Thursday, 14 October 2021

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To whom it may concern

Consultation Document: Strengthening Canada's External Complaint Handling System

According to the consultation document, the FCAC report into "The Operations of External Complaint Bodies" raised a number of issues concerning the current ECB system. These were as follows:

a) Multiple ECBs where banks have the right to choose and the impact this has on the "perception" of fairness;
b) The additional complexity and inefficiency of multiple complaint bodies especially with respect to consumer awareness and process efficiency (given the low volume of investigations);
c) Resourcing of regulatory supervision and its complexity with respect to multiple ombuds;
d) Questions as to whether the competition itself is benefiting consumers.

The FCAC report in fact raised a great many other issues with respect to the efficacy of the two ECBs, in particular that of the ADRBO and the system in general. A further report into bank internal dispute resolution (IDR) confirmed that problems extend further into the system – this system includes the banks, their IDRs, various regulators and the Department of Finance. The changes that allowed for a "competitive market" for ECBs within banking have failed, and have arguably held back the development of an effective ECB system within Canada for some time.

The consultation itself may also have been surpassed by the Liberal party's own election mandate. This promised a single independent ombuds organisation with binding arbitration – of the two "ombudsman", the ADRBO, attached as it is to ADR Chambers, is the one with arbitration expertise. Yet, the world has been moving away from reliance on arbitration and towards the simpler and more effective ombudsman approach. This is the case even within bodies that retain elements of arbitration in their final decision-making layer.

The consultation makes no suggestion as to which ECB model it favours. It in fact makes no specific mention of an ombudsman model, even though the two ECBs are denoted in title as ombudsman.

Overarching principles, especially with respect to consumer outcomes (levelling the playing field, treating the consumer fairly), which could have been used to guide policy and consultation submissions are also absent.

The consultation asks a number of questions but provides little insight into the Department of Finance's own thinking and research into this area. It would seem we are starting from scratch.

The consultation raised the following questions:

1. Are the principles noted in the consultation "appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada"

2. What ECB system structure would best address the deficiencies identified in the FCAC report and most effectively uphold the guiding principles outlined in the previous section?

3. To what extent does the profit structure of an ECB have a real or perceived impact on the impartiality and independence of an ECB?

4. To what extent could an ECB's assessment formula impact the real or perceived impartiality and independence of the ECB?

5. What are the benefits to consumers from a banking ECB that provides non-bank dispute resolution services? Are there drawbacks?

6. Should an ECB be required to provide complainant assistance, and what type of complainant assistance should be provided?

7. Do you have views on whether the decisions of an ECB should be binding or non-binding on banks?

8. Should the government establish requirements for representation on the board of directors of an ECB? To what extent should an ECB be required to make public its governance process?

Question 1 omits the principle of transparency; expectations of transparency are also not clearly addressed in the FCAC report. Clarity of purpose and proportionality is also unaddressed and there is no clarifying statement with regard to fairness throughout the consultation.

"With respect to question 2, the ADRBO, based on the evidence within the FCAC report, is currently the model with the most deficiencies. OBSI deficiencies are also relevant and significant, but of a much lesser order of magnitude - many of the OBSI issues have been raised by previous independent reviews and these point to regulatory/legislative support concerns, industry resistance to a public interest mandate (unaddressed here specifically), lack of strategic influence, consumer outreach and narrow systemic issues powers. "

Question 3 is, again, partially addressed by the FCAC review in that of the two models, the for-profit option has underperformed the most with respect to FCAC expectations. Not for profit models will be able to incorporate wider public interest objectives that would not necessarily be addressed within a for profit model. This public interest component is a dividend as such. The public interest could arguably be treated as a competitive market discipline, provided it is

held accountable. In this respect, competition for competing ECBs have left the public interest unaccountable and unsatisfied.

