

Tackling Consumer Vulnerability in Energy and Banking: Towards a New Approach

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ABSTRACT

This article examines the new approach to vulnerability developed by Ofgem and the Financial Conduct Authority to see whether it has been implemented at company level and had an impact on the ombudsman. It sets out the context within which this approach has been developed and then looks at its implementation through two case studies. The main lesson from these case studies is that establishing a broad concept of vulnerability, as has been argued for in the academic literature, is just a first step. Operationalising the concept presents major challenges especially in the context of systems dealing with large numbers of consumers.

Keywords

Consumer, vulnerability, essential services, regulation, Ombudsman

Introduction

There are many people in the United Kingdom in circumstances that may place them at risk of vulnerability. There are, for example, around 11 million people in the population with a limiting physical or mental disability, 6.5 million people who function as carers (see Carers UK 2018), around 5.1 million adults in England lack basic literacy skills (see Literacy Trust 2018) and there are just under 5 million people over the age of 75 (Office for National Statistics, 2016, Figure 5). This is without considering that vulnerability may also be transitory, and/or triggered by life events such as divorce, bereavement, illness or loss of employment. Vulnerable consumers do not constitute a separate or static part of the population (National Audit Office (NAO) 2017, para 1). Approaches which focus on identifying vulnerable groups of consumers such as the elderly or disabled do not fully capture all these dimensions of vulnerability.

The need for a wider conception of vulnerability, which recognises its multi-factorial, multi-dimensional and transitory elements, is a common theme of the relevant academic literature, discussed briefly below. What none of this work has done is to examine how a different approach would be operationalised within an area where the regulators have attempted to drive changes to company behaviour in a competitive marketplace through adopting a wide definition of vulnerability. This paper does that by presenting two exploratory case studies, from energy and financial services, which look at how modern broad conceptions of

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vulnerability are being put into practice by regulators, companies and alternative dispute resolution (ADR) schemes. The main lesson from these case studies is that establishing a broad concept of vulnerability, as has been argued for in the academic literature, is just a first step. Operationalising the concept presents major challenges especially in the context of systems dealing with large numbers of consumers.

In policy terms, the issue of vulnerability has become a high profile one in the regulated sectors following the launch of Ofgem's (2013a) vulnerability strategy. This triggered a large amount of policy development from other regulators: the Financial Conduct Authority (2015), the Office of Water Services (Ofwat, 2016), the Office of Communications (Ofcom, 2016, Ch. 9), two industry associations (British Bankers Association, 2016; Energy UK, 2016) and the European Commission (through the Working Group on vulnerable consumers in the energy sector (for details see EU Commission 2017). The National Audit Office (2017) has also undertaken a review of policies in relation to vulnerable consumers in regulated sectors. Ofgem (2016a) has now moved further by inserting a broad enforceable principle into suppliers' licences to ensure that they consider the needs and circumstance of consumers in vulnerable situations, as has Ofcom (2017). Ofwat (2017) has made vulnerability an explicit part of its price review and wants to incentivise companies to ensure that they provide good support for customers in vulnerable circumstances. Although these policies encourage companies to take a wider approach to vulnerability, and offer examples of good practice, they did not provide detailed guidance as to how a wider approach should be implemented.

The case studies take a systematic approach to vulnerability, highlighting four themes: policy and organisation, identifying consumers in vulnerable circumstances, accessibility and recognising trends and issues. These themes all relate to important issues around whether there has been a new approach to consumers in vulnerable circumstances. The first, policy and organisation, looks at whether policies on consumers in vulnerable circumstances have been adopted, what those are and whether this has influenced organisational design. The second examines how such consumers are identified once a broader conception of vulnerability is adopted. The third looks at how accessible an organisation is and whether there is information available on the composition of those who do access the organisation. Finally, there is the question of to what extent the organisation can use information to recognise general trends and address systemic issues as opposed to dealing with cases on an individual basis. This is particularly important for the two Ombudsmen in this area as it is often argued that one of the main potential advantages of Ombudsman is that they can highlight systemic problems (Buck et al, 2013, Ch. 5).

Before examining the case studies, the paper has two main sections. The first assesses, albeit briefly, the relevant academic literature on vulnerability, outside criminal law, and provides connections with administrative justice and ADR themes. The second section describes the legal and policy context in the energy and financial services industries, including the arrangements for complaints and redress. The case studies then follow and there is a concluding analytical section.

Vulnerability, administrative justice and ADR

There has been increasing legal academic interest in developing the literature on vulnerability, outside of the field of criminal law and procedure where the concept is more familiar. There is the pioneering work of Fineman (2008; 2010; 2013) which has been developed in various ways but with a primary focus on human rights and family law (Gear 2010; Herring 2016). Fineman's work began as a "stealthily disguised human rights discourse, fashioned for an American audience" (2013a, 13) which critiqued the limitations of equality and argued instead for developing the concepts of vulnerability and resilience to support an argument for a

responsive state. One aim was to use this conception critically to explore new possibilities and fresh questions in the search for a more substantively just and equal social order (Gear 2013, 42-3). The implication of this view is that the state must be more responsive to the vulnerable subject which might include, among other things, a concern with access to essential services (Fineman et al. 2017). In addition, there is a small strand of writing in relation to consumer and contract law which is aimed at trying to identify an appropriate approach to vulnerability which will then have an impact upon the relevant legal concepts (Cartwright 2015; Herring, 2016, Ch. 8; Waddington 2013). There is also research which developed in the academic marketing literature but has since found its way into work on Alternative Dispute Resolution (ADR) (Hamilton et al. 2016; Menzel Baker et al. 2005). This work has largely been concerned with finding an appropriate definition for consumer vulnerability which will take into account its multi-dimensional nature, that vulnerability may be dynamic and transient and, finally, the impact that market practices may have on consumer vulnerability (Sourdin et al. 2017).

