body may only refuse to deal with a domestic dispute or a cross-border dispute which it is competent to deal with on one of the following grounds—

- (a) prior to submitting the complaint to the body, the consumer has not attempted to contact the trader concerned in order to discuss the consumer's complaint and sought, as a first step, to resolve the matter directly with the trader;
- (b) the dispute is frivolous or vexatious;
- (c) the dispute is being, or has been previously, considered by another ADR entity or by a court;
- (d) the value of the claim falls below or above the monetary thresholds set by the body;
- (e) the consumer has not submitted the complaint to the body within the time period specified by the body, provided that such time period is not less than 12 months from the date upon which the trader has given notice to the consumer that the trader is unable to resolve the complaint with the consumer;
- (f) dealing with such a type of dispute would seriously impair the effective operation of the body.

**14.** The body ensures that its policy regarding when it will refuse to deal with a dispute, including in relation to the level of any monetary threshold it sets, does not significantly impair consumers' access to its alternative dispute resolution procedures.

**15.** Subject to paragraph 16, where a body refuses to deal with a dispute, it must, within three weeks of the date upon which it received the complaint file, inform both parties and provide a reasoned explanation of the grounds for not considering the dispute.

**16.** Where following the expiry of the period referred to in paragraph 15, it appears to the body that one of the parties has sought to mislead the body as regards the existence or non-existence of one of the grounds for it to decline to deal with a dispute, the body may immediately decline to deal further with the dispute.

## **SCHEDULE 5**

### **Regulation 11(2)**

#### **Information to be included in an ADR entity's annual activity report**

- a) the number of domestic disputes and cross-border disputes the ADR entity has received;
- b) the types of complaints to which the domestic disputes and cross-border disputes relate;
- c) a description of any systematic or significant problems that occur frequently and lead to disputes between consumers and traders of which the ADR entity has become aware due to its operations as an ADR entity;
- d) any recommendations the ADR entity may have as to how the problems referred to in paragraph (c) could be avoided or resolved in future, in order to raise traders' standards and to facilitate the exchange of information and best practices;
- e) the number of disputes which the ADR entity has refused to deal with, and percentage share of the grounds set out in paragraph 13 of Schedule 3 on which the ADR entity has declined to consider such disputes;
- f) the percentage of alternative dispute resolution procedures which were discontinued for operational reasons and, if known, the reasons for the discontinuation;
- g) the average time taken to resolve domestic disputes and cross-border disputes;
- h) the rate of compliance, if known, with the outcomes of the alternative dispute resolution procedures;
- i) the co-operation, if any, of the ADR entity within any network of ADR entities which facilitates the resolution of cross-border disputes.

## **SCHEDULE 6**

### **Regulation 11(3)**

#### **Information which an ADR entity must communicate to the relevant competent authority every two years**

- a) the number of disputes received by the ADR entity and the types of complaints to which the disputes related;
- b) the percentage share of alternative dispute resolution procedures which were discontinued before an outcome was reached;
- c) the average time taken to resolve the disputes which the ADR entity has received;
- d) the rate of compliance, if known, with the outcomes of its alternative dispute resolution procedures;
- e) any recommendations the ADR entity may have as to how any systematic or significant problems that occur frequently and lead to disputes between consumers and traders could be avoided or resolved in future;
- f) where the ADR entity is a member of any network of ADR entities which facilitates the resolution of cross-border disputes, an assessment of the

- effectiveness of its co-operation in that network;
- g) where the ADR entity provides training to its ADR officials, details of the training it provides;
- h) an assessment of the effectiveness of an alternative dispute resolution procedure offered by the ADR entity and of possible ways of improving its performance.



## Appendix C: Review of case files

We looked at a small sample of OSE cases to:

- make sure we appreciated the nature of the cases handled, and
- observe the practical operation of the case handling procedures presented to us.

A number of the cases were resolved swiftly by contacting the parties by phone, and with a minimum of paperwork involved. We note that this may impact on the picture of case files and deadlock letters, because in resolving the cases in this quick, informal way, the case records now may not appear as full as they might.

The sample of cases is not large enough for us to draw any overall conclusions about how OSE handles cases in general. Our observations are that:

- some of the cases we looked at were consistent with firms not considering cases before they reach OSE;
- some were consistent with the firm handling the case but failing to resolve the complaint (i.e. reaching a final position) before the case reaches OSE;
- three were consistent with remedies being stated (to resolve the matter with the customer) without it being clear that the firm had made a significant error;
- other cases were consistent with a firm making an error, and being prompted to correct it when the consumer called on OSE;
- one case may have been consistent with OSE offering a pre-agreed remedy;
- on many cases there is a record that remedies were followed up and checked.

It is also worth noting, that in one case we looked at, even where a document from a firm had the label “case file” it was not apparent that this was a record of a firm’s previous complaint handling rather than a first consideration of the case by the firm.

We did not see many deadlock letters on file, although in one case the firm’s case file described its final position and recorded that a deadlock letter had been sent.

<b>Case</b>	<b>Did the consumer experience a change?</b>	<b>Did the firm agree with the findings?</b>	<b>Case file</b>	<b>Deadlock letter?</b>	<b>Nature of the case</b>
1.	Yes	Yes	No (unclear)	No	Consistent with a firm not handling the complaint before it reached OSE
2.	Yes	Yes	No	No	Consistent with a firm not handling the complaint before it reached OSE
3.	No (or in part) – remedies specified	Yes	Yes	No	Consistent with an ombudsman dealing with an unhappy customer to resolve the matter but it is not clear that the firm made an error
4.	Yes	Firm resolved the case on first contact	Yes	Yes	Consistent with a firm making an error corrected when OSE became involved
5.	Yes	Yes	No	No	Consistent with a firm not handling the complaint before it reached OSE
6.	Yes	Yes	Yes	No – the firm thought it had resolved the matter	Consistent with OSE imposing some remedies that may not have been necessary, but having reasons to increase a goodwill payment
7.	No (or in part) – remedies specified	Yes	Yes	No – the firm had not reached a resolution	Consistent with OSE restating an existing offer to close the matter
8.	Yes	Yes – the firm proposed a resolution on first contact	Yes	No	Consistent with the firm not resolving the matter quickly enough
9.	Yes	Yes	No	No	Consistent with the firm being unable to resolve the matter and pushed to do so by OSE
10.	Yes	Yes	No	No	Consistent with the firm resolving the matter but not apologising or making a goodwill payment (to a customer who had left)
11.	No (or in part) –	Yes – the firm	Yes	Yes	Consistent with a customer not accepting a firm's

	remedies specified	proactively offered £150 on sending the case file (which appears to have already been offered)			position – it is not clear that the customer experienced a change although remedies were specified
12.	Yes – goodwill payment	Yes	No	No	The nature of this case isn't clear from the case file – it is possible that OSE put a pre-agreed remedy to the customer
13.	Yes	Yes - proposal made in response to case file request, and improved on by OSE	No	No	Consistent with a firm not handling the complaint before it reached OSE – there is a note on file called “case file” but it is not obvious the firm had previously considered the complaint
14.	Yes	Yes	No	No	Consistent with a firm not handling the complaint before it reached OSE
15.	Yes	Yes	No	No	Consistent with a firm not handling the complaint before it reached OSE