> It is also relevant to address the system and the ECB's place within the system. It is the view of this submission that financial services ECBs lie towards the end point of a system which includes professional standards, registrant conduct, firm standards and processes, and regulatory oversight. They close the loop - independent impartial complaint resolution with big system strategic perspectives that supports system evolution. In fact, no mention of the wider system in which ECBs are situated are mentioned in the consultation.

Question 4 addressed the differences in fee structures between the OBSI and the ADRBO, which again are correlated with the FCAC deficiencies. But perhaps the lack of investigative thoroughness and other process deficiencies in the ADRBO model are more relevant than the fee structure itself. If either one of the fee structures fails to properly price the process and the function, then that is surely the more relevant.

The preamble to question 5 alludes to the fact that ADRBO handles disputes in other areas. Are we being asked to consider whether the ADRBO could also handle a bank's investment complaints? Again, the FCAC review suggests that ADRBO's deficiencies with respect to complaint handling are the most pressing issue. If these are both correlated with and caused by fundamentals within the ADR approach and structure, why should we extend the associated problems to investment complaints? Why place an organisation (the OBSI) that has arguably addressed complaints more effectively (in terms investigation, evidence and accessibility) at risk? Is this in the public interest?

Question 6: the ability to provide advice and assistance to consumers is one of the key functions of a modern ombudsman and/or progressive dispute resolution provider considerate of systemic issues and in coproduction with regulators and firms focused on treating consumers fairly.

Question 7 is critical: the 2016 OBSI Independent review noted that the ability to secure redress was vital in the OBSI's ability to raise efficiency so as "to devote more resources to helping prevent complaints and lift industry standards." Lack of binding authority also likely impacts an ombuds strategic influence. A binding decision states that the system is both accountable to and confident of its standards, and that institutions, regulators and legislators stand behind the system for the benefit of consumers. The sums that Canada's ECBs currently pay out are insignificant compared to the value of turnover and/or compared to other international jurisdictions.

Question 8: what is the scope and function of the intended ECB system? If it is to be directed towards the public interest, if it is to fully satisfy the principles of accountability, transparency, effectiveness, accessibility, independence, impartiality and fairness, then it needs to have a governance structure that will compel the organisation to achieve its stated objectives while being fully compliant with its principles.

Globally, Canadian financial services ECBs address much lower levels of complaints, are underfunded and lack legislative and regulatory support. Within this environment its ECB models have failed to evolve and lack the necessary transparency and accountability to the wider public interest.

This submission is supportive of a single ombudsman for all financial services complaints, for a non-profit consumer ombudsman model with binding decisions and systemic issue powers with strategic influence.

The rest of the document focusses briefly on the FCAC report into external complaint bodies, the most recent OBSI Independent Review, at some of the academic work on ECB models and the complaint system and then addresses the individual questions noted above in more detail.

FCAC Review into External Complaint Bodies

Briefly, and drawing heavily from the FCAC review, the FCAC review noted concerns with consumer accessibility to ADRBO's complaint process; its procedures for accepting and investigating complaints were not consistent with the FCAC's expectations. The review also noted issues with respect to effectiveness ("failure to demonstrate organisational commitment to effectiveness") that included its initial view process, its training (no mandatory training program – does not look for financial services experience when hiring) and procedures for investigations and recommendations. ADRBO (and the OBSI) did not meet expectations for timeliness and efficiency.

ADRBO's procedures for ensuring impartial and independent investigations were neither well detailed nor sufficiently comprehensive. Both ECBs could improve policies and procedures for protecting the independence of final recommendations.

Importantly ADRBO relied almost exclusively on the consumer's submission and evidence and arguments from the bank's final letter, raising serious concerns over due process and natural justice (fairness). One of the roles of an ombudsman is to be inquisitorial, to ascertain the full facts of the case and to address imbalances in ability to argue and present a case. Addressing consumer vulnerabilities is an important and developing theme not just amongst ECBs but amongst the world's financial services regulators. Not one of ADRBO's initial view letters indicated any further research. ADRBO had not implemented policies and procedures necessary to ensure its personnel actively supported and guided consumers through the investigation procedure.