This literature on vulnerability is diverse but there are some common themes. The first is the search for an appropriate definition or approach to the problem of vulnerability and there is widespread agreement that vulnerability may be multi-factorial, multi-dimensional and transitory. To put it another way, it is not a characteristic of specified groups but something which may affect anyone in society. Much of the literature is concerned to show how existing legal devices or policies do not consider the dimensions of vulnerability and that, therefore, a changed approach is needed. This can range from the focused suggestions of the consumer law and ADR literature to the more radical and transformative approaches characteristic of those gaining their inspiration from Fineman's work.

This literature sets a series of challenges for legal arrangements which are relevant for administrative justice which is often concerned with the delivery of services or benefits to those in vulnerable circumstances. Although energy and financial services are provided by commercial organisations, they operate within a set of rules determined by independent regulatory agencies which require, among other things, redress procedures and access to ADR. Administrative justice has often been concerned with access to justice, whether it be in the sense of ensuring just primary decision making (Adler, 2010) or in terms of ensuring effective redress mechanisms. One important issue is how to deliver services on a mass basis while at the same time taking into account the individual characteristics of consumers and trying to find a way to do this is the central thrust of policy here. This study contributes by examining how two organisations reacted to a policy preference of regulators which was not obligatory and looks at lower level decision making as well as the "law in books"/"law in action" dichotomy. As regards the latter point, it is a counter-example to those which point out the differences.

There is a strong focus in this article on complaint handling and redress and it can be argued that this is a secondary concern in relation to vulnerability. On the other hand, the absolute number of complaints in these sectors is high and it is assumed that ADR mechanisms will be more accessible than ordinary courts. Yet, as discussed below, there is a very significant drop out rate between complaints to companies and those which reach the external redress system and it is worth asking to what extent the ADR systems take into account vulnerability issues. In addition, as mentioned above, it is often argued that one of the main potential advantages of Ombudsman is that they can highlight systemic problems but they are likely to be less effective in this role if particular groups of consumers never reach them (Buck et al 2011, Ch. 5).

Methodology

The research took place in late 2016 and involved, as well as a literature and document review, semi-structured telephone interviews with the Financial Ombudsman Service, Ombudsman Services: Energy (OS:E), Citizens Advice (the Extra Help Unit and the consumer helpline) and

two service providers: one in energy and one in financial services. The interviews were a combination of single and group interviews with people who were responsible for vulnerability issues (middle level managers) and/or had day to day involvement with the practice of the organisation and complaint handling. This is a limited information base and it cannot be assumed that the service providers are representative of practices in their industries. They were chosen largely on pragmatic grounds, that is, they were willing to participate. It is likely that they represent firms that have paid more attention to this issue or were more confident in their procedures and policies. Nevertheless, this is a beginning for understanding the complex issues about energy and financial services that will help inform future research.

The legal framework and policy context

The starting point is Ofgem's principal objective to protect the interests of existing and future consumers. When performing its duties Ofgem is required (Electricity Act 1989, s 3A(3), Gas Act 1986, s 4AA(3)) to have regard to the interests of:

- (a) individuals who are disabled or chronically sick;
- (b) individuals of pensionable age;
- (c) individuals with low incomes; and
- (d) individuals residing in rural areas

This is a list of groups of people who can be seen as, among other things, being in vulnerable circumstances. One of the problems with this approach of listing groups is that the list is both over and under-inclusive. For example, a person of pensionable age may not be vulnerable: they may be in full possession of all their mental and physical faculties and relatively well-off. At the same time, this list does not recognise other forms of vulnerability such as illiteracy. Equally, the legislation does not explicitly take into account vulnerability which may be triggered by life events, such as unemployment, bereavement or divorce. Nor does it recognise that there are frequently multiple risk factors facing many people in vulnerable circumstances. It does say, however, that this list does not stop Ofgem from having regard to the interests of other descriptions of consumers which has allowed for the development of Ofgem's vulnerability policy (Personal communication, August 2017 from ex-Ofgem Partner).

In contrast, the Financial Conduct Authority's (FCA) strategic objective is to make sure that the market functions well and it has specific objectives which include consumer protection (sections 1B-1E Financial Services and Markets Act 2000). Although no mention is made of specific groups of consumers, the legislation does provide that, when the FCA is considering what constitutes an appropriate level of consumer protection, it must have regard to the differing degrees of experience and expertise that different consumers may have (section 1C(b) Financial Services and Markets Act 2000). In addition, those providing financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question (Section 1C(e) Financial Services and Markets Act 2000).

The development of Ofgem's vulnerability strategy

Increasing concern over rising energy prices from the mid-2000s led to Ofgem's Energy Supply Probe (2008) which found that the market was not working in the best interests of consumers, with vulnerable consumer groups being disproportionately affected, and it highlighted ways in which the energy market contributed to consumer vulnerability. Several measures were put in place to deal with these issues, such as banning regional price differentiation in tariffs and improving customer information, but the subsequent Retail Market Review (2012) again found

failings in the energy market including difficulties faced by vulnerable consumers and, among other things, introduced restrictions on the number of tariffs that could be offered by the energy suppliers. Rising public and political dissatisfaction with the energy market led to a joint investigation of competition in the energy markets by Ofgem and the Office of Fair Trading (2014) which ultimately led to the market investigation reference to the CMA (2016a).