ADRBO also failed to provide its investigators with detailed instructions or guidelines and manuals had not been updated since 2015 (less than one page devoted to explaining how to conduct an investigation). The FCAC noted a significant number of inconsistencies in investigators' approaches, had not developed reimbursement guidelines or case studies and questioned the ability of ADRBO to handle complaints consistently and appropriately.

The report also noted that ADRBO failed to use feedback from consumer experiences to raise accountability, improve processes or better serve consumers.

Finally, for an organisation charged with independently, impartially and effectively investigating complaints, ADRBO did not meet FCAC expectations for self-reporting consumer complaints.

These were the deficiencies identified specifically by the FCAC. If we were to raise the benchmark towards that of an international consumer ombudsman, we would likely see many more.

OBSI 2016 Independent Review

The 2016 Independent Review noted that the OBSI model was inherently inefficient and overly focused on "overly focused on resolution through negotiated settlements rather than judicious use of determinations". This appeared largely a consequence of lack of binding decisions, industry lowballing and general resistance to the development of a public interest mandate.

Moreover, because the OBSI's "current resources are consumed by the resolution process, OBSI has little left to help consumers, firms and regulators learn from the cases resolved or to identify more widespread issues and trends. And, because the lessons are not shared, OBSI is unable to fulfil an ombudsman's role in helping prevent future complaints from arising; improve the investment industry; lift consumer confidence in the investment market."

The report noted that ""Regulators must now decide whether OBSI is to remain with its current limited mandate – and therefore limited effectiveness, efficiency and value – or whether it becomes a full value ombudsman service".

With respect to the ability to secure redress it also noted "Ultimately, to be a world class ombudsman, OBSI should have the means and ability to secure redress and to devote more resources to helping prevent complaints and lift industry standards."

With respect to strategic influence, it stated "in many respects it had fallen behind in terms of strategic influence…. By that we mean using intelligence from casework to help prevent and reduce complaints; empower customers and firms to resolve complaints more effectively; improve investment service provision; and make proactive contributions to public policy""

With respect to binding decisions and the wider functions of an ombudsman the review also noted the industry views:

> "Firms and industry groups generally had a somewhat less ambitious agenda for OBSI. They wanted timely, cost-effective and expert dispute resolution. Some had residual concerns about industry knowledge. Some challenged OBSI's impartiality, holding the view that "levelling the playing field" between firms and customers created a consumer bias (see section 5.2.1). Some feared that having a wider mandate that included binding authority and systemic issues would turn OBSI into a regulator (discussed below in 2.3). Others opposed binding authority because of residual issues with OBSI's compensation approach and because it would turn OBSI into a tribunal (section 4). Bigger firms tended to consider an external ombudsman was limited in the value it could add given the much higher number of complaints these firms resolved through their own internal complaints procedures.

The review also dedicated a substantial section of the report to systemic issues, and systemic issue protocols remains unaddressed and undeveloped since the 2016 review.

Can either of Canada's bank ECBs be used as a basis for determining which ECB system type is appropriate for Canada's financial system?

ECB Models and systemic issues

The Department of Finance's consultation asks about functions of an ECB without specifically denoting the type of ECB and differences of function associated with an ECB.

Hodges (2016)[1] addresses the wider vision of consumer dispute resolution provision with CDR systems that provide 1) Consumer advice, 2) Dispute resolution, 3) Aggregation of data, 4) Publication of aggregated data, 5) Improving market behaviour.

These components of a wider consumer dispute resolution body (CDR) are similar to that of Gill and Hurst (2016)[2] who noted that functions of a consumer ombudsman to be 1) to provide independent dispute resolution, 2) a strict alternative to the courts and an equitable jurisdiction to provide additional consumer protection, 3) to provide advice and assistance to consumers in their dispute, 4) to equalise the balance of power and provide special assistance to the most vulnerable, 5) to manage expectations where complaints are not valid, 6) to raise standards and 7) to enhance consumer confidence and trust.

Hodges also notes that "triage, information and advice should be the initial stage of a CDR scheme" and that "regulatory control over a market requires the maximisation of data on what is going on".

In Gill and Hirst (2016) a comparison is also provided between an ombudsman's functions and process characteristics and consumer dispute resolution. The latter's functions are primarily to "resolve individual disputes" while the former also include a) advice and support to the consumer, b) feedback to industry and seek to raise standards, c) a more explicit role in addressing power imbalances between parties and d) special concern for the vulnerable.

Process characteristics note that a consumer ombuds is more inquisitorial and has strong powers of investigation, employs a multi-process approach and is more accessible as a result of its advisory functions and inquisitorial approach.

Importantly, an ombudsman is "more likely to have equitable jurisdiction rather than limited to strict legality". With respect to governance an ombudsman is more visible and accountable.

These differences tend to reflect some of the issues unearthed by the FCAC review and which quite possibly lend themselves to the questions developed by the DoF: that is ADRBO had limitations with respect to investigative powers (including issues of advice) and appeared to discount those cases where there were not clear issues of process (i.e., the banks process seemed fair and appropriate) and restricted itself to the arguments presented as is (not inquisitorial).

Gill and Hirst also noted a) "that ombudsmen would do a lot of the 'donkey work' for the consumer in terms of framing issues and requesting documents and that this would not generally be done by adjudication or arbitration schemes" and b) "The fair and reasonable standard and the provision of an equitable jurisdiction was seen as being distinct from other mechanisms, which were more likely to be restricted to the strict letter of the law in their decision making". Missing from the principles noted as part of question 1 is an objective statement with respect to fairness.

[1] Christopher Hodges, 'Consumer Redress: Implementing the Vision' in Pablo Cortés, The New Regulatory Framework for Consumer Dispute Resolution (Oxford University Press, 2016).
[2] Gill, C., & Hirst, C. (2016). Defining Consumer Ombudsmen: A Report for Ombudsman Services.

ECB and The Professional, Firm, Regulatory regime

Consumer complaints are part of a much bigger system picture. Ensuring that complaints are fairly and adequately addressed is clearly one important consideration in dispute resolution. But if we assume that a complaint may have more complex root causes, relying on consumer capacities and resources to address complex problems may require us to address more than the complaint itself.

How do we ensure that complaints and their root causes are adequately addressed so that we can address root causes where necessary and retain confidence and integrity of the wider system?

External complaint resolution is part of the fabric of the system and reflects and impacts not only its integrity but its effectiveness. In the UK internal complaint resolution has to, inter alia, consider decisions made by the UK FOS and follow more rigorous complaint handling standards. You could say that the evolution of external complaint resolution reflects the evolution of regulation, professional and industry standards and their impacts their accountability.

When addressing the functions of an ECB we need to be clear about its place within an effective system regime that sets standards, regulates those standards and is reliant on professional competencies and standards of conduct. This is a complex regime, and we need to close the loop and to be able to address not just complaints but complaints that arise as a result of systemic weaknesses.

Appendix A provides an excerpt from Teasdale (2021) titled, "What is the Regulatory Resource Contravention Trade-Off? A Proposed Consumer Advocacy Position on IIROC's Minor Contravention Program".

The document addressed a conceptual model of regulatory and system expectations, system regime, enforcement resource allocation and rule contravention trade-offs and has relevance to the systemic complexity of ECB systems.

Detailed Responses to questions 1 to 8

Question 1 – Principles

Are these principles appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada?

Question 1 omits the principle of transparency; expectations of transparency are also not clearly addressed in the FCAC report. Clarity of purpose and proportionality is also unaddressed and there is no clarifying statement with regard to fairness throughout the consultation.