Within this context Ofgem (2013a) became the first regulator in the UK to create a consumer vulnerability strategy which describes how the regulator defined and approached the complex issue of vulnerability. Its objective is to protect and empower consumers in vulnerable situations in the energy market and to ensure equality of access to market benefits. Rather than relying on a list of assumed 'vulnerable groups', the strategy is based on a broad understanding of the range of contributory factors including the role of the market:

Consumer vulnerability also recognises that vulnerability can be complex, multidimensional and transitory. Vulnerability is not just about an individual; the market can cause or exacerbate vulnerability, and different consumers may be vulnerable in different situations. (Ofgem 2013a, p. 6)

While recognising that any consumer can face detriment in a market, Ofgem's work under the strategy focuses on those consumers in vulnerable situations who are most in need of protection or support. Vulnerability is defined as when a consumer's personal circumstances and characteristics combine with aspects of the market to create situations where he or she is:

- significantly less able than a typical consumer to protect or represent his or her interests in the energy market;
- and/or significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial (*ibid*, 12).

An important first application of the strategy came in the revision of the price control for distribution companies in 2014 when Ofgem (2013b, Ch. 7) introduced a financial incentive to encourage them to help consumers in vulnerable situations which has led to them, among other things, ensuring their customer services staff identify and respond to customer vulnerability and that they are developing partnerships with relevant organisations (Frontier Economics/Sustainability First, 2016).

Ofgem (2017a) has expanded its approach and introduced an enforceable vulnerability obligation within the suppliers' licence as part of a broader move to principles based regulation. Its centrepiece is a new condition requiring suppliers to implement, review and update processes which are, and continue to be, fit for the purpose of identifying consumers in vulnerable situations and, when applying the required standards of conduct, ensures that the suppliers take into account the vulnerable situation of a consumer.

The development of FCA vulnerability policy

The FCA was created by splitting its predecessor, the Financial Services Authority into the FCA, responsible for consumer protection, and the Prudential Regulation Authority, responsible for systemic issues. The greater emphasis on consumer protection seems to have been one of the reasons (generally see Centre for Consumers and Essential Services 2014, section 6) behind the creation of a new approach in 2015 through Occasional Paper 8 (FCA 2015). The Paper used a broad definition of a vulnerable consumer as someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care. The paper aimed to broaden understanding and stimulate debate and interest around vulnerability, to provide practical help and resources for firms in developing a vulnerability strategy and to highlight areas of good practice. Unlike Ofgem's approach, it was not tied into explicit changes in the FCA's approach to regulation nor has it been developed into an enforceable principle. This approach has been welcomed by

many parts of the financial services industry and, in particular, the retail banking sector, having been followed by the British Banker's Association's (2016) own report on vulnerability. The NAO (2017, para. 2.9) reported that the FCA's paper had had a particularly wide reach.

Before discussing the experiences of the suppliers and the ADR schemes interviewed for this research the rules relating to complaint handling in the two sectors are outlined.

Complaint handling – energy and financial services

The relevant rules in both sectors require suppliers to have complaint handling procedures in place and these procedures must meet certain general requirements in relation to accessibility and recording of complaints, among other things (Gas and Electricity (Consumer Complaint Handling Regulations) 2008/1898, DISP FCA Handbook). There are some differences in approach. In energy, an internal review stage is required, although not in financial services. Unlike the energy sector, in financial services firms are required to have in place a process for analysing complaints, identifying the root causes of complaints and dealing with the issues (DISP 1.3.3B Financial Conduct Authority Handbook). In addition, if a firm identifies a recurring or systemic problem, it should consider whether it ought to act with regard to the position of consumers who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and consider whether it ought to undertake a redress or remedy exercise (DISP 1.3.6 Financial Conduct Authority Handbook).

In both sectors, regulated firms must be members of a redress scheme. In energy, section 47 Consumers, Estate Agents and Redress Act 2007 (CEAR) place an obligation on all providers to be members of a scheme approved by the regulator under section 49. OS:E was approved as the sole redress scheme for the energy sector in 2008. In financial services, if disputes cannot be resolved at a firm level, they can be referred to the Financial Ombudsman Service, a statutory scheme originating in Part XVI of the Financial Services and Markets Act 2000 covering all authorised firms.

Complaints and consumers in vulnerable circumstances

These rules apply to complaints in general. The only specific reference to vulnerability, and a major difference between the two sectors, lies in relation to complaints made under sections 12 and 13 CEAR. These two sections apply to complaints made by or on behalf of a vulnerable person or where the complaint is in relation to the disconnection of an energy supply. The power to investigate such complaints is vested in Citizens Advice and the day to day work is handled by the Extra Help Unit, based in Glasgow and run by Citizens Advice Scotland, although its remit is UK wide. The Act deliberately does not provide a definition of vulnerability (see Hansard, Vol 689 HL Debs 30 January 2007 at col 151) but says instead that a consumer is vulnerable if Citizens Advice is satisfied that it would not be reasonable for the person to pursue their complaint on their own behalf (section 12(2) CEAR). The explanatory notes (Consumers, Estate Agents and Redress Act 2007, Explanatory Notes to section 12) to the Bill said:

This might apply to persons who are unable to pursue a complaint by reason of a mental or physical disability, a lack of basic skills (such as literacy) or due to their personal circumstances (such as a recent bereavement).