The Ombudsman Association principles[3] are similar to those noted with the exception of a) Proportionality, which includes an objective statement regarding fairness and b) Openness and Transparency and c) Clarity of Purpose.

Accessibility – this requires some statement with regard to the scope and function of the ECB to fully explore.

Hodges (2016) notes that "*A key distinguishing feature of consumer ombudsmen compared to courts is their inquisitorial rather than adversarial approach (Brooker 2008). This reflects their mission to provide an accessible form of justice and to redress the power imbalances caused by businesses' greater resources and technical knowledge (Thomas and Frizon 2012).*"[4] As noted throughout, without defined scope and function it is difficult to interpret these principles.

A deeper explanation of what accessibility means may well be dependent on the scope and function of the eventual body recommended and the system in which it lies. Canada's OBSI and ADRBO process between 2% of Australia's AFCA and the UK's FOS complaint volumes. The FCAC reports note high levels of attrition and hence accessibility is an issue going forward.

Accountability requires openness and transparency and some statement regarding this needs to be clearly made. Statements such as "adequate" raise concerns as to operational standards and it is unclear as to what the FCAC's own expectations are with respect to transparency. An ombudsman's accountability should be beyond adequate, but an example to its stakeholders. Based on the FCAC's report we have to ask just how accountable are the ECBs and the system in which they operate?

Impactful decisions would benefit by including some statement regarding the quality of decisions. An ombudsman's influence extends beyond the complaint, towards the system and impact should include expectations with respect to this, if this is indeed a guiding principle. Are we talking systemic and strategic impact? Are we talking about learning from determinations and improving advice and complaint processes as well as regulatory decision making? What is the scope of the impactful decision if we have not decided the scope of the ECB?

Impartial is not necessarily a question of indiscriminate balance, but of fairness, objectivity and integrity of process. While equal weight may be given to rights of the firm/advisor and the

[3] https://www.ombudsmanassociation.org/best-practice-and-publications/principles-good-complaint-handling

[4] https://eresearch.qmu.ac.uk/bitstream/handle/20.500.12289/4556/Defining-Consumer-Ombudsmen-Report-2016.pdf;jsessionid=4568D05E11A2E6A2B78A689F215FE0C6?sequence=1

rights of the complainant, and equal place to their views, within the process, evidence does not necessarily have equal impact. Balancing may well be more accurately described as not ascribing undue weight to any one input or interest other than that derived from the fundamental facets and merits of the evidence itself. Since a levelling of the playing field is a feature of an ombudsman, righting an imbalance is also a natural feature of a fair process. In this case balancing is a dynamic that favours the complainant. A statement of fairness may be needed here. Especially, the nature of the investigative powers and process may also impact outcomes and some supportive reasoning is likely necessary here to differentiate the scope and function of the intended ECB. Objectivity is impacted by investigation.

These guiding principles also lack a statement of underlying values and of primary objectives (i.e., clarity of purpose), which would be clearer if we knew the scope and function of the intended ECB structure or at least some of the boundaries considered.

The Ombudsman Association notes two other important objectives of an ombudsman:

1 - to formulate and promote standards of best practice and

2 - to encourage efficiency and effectiveness

Why are these not part of the consultation on guiding principles?

Question 2 – ECB system structure and FCAC identified deficiencies

What ECB system structure would best address the deficiencies identified in the FCAC report and most effectively uphold the guiding principles outlined in the previous section?

"*With respect to question 2, the ADRBO, based on the evidence within the FCAC report, is currently the model with the most deficiencies. OBSI deficiencies are also relevant and significant, but of a much lesser order of magnitude; many of the OBSI issues have been raised by previous independent reviews and these point to regulatory/legislative support concerns, industry resistance to a public interest mandate (unaddressed here specifically), lack of strategic influence, consumer outreach and narrow systemic issues powers.* "

One of the key deficiencies noted in the report was related to identifying systemic issues. The most appropriate ECB system structure would be that of an independent ombudsman with a clear public interest mandate. The development of the OBSI's systemic issue powers were materially affected by legislative changes that allowed competing bank ECBs. It is possible that system issues, either CSA or FCAC originated, have compounded systemic issue reach and assessment.

Competing ECBs may lead to lack of clarity with respect to function. Addressing systemic issues and applying case lessons strategically is not a function of a pure consumer dispute resolution provision, whereas it is firmly recognised as an ombudsman function. International ECBs provide much more information on their written determinations; in the 2020 annual report the UK FOS noted that it had added 24,000 publicly accessible written determinations. The IRISH FSPO has published 1,000 since its launch in 2018 and the Australian AFCA has 6,225 since October 2019. This volume of evidence as it were indicates not only higher levels of transparency and accountability for process and decisions, but a willingness to learn, high levels of organisational efficiency and professionalism and a commitment to the public interest. These organisations are allowed to be impartial, independent, transparent, accountable and objective.

Other issues, specifically with respect to accessibility and investigations and use of evidence would again favour that of an ombuds organisation. As noted by Gill (2016) and highlighted in the section in this report on ECB Models and Systemic issues, these are functions and process usually associated with consumer ombudsman. It may also be one reason why ADRBO is deficient, i.e., process has transcended from their formal mediation and arbitration procedures.

A unified ECB system, that which was largely in place before the Federal government allowed for multiple ECBs in the banking sphere, would also have more effectively addressed the deficiencies identified. With no competing lower standard, to which banks have arguably drifted towards (lower levels of evidence and investigation translate into lower costs), we could have held our ECB system to a higher standard. Indeed, if we are to address competition, we have numerous other benchmarks globally to which we can assess the efficacy and efficiency of the Canadian ECB system – there are objective and transparent competitive benchmarks available for Canadian legislators and regulators to judge and assess over oversee the ECB system.

You could argue that the evidence against market competition, obviation of consumer choice and the system inherent lack of transparency is held not just within the FCAC report but globally amongst the data and lessons provided by the evolution of consumer ADR.

Consumer ADR systems have evolved over time, have moved towards both consolidation and a broader unified reach. But globally they have evolved alongside legislative and regulatory support and accommodation. The ECB model is only as good as its supportive environment.

And it is not just fair complaint resolution and investigative process that is at issue but the wider impact of an effective ECB on the wider system that is at issue[5]:

> "a fractured CDR system will not deliver aggregated data and hence effective regulation of market behaviour. These considerations point to conclusions that a CDR system should have a unified and not pluralist design. Treating CDR as a market and hence permitting multiple diffuse CDR entities is unlikely to attract maximal usage or data. If the five functions are to be delivered, CDR coverage should be provided by a restricted number of entities. The best current model is that of (some) Ombudsmen"

The question however asks what ECB system structure would best address the deficiencies noted in the FCAC report without a) addressing function and b) without defining system. The ombudsman model (Hodges (2016) and Gill (2016)) and the differences between a pure dispute resolution provider and an ombudsman note a quite wide divide between potential ECBs and potential ECB systems. Also relevant are those issues unaddressed by the FCAC report that are also dependent on both system and function.

International complaint resolution, with some exceptions, are overwhelmingly focused on either a single unified body, or at the very least dedicated external dispute resolution provision for specific sectors. Even where competing EDRs exist, most of the complaints within a specific sector are handled by one service provider. Most financial service ECBs also operate on a not-for-profit basis; there appears little rational for competing not for profit provision within financial services external complaint provision.

[5] Christopher Hodges, 'Consumer Redress: Implementing the Vision' in Pablo Cortés, The New Regulatory Framework for Consumer Dispute Resolution (Oxford University Press, 2016).

With respect to system, an ECB system model that incorporates learning, strategic influence and systemic issues, early advice and early dispute resolution would tend to favour large, centralised financial services ombudsman.