The Extra Help Unit said that they took a very broad approach to vulnerability and that, in practice, this was never challenged by suppliers.

If Citizens Advice thinks that it is appropriate to do so, it can either give advice to the complainant or make representations on their behalf to the company complained against. The regulations say that if a reference is made by the Extra Help Unit to a supplier, the supplier must take such additional steps as it considers necessary or appropriate with a view to assisting

the vulnerable consumer and resolving the complaint in an appropriate and prompt manner. Unlike OS:E, the Extra Help Unit will advocate on behalf of the consumer, although they cannot take any decision binding on the company.

Table 1 gives an indication of the amount of individual complaints handled by the EHU since 2011-12. Consumers in vulnerable circumstances do not have direct access to the EHU and are typically referred by Citizens Advice Consumer Services. By comparison, OS:E handles around 40,000 complaints per annum, which suggests that there are significant numbers of cases relating to consumers in vulnerable circumstances.

Table 1: EHU complaints

Year	Complaints
2016-17	6,943
2015-16	8,397
2014-15	7,405
2013-14	4,759
2012-13	4,561
2011-12	3,618
2010-11	4,465
2009-10	5,468

Source: Extra Help Unit

One other important difference between the industries, which seems to stem from these provisions, is that there is a quarterly meeting between Ofgem, OS:E and the constituent parts of Citizens Advice in London to discuss relevant issues. There is no equivalent arrangement in financial services.

Complaint handling in practice

Although both industries have well-established framework for handling complaints there have been significant concerns over the years about how effective energy suppliers and financial services companies are in handling consumer complaints.

This can be illustrated in several ways. First, the absolute number of complaints is high. Although in energy it has dropped to around 3.5 million in 2016 from about 6.7 million in 2014 (Ofgem 2017b), for financial services it was around 5 million in 2016 (FCA 2018). Secondly, between 2010 and the beginning of 2017, there were ten cases where Ofgem took enforcement action for a breach of licence conditions against energy suppliers in relation to complaint handling issues.¹

There has also been concern over the effectiveness of complaint handling procedures in companies, especially in relation to banks and complaints about the sale of Payment Protection Insurance (Financial Services Authority 2009; 2010a; 2010b; 2010c). Thirdly, in addition to its regular research reports on complaint handling, Ofgem has commissioned a number of specific reports on complaint handling by the energy supply companies and the working of OS:E which have all raised issues of concern (see Lucerna partners 2015; Sohn Associates, 2010). Ofgem's most recent research into complaint handling by companies found that complainants were more likely to be dissatisfied than satisfied with the handling of their complaint (60% of domestic consumers were dissatisfied) and that satisfaction levels had gone down significantly from 2014 from 30% to 27% (Ofgem 2016b, 3). This seems to have been driven by the failure of staff to taking ownership of a complaint and acting proactively to resolve it, as well as contributing to the view that resolution timescales are too long and that staff do not get back to the complainant as promised (Ofgem 2016b, 49). Despite this

dissatisfaction, research commissioned by Ofgem has found that only around 5% of consumers escalate their complaint to OS:E (GfK, 2013). The FCA has tried to improve complaint handling through undertaking a thematic review of complaint handling and introducing new rules to improve complaint handling (NAO 2016, paras. 4.2-4.4).

This evidence suggests that it is worth looking carefully at a company's customer service policy and procedures, especially as regards customers in vulnerable circumstances and this leads into the case studies.

Vulnerability and complaint handling – the energy supplier's story

The energy supplier was one of the so-called "Big Six" suppliers and therefore had a long history of participation in the market, as well as being a sizeable organisation.

Policy and organisation

The supplier has had a policy on managing vulnerable consumers since 2011 which has been reviewed and revised in 2015 and 2016. The policy adopts a wide definition of vulnerability, equivalent to Ofgem's, which recognises both financial and non-financial as well as temporary and long-term aspects of vulnerability. A specific senior person within the company is made responsible for the implementation of the policy which emanates from the Leadership Team. A more junior person ensures that the policy is executed. Because the company is organised in a series of divisions, each supplying different products and services and operating in different regulatory contexts, the company recognises that customers may have to be treated differently and that each Business Unit will need its own set of standards. There is a forum where the directors of the business units meet to ensure that the policy and the accompanying standards are complied with in the Units. In addition to these arrangements, there is a Consumer Vulnerability Team, with about half a dozen members which is responsible for company strategy in this area and large projects and has been in place since November 2014, sitting within Group Corporate Affairs.

The company's approach to vulnerability comprises two strands. First, there are the legal and regulatory obligations that must be met, largely laid down in the licence conditions (Electricity Supply Standard Licence Conditions 25-28A and Gas Supply Standard Licence Conditions 25-30). The second strand is a more positive approach which was described as looking to drive continuous change, stakeholder engagement and bring innovation into the business to provide first class customer service. Here the idea is, among other things, to try and improve the ability of front-line staff to be more aware of vulnerability issues and to improve their listening and communication skills.

The company engaged in significant training on the issue of vulnerability. For example, by around February 2015, the company had done some 20,000 hours of refresher training on vulnerability and planned in 2017 that there would be another three hours training on changes to the Priority Services Register for relevant staff. Training is targeted at customer facing people which includes those who work over the phone but also those staff who work in the field, for example, in relation to smart metering. Although much of this training is done in-house, external expertise from the voluntary sector may also be utilised.