There are of course other models, but many of these are no longer predominant. Notably the older arbitration models; many of those countries that have historically favoured arbitration have evolved towards introducing informal ombuds processes to address the majority of complaints. As per Hodges (2016):

> "*The models within which CADR providers operate have developed over time. The model thirty years ago, involving a panel of three 'arbitrators', was influenced by models of courts plus a desire to have balanced representation, as in arbitration. More recently created ombudsmen systems have case handlers at initial stages, and escalate unresolved cases to single more senior staff and ultimately to a single ombudsman (large organisations may contain multiple staff qualifying as an ombudsman). The three-person panel may have the advantage of symbolic representation, individual expertise of panel members, and a guard against bias. But the one-person model is quicker and usually cheaper. Different models may be appropriate in different situations."*[6]

Finally, the consultation asks a question but begs another. Canada lacks an ECB system and environment able to effectively and efficiently address the deficiencies noted. ADRBO, as is, lacks the process, structure, mission, vision and values to develop into an ombudsman and the OBSI is constrained from fully evolving. No option as is will address the deficiencies. Only a commitment to system, to environment and to the wider public interest will.

Canada lacks an evolved consumer protection environment and stands apart from those jurisdictions with evolved ombudsman (Australia, UK, Ireland, South Africa, New Zealand), those with evolved ombuds-like arbitration models, such as those seen in Holland the Nordic countries, and the evolving embedded regulatory models of France, Spain and Italy. The question cannot be answered quickly, but we are closest to the modern consumer ombudsman model and definitely far away from either of the other two evolving models.

Question 3 – For profit or not for profit

To what extent does the profit structure of an ECB have a real or perceived impact on the impartiality and independence of an ECB?

Question 3 is again partially addressed by the FCAC review in that of the two models, the for-profit option has underperformed the most with respect to FCAC expectations. Not for profit models will be able to incorporate wider public interest objectives that would not necessarily be addressed within a for profit model. This public interest component is a dividend as such. The public interest could arguably be treated as a competitive market discipline, provided it is

[6] Hodges, Christopher, New Modes of Redress for Consumers: ADR and Regulation (2012). Oxford Legal Studies Research Paper No. 57/2012, Available at SSRN: https://ssrn.com/abstract=2126485 or http://dx.doi.org/10.2139/ssrn.2126485

held accountable. In this respect, competition for competing ECBs have left the public interest unaccountable and unsatisfied.

It is also relevant to address the system and the ECB's place within the system. It is the view of this submission that financial services ECBs lie towards the end point of a system which includes professional standards, registrant conduct, firm standards and processes, regulatory oversight. They close the loop - independent impartial complaint resolution with big system strategic perspectives that support system evolution. In fact, no mention of the wider system in which ECBs are situated are mentioned in the consultation.

The consultation notes that "In its ECB report, the FCAC found that both ECBs find in favour of the banks roughly the same percentage of time and did not find evidence that a for-profit funding model resulted in more favourable treatment of the banks." Yet the review also found serious deficiencies in accessibility, investigative process and accountability as well as implied conspicuous gaps with respect to the functionality of true consumer ombudsman. Fewer cases got to the point where they could be assessed and there is no qualitative assessment of the case outcomes. The reasoning is spurious. Additionally, the system, irrespective of funding model, has been impacted by its externalities. The for-profit option with limited accountability and impaired competition (banks choose, consumers cannot "see" or choose) has infected the system itself, so making it difficult to cleanly extrapolate either way.

Many of the deficiencies identified by the FCAC would have costs associated with their remedy: taking on a higher level of complaints and improving process, and hence charging more, may well impact the decision to opt for the ADRBO as well as system function itself. The point addressed as a focus for assessing the conflict posed by a for profit model is overly narrow and ignores the wider functions and externalities that are likely impacted by the particular for-profit model in situ. A competitive market outcome, where buyers and sellers are rationale and informed would have addressed and remedied these issues long ago. In this respect a fully accountable, fully transparent consumer ombudsman model would substitute an imperfect market profit and service for a public interest dividend and greater accountability – the market for non-profit consumer ombudsman and other CADRs is well populated and increasingly transparent. Competitive comparative benchmarks are available for assessing economic efficacy.