To ensure that the company's expectation is delivered there is an assurance framework within which front-line staff are monitored. In certain business units, everyone in that area is measured on their performance on recognising, recording and referring customers who are in a vulnerable situation. There is an expectation that on every call front-line staff should be able to recognise vulnerability. As part of the general monitoring of call quality, quality assessors listen into calls at least once a month. There are individual assessments of the call handlers and the information is collated at site level and assessed. Team managers also check team calls

and there is provision for in the moment coaching on handling calls. The company intends supports this by running roadshows for staff and refresher briefings as well as other similar activities.

Complaints are handled in two ways. If during a call, a customer expresses dissatisfaction or identifies themselves as vulnerable, then the front-line staff are empowered to recognise this and deal with the situation at that point. The second way of dealing with an issue is if a customer formally raises a “complaint” or submits a complaint via the website or through the post. With these complaints, the matter is referred to a specialist team who have within the team people with expertise in dealing with certain types of complaints.

Identifying customers in vulnerable circumstances

Identifying customers in vulnerable situations is done through staff listening to what customers are saying. This is not a case of asking bluntly, “Are you vulnerable?” The company feels that one of the things it does well, especially on complaint handling, is to ensure that its staff have proper levels of empathy with customers and take an appropriate approach to each customer as in individual.

Certain issues are easier to identify. The respondents felt that issues around sight, hearing and dyslexia would be communicated by customers in a straightforward manner. They also felt that it was easy to get information on age. It was much harder to identify mental health or anxiety issues which may manifest themselves as the customer being more confrontational or aggressive. There are also what they called invisible issues, such as mental health issues like bipolar disorder, depression etc., which are much more difficult to identify over a phone call.

Accessibility

The company has carried out work in the past on accessibility and, as a result, introduced live web-chats which have been very popular and had positive feedback. When they do feedback surveys they ask questions about accessibility. They have simplified their automatic voice response system substantially. They recognised that one of the main barriers in terms of customers contacting them is an emotional one, in that people may be frightened to call. This is one of the reasons why they do various types of external partnering work, to break down the barriers that people may experience or perceive.

At the time of the interviews they had done some pilot work in various business units on compliance with the BSI standard on inclusivity, including a video relay service for customers who use British Sign Language and are thinking of extending this to other areas as the feedback for the pilot was positive. The company has now obtained BSI certification for this standard.

Identifying trends and issues

Complaints were seen as a learning opportunity. As they put it, complaints are a business imperative, not an inconvenience. They have very structured teams and functions whose job it is to analyse the issue that has been raised in the complaint(s) and to understand the issue. There is an operational team which aims to fix the specific issue and then to identify where the problem occurred and provide a solution for the future of the business. So, for example, they will look at the customer journey to see what had caused the issue. They also have a programme where staff can provide feedback on areas which could cause complaints, or provide feedback from everyday conversations with customers.

The company also talks regularly with the EHU and OS:E sharing information on trends and best practice. There is an operational conversation every month with these two organisations to ensure that the procedures they have in place are working smoothly. In addition, they have a meeting every quarter with OS:E to discuss policy and strategy issues.

Vulnerability and complaint handling: Ombudsman Service: Energy

When energy companies are unable to resolve complaints, customers have the option of taking their complaint to OS:E, part of Ombudsman Services, which was founded in 2002 and is a not for profit company providing independent dispute resolution services to several sectors, such as communications and property. At the end of 2016 the wider company had over 650 employees, so it is a sizeable operation.

Table 2 gives some basic information on complaint handling by OS:E. Not all contacts are necessarily complaints but this figure will also include enquiries and a significant proportion (around 50%) of such inquiries may relate to matters outside the jurisdiction of OS:E. As mentioned above, relatively few consumers escalate complaints to OS:E. There was a significant rise in complaints to OS:E in 2014 which appears to have been driven by the ScottishPower and Npower's failure to implement a new billing system, although the number has not declined since then (Ofgem 2016c; 2016d).

Table 2: Complaints to Ombudsman Services: Energy

Year	Contacts	Number of complaints resolved
January – September 2017	NA	36,380
January – December 2016	88,255	41,622
April – December 2015	89,569	39,281 (48,992 to end March 2016)
2014-15	140,092	46,632
2013-14	87,542	15,031
2012-13	47,477	8,768
2011-12	74,505	≈ 6,600

Source: Ombudsman Services Annual Reports

Policy and organisation

At the time of the interview, it was recognised that while accessibility options and general guidance was in place, OS:E were working on establishing a more formal policy on vulnerability. This included work on identifying and tracking customers in vulnerable circumstances on internal systems and was planned for launch at the end of Q2 2017. It was possible that they were going to develop a small in-house unit on vulnerability, which would work across all of Ombudsman Services. The interviewees accepted that there needed to be a broad definition of vulnerability, talking about personal circumstances that placed people at a disadvantage and how vulnerability was transient. They had been doing some internal work on vulnerability which they intended to roll out across the organisation.

The programme of work includes introducing new training for operational staff on identifying and assisting customers in vulnerable circumstances, along with internal communications activity aimed at raising general awareness of vulnerability across the organisation. They had general introductory training on the subject which included sessions on the Equalities Act and the Mental Capacity Act. In addition, external bodies had been brought in for some training.

Identifying customers in vulnerable circumstances

The most difficult vulnerabilities to identify were felt to be those around mental health issues where it was important to ask the right questions and to read between the lines. The problem was that in some instances the issue came out as the customer being angry or frustrated which made it difficult for the member of staff to identify the underlying problem. People were much more willing to identify themselves as having issues with sight or hearing, by contrast. They have several devices for ensuring the quality of call handling, involving looking at overall performance, checking back on calls and listening into them.

One challenge that OS:E did identify is that customers could become vulnerable while making a complaint, for example, if they were waiting for a refund which did not arrive. They recognised that it was possible that a complainant might not be vulnerable when they first entered the OSE process but could become vulnerable in the course of the process.

Accessibility

Their material is available in braille and large print and they have access to a translation service that will allow them to work in people's native languages. The web-site can also be altered to display the material in different languages. They also offer a video service with an interpreter, although there had been hardly any take-up of this service.

In terms of the demographics of complainants, the typical customer of OS:E was white and middle-aged, as confirmed in 2016 demographic data taken from the customer satisfaction survey. Although they did customer satisfaction surveys the main focus of those was on the speed of resolution, clarity of communication and understanding of what OS:E do, rather than looking at demographic characteristics of the population.

They have started doing some outreach work, for example, through roadshows as well as with contact with charitable agencies, such as the Royal National Institute of Blind People. They felt that they had good links with Citizens Advice, both at Extra Help Unit and bureaux level. It was possible to do warm transfers, that is, to speak with the Extra Help Unit before making the transfer. With more general Citizens Advice contacts, the cases would be referred via e-mail.

Identifying trends and issues

OS:E take part in the quarterly sector liaison meetings. In addition, they had regular meetings with the Extra Help Unit and Ofgem, about once every two to three months. There were also monthly calls with the Ofgem consumer team to discuss trends. They also had an individual relationship with each energy supplier which allowed them to discuss general issues as well as individual cases. Their annual reports give some examples of more general issues which have been raised with suppliers.

The OS:E sees this as a proactive approach which builds on its traditional role of handling individual complaints and ensuring that consumers, where appropriate, receive redress. Data insights are used to identify and tackle issues in individual companies, and recommendations are made to improve customer service and complaint handling. In addition, data can be used to identify systemic industry wide issues with either recommendations made for improvement, or referral to the appropriate body for action. These efforts form part of an approach designed at tackling consumer detriment upstream in a much more preventative manner.

OS:E believes that this approach is particularly important given the relatively low proportion of eligible consumers who utilise their right to ADR. Independent research indicates that this figure could be as low as around 5% -10%, meaning there are potentially a significant number of consumers who reach the end of the supplier's complaint handling process without a resolution to their complaint, and do not take the matter any further (GfK 2013). OS:E believes

it is likely that many consumers in vulnerable circumstances will fall into this category and that a wider role in identifying and tackling systemic issues within individual companies and whole sectors, can bring benefits for all consumers, even those who are not aware of the ombudsman.

Vulnerability and complaint handling – the financial services provider’s story

After describing the energy case studies, the story turns to financial services, beginning with a large retail financial services organisation who were identified as having progressive vulnerability policies by the Financial Ombudsman and therefore potentially an outlier.

Policy and organisation

The interviewee suggested that the business was in the middle of a transformation of its practices to meet what they wanted to do for customers in vulnerable circumstances, having launched their, evolving, strategy at the end of 2015. This strategy was informed by the work done by the FCA and the British Bankers Association. Although the FCA were focusing on vulnerability, the lack of explicit guidance was seen as a challenge and an opportunity to innovate.

As part of their Customer Experience division, the company had set up a Customer Vulnerability and Diversity team whose remit was to look at their strategy and policies and approach to vulnerability to embed these ideas in their working practices. Working closely with this team was a specialist support team for customers in vulnerable circumstances. This began with about six to seven Full Time Equivalents (it has since more or less doubled in size) and was launched originally to support customers with cancer. It had been designed with the help of a national charity who had helped to improve the team’s skills and empathy. Their remit was later widened to include life-limiting conditions and mental capacity, although they may also support customers with other vulnerabilities.

One important aspect of this team is that they are empowered, in appropriate circumstances, to override standard policies. So, for example, they could remove a late payment charge or authorise a payment holiday on a mortgage to ensure that the customer was secure. Also within this team, customers in vulnerable circumstances are given a dedicated case handler who operates outside the normal service level agreements, for example, on call times and can give a personalised service to the customer. It is also possible for “warm” referrals to be made to the relevant national charity. As well as this team, there are several other relevant teams. There is a collection and recoveries team which has a sub-team within it for customers in vulnerable circumstances. As is common in the financial services industry there is a bereavement team. There is also a specific team for third party access, that is, where a customer requires a third party to help with their finances.

As for complaint handling, there is a central complaint handling team with about two to three hundred people. At the time of the interview, the business was described as having a federated complaints system whereby, in the first instance, each business area deals with complaints. Only if the complaints could not be resolved at this level would they be passed onto the central team, who would also advise and help the specific business areas. More recently, the complaint teams have been merged into a single, central team. This team will also deal with complaints that are sent direct to the executive team or complaints about PPI. Within the complaints team there are people with special training who can support customers with diverse needs.

Identifying customers in vulnerable circumstances

The company defines a vulnerable customer as someone who is at greater risk of suffering detriment because of their personal or financial circumstances and has tried to train the customer facing staff on how to identify vulnerability and how to be empathetic, particularly on life-limiting conditions and mental capacity. It was recognised that the most vulnerable would not always self-identify as vulnerable, that it was for staff to ask the right questions or identify the right signs. Often the identification and reference to the vulnerable customers' support team would come through staff in branches who had face-to-face contact with customers which could encourage the customer to be more open about their circumstances.

In terms of collecting information, there are no standard categories for vulnerable circumstances nor are there flags within the system. The interviewee thought that the flags might stigmatise the customer (although not mentioned, there would also be data protection issues). The information on vulnerable circumstances is collected through the free text boxes which exist in the multiple systems within the company.

Accessibility

In terms of their vulnerability policies, at the time of the interview there were various types of what were described as low-level promotion on the web-site. They had not, at that time, rolled out a large marketing campaign. It was evident that the volume of enquiries that they were getting was not reflective of their customer demographics. They expected the numbers to rise in the future but also recognised that this would depend on doing more training for front-line staff in terms of identifying vulnerability as this would raise the number of referrals. They review their policies on accessibility to spot any barriers and remove them. There is a specific disability help line for complaints.

The company has worked very closely with several national charities and indeed developed a joint initiative for customers with a specific set of vulnerable circumstances with one of them. They also liaise with debt-advice organisations through a dedicated person and have consulted Citizens Advice on aspects of their strategy and policies.

Identifying trends and issues

Complaints were identified as a "real driver" for business and service improvements. For example, over the last twelve months they had focused on improving services in relation to bereavement, mortgage processes and the opening of new savings accounts because of an internal review of these areas based in part on levels of complaints. Their complaints team and their liaison team are in regular contact with the Financial Ombudsman Service. They meet both individually and as part of industry groups.

Vulnerability and complaint handling: The Financial Ombudsman Service

If the company cannot resolve a complaint, customers have access to the Financial Ombudsman. At the end of the first quarter of 2016 the Financial Ombudsman had 3,700 staff, of whom 234 were Ombudsmen and 2,134 were case handlers. Table 3 gives some idea of the volume of work that is handled and indicates the scale of the operation which makes it the largest ADR service in Europe and probably the world. The Financial Ombudsman covers several different industry sectors, for example, insurance as well as banking.

Table 3: Financial Ombudsman Service complaints

Year	Enquiries	Complaints resolved
2016-17	1,394,379	336,381

2015-16	1,631,955	438,802
2014-15	1,786,973	448,387
2013-14	2,357,374	518,778
2012-13	2,161,439	223,229

Source: Financial Ombudsman Service Annual Reports

Policy and organisation

The most interesting point about the Financial Ombudsman is that although they have had a policy or definition of vulnerability they became unhappy with it because it was felt to have become a tick box exercise. So, they moved away from categorisation towards focusing on looking at the life events that might happen to people and put them in a vulnerable situation. The interviewee thought that tearing up the rule book was the “best thing we ever did” because it humanised the consumers and meant that the complaint handlers would focus on the substantive issues. This development has taken place in the context of a three-year rolling plan on equality, diversity and inclusion.²

To ensure quality of service, the teams are quite small and the team manager is linked into all calls that are going on with a facility to intervene if the consumer seems unhappy. They also do surveys of complainants after the case has been completed. They do, however, have a number of people on the front-line staff who are particularly good at handling difficult situations, for example, talking to a confused elderly consumer or someone with challenging behaviour or language and these people may be brought in when necessary.

They have strong contacts with various charities which work with people in vulnerable situations, such as Age UK, CA, Dyslexia Awareness, and they can either do warm transfers, that is, speaking to the charity before transferring the call, or to have a three-way conversation if necessary. It was estimated that there were around twenty-five charities that they worked with where they had the capacity for warm transfers. This was also possible for the FCA, as many consumers contacted the FCA by mistake.

Identifying consumers in vulnerable circumstances

Almost all contacts to the Financial Ombudsman are made by phone and it is therefore critical to spot the problem or the issue of vulnerability at this point. Because there is no formal definition of vulnerability, the Financial Ombudsman spends a substantial amount of time in working with and training its staff so that they understand the dimensions of vulnerability and pick up relevant clues or information during phone calls. By, among other things, creating networks of interest groups among staff people can talk about what has happened to them, for example, bereavement, carers, mental health. This sharing amongst the staff, it was felt, helps the staff to listen to what people on the phone are saying or doing. The key phrase used by the interviewee was that there needed to be “active listening”.

The interviewee made the point that if a person has financial problems, this may indicate that there are other problems behind the scenes and that this need to be resolved to solve the problem. It was important to look at what people were saying and not saying and the sorts of phrases that they use as these could give a clue to their situation. The issues that were most challenging to identify were often mental health issues and issues relating not to the individual but to a partner who was in the room at the same time as the phone call was taking place. Large debts were also an issue, as the consumer might be ringing about one business but this was simply the tip of the iceberg.

Accessibility

Unusually for an ADR body, the Financial Ombudsman collects demographic data (Gill et al. 2017, 35-8). Although the standard complaint information is restricted to gender and occupation after a person's complaint is dealt with there is a supplementary survey for all complainants which asks questions about the person's characteristics, e.g., socio-economic background, disability, ethnicity. Thus, the Financial Ombudsman has a picture of the type of people who reach it.

Accessibility is assessed by two independent external agencies on a yearly basis, so effectively there is assessment every six months. An example given from a recent assessment was that complaints from the BME community had gone down in a sector but the explanation was that people from that community were less likely to buy that product.

Identifying trends and issues

Formal contact between the FCA and the Financial Ombudsman takes place in two ways. First, there is a Coordination Committee between the FCA and the Financial Ombudsman, with the Financial Services Compensation Scheme as an observer. The framework for this is set out in a Memorandum of Understanding between the Financial Ombudsman and the FCA. The Financial Services and Markets Act 2012 section 234D also makes provision for the Financial Ombudsman to bring what can be called systemic matters to the attention of the FCA either when the Financial Ombudsman thinks that there has been a regular breach of regulatory requirements which are leading to consumer loss or damage or if the firms have acted in a way such that FOS would make an award against them. The FCA is given ninety days to respond to such a reference and explain whether it feels it necessary to act and, if so, what action it will take (for details see Graham 2016).

As regards identifying trends, there is a specific team who were said to be in constant contact with the FCA in terms of general trends and particular issues. Also, the Chief Executive of the Financial Ombudsman meets regularly with the Chief Executive of the FCA. They also talk to trade associations and they have put on events for smaller businesses. In relation of larger businesses, for example, the banks, it was said that there was a large amount of communication with them, talking about things like turn-around time, where their policies might differ from other providers etc.

Conclusions

The regulators have developed a new approach to vulnerability, as well as principles based regulation, without any change in the legal framework. It is striking that, although the regulators did not require companies to adopt a new approach, the evidence from the two companies looked at in this study is that they have begun to take a more systematic approach to vulnerability issues. They may not be representative of their industries. Recent research suggests that in energy larger supply companies and distribution companies are addressing the issue, but smaller suppliers were less likely to adopt such an approach to vulnerability (Sustainability First, 2018). Surprisingly, although OS:E had recognised the importance of the issue, at the time of this research it was struggling to address it. This can be contrasted with the position of the Financial Ombudsman where it appeared that the organisation had addressed vulnerability seriously and with some success.

The companies interviewed for this research have made an organisational commitment to having an effective, broad, vulnerability policy. This involved the training of generalist staff and the creation of specialist teams, both operational and policy. Identifying customers in vulnerable circumstances required an emphasis on listening and understanding the customer, whilst being alert for clues. There was common agreement that certain types of vulnerabilities,

for example, those stemming from mental health issues, were more difficult to identify. Both companies were making strong attempts to be accessible for their customers and to learn lessons from customer experiences or complaints.

One of the lessons from this research is that establishing a broad concept of vulnerability, as has been argued for in the academic literature, is just a first step. Operationalising the concept presents major challenges especially in the context of systems dealing with large numbers of consumers. Identifying consumers in vulnerable circumstances is a challenging issue, especially once a broader approach is taken and it is recognised that vulnerability depends on the circumstances of the consumer (Gill et al. 2017, paras 2.3 and 2.11). This is exacerbated in industries where there may be a lack of trust between the supplier and the consumer and where almost all contact is done remotely, for example, either by telephone or e-mail. The new approach also creates challenges in recording information in a systematic manner. It was apparent from interviews with all parties that information about vulnerability was typically recorded in free text areas within information technology systems and that it could not be accessed to provide statistical information.

The difficulty, however, is in obtaining aggregate information which would allow companies and ADR bodies to understand the types of consumers coming to them and the outcomes that have been obtained. This is particularly important because there is a substantial divide between those people who complain to the companies and those who complain to an Ombudsman. In energy, there were around 3.5 million complaints to companies in 2016 as compared to around 40,000 complaints to O:SE. In financial services the relative figures are around 5 million to companies and about 450,000 to the Financial Ombudsman. This is not necessarily negative; it is better for consumers if their complaint is resolved by the company, rather than having to go to the Ombudsman. The problem is that very little is known about who these people are and about the socio-economic characteristics of people who use an Ombudsman (Gill et al. 2017, 47-8). Without knowing this information, it is impossible to assess whether the narrowing process is neutral between different categories of consumers or not.

It was widely recognised that effective complaint handling meant not only dealing fairly and effectively with individual cases but using complaints to identify systemic issues and to deal with the causes of complaints. It has also been argued that one of the benefits of an Ombudsman ADR scheme is that it allows for good communication between the regulator and the Ombudsman. It is not clear that the arrangements in these two sectors are working effectively. Although there seem to be regular meetings in the energy sector, there are some doubts about OS:E's ability to identify issues of wider concern although this is an issue it is addressing (Lucerna Partners 2015). In the financial services sector the current arrangements are unclear and the National Audit Office has concluded that although the FCA and the Financial Ombudsman work hard to coordinate their activities, they have not yet convinced firms that this happens effectively (NAO 2016, para. 8).

This research does not supply any information about the experiences and perceptions of consumers in vulnerable circumstances who have been in contact with either the companies or the ADR systems. This is critical because although it is easy to identify policies and procedures which look positive, how they work for the recipients is the most important issue. Recent research suggests that consumers' views of Ombudsman schemes in the UK are not positive (Creutzfeldt 2015; MoneySavingExpert 2017) but there is research planned which will look specifically at the experience of consumers in vulnerable circumstances in the energy sector (see Creutzfeldt and Gill 2018).

There are two cautionary concluding notes. First, although it is positive to consider vulnerabilities when dealing with consumers, what difference will this make in practice? Does it mean different, better, substantive outcomes for consumers in vulnerable situations or simply

a more nuanced or sympathetic application of standard policies? Secondly, there is a danger that by expanding the concept of vulnerability, in a world of limited resources, attention may be diverted from groups with well-known chronic issues of vulnerability before these are properly tackled.

Notes

- 1 See: <https://www.ofgem.gov.uk/investigations/investigations-and-enforcement-data> (accessed 19/02/18)
- 2 See <http://www.financial-ombudsman.org.uk/about/actionplan-2016.pdf> (accessed 19/02/18).

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