Most financial services ECBs around the world operate on a non-profit basis and deal with much higher volumes of complaints. This is especially the case with respect to the large, single body ECBs, especially those that provide complainant assistance and that address systemic issues.

Also, without having full access to ADRBO and OBSI data as well as an assessment of the case files, it is difficult to make any statement regarding the impact of a for profit structure on the impartiality and independent of the actual decision making on cases that made it through.

Given that Canadian ombudsman process a fraction of the complaint volume that its leading international peers process one could argue that the Canadian system itself is substandard and that we need to look further than for profit or not for profit differences – Canada's ombudsman processed 3% of the UK's FOS (ex PPI), 6% of AFCA's (ex-registration and referrals), 6% of Finland's, 16% of Spain's and 20% of Taiwan's complaint volumes.

One could argue that a pricing structure aimed at financial institutions where consumers have no choice over the ECB is hardly a competitive market option. Given the deficiencies found

by the FCAC review of ADRBO either the price has been set too low to achieve the expectations of the FCAC or its processes are inadequate. Neither imply efficacy of a for profit model.

The preamble to question 3 discusses scope of function, complaint assistance and binding recommendations.

Preferred scope of function and the preferred type of ECB has already been discussed. An ombudsman and/or a non-profit model tends to be associated with complaint assistance.

The gold standard for system dispute resolution provision, based on academic papers referenced in this submission, is that of a single independent ombuds organisation with binding powers and the ability to address systemic issues. Not all ECBs around the world have binding powers or are primarily ombuds organisations. That said many of those that operate an arbitration model have developed the informal frameworks of modern ombudsman as part of their architecture and are coalescing and are evolving. European Arbitration models you could argue are becoming more ombuds like as opposed to more arbitration like.

In a recent article Sharma (2020)[7] noted, via reference to the UK's FOS many of the benefits of a not-for-profit ombudsman:

> "The synergies generated by the FOS's distinctive position also makes it a unique organisation and places it in an arrangement through which it can effectively serve the customers and the industry by resolving their disputes, the regulators/law makers by providing them guidelines for making new policies, the courts by keeping litigations away from their purview.…
>
> unlike mandatory arbitrations wherein one-off disputes are arbitrated, award rendered and forgotten; an FOS-like system provides an opportunity to oversee and examine unrelated disputes for the purpose of arriving at meaningful policy formulations… an FOS-like system counters the problem of opacity, of keeping mistakes/shortcomings of the companies out of public view….
>
> an FOS-like system serves as a watchdog for the industry. The arbitration industry as such does not have any inbuilt mechanism to receive feedback on its own functioning….
>
> an FOS-like system does not obstruct the development of law and can impact reformation of the law. Arbitration as an alternative to litigation is often criticised for stagnating the development of law by taking disputes outside the purview of courts. An FOS-like system overcomes this problem. An FOS-like system does not completely take cases outside the court system since the complainant has the option of going to the court if he does not accept the decision of the ombudsman. Furthermore, ombudsman train and mentor adjudicators, which gives rise to an "institutional culture that impacts the decision-making heuristics and instincts of individual adjudicators" (Schwarcz, 2009) which results in consistent decisions, brings about predictability and improves the dispute resolution system……

[7] Sharma, M. (2020). A Fair Alternative to Unfair Arbitration: Proposing an Ombudsman Scheme for Consumer Dispute Resolution in the USA.

> one of the arguments against arbitration is that it is private adjudication of disputes and that arbitrators and their awards are relatively free from public scrutiny. An FOS-like system easily overcomes such a problem. Ombudsman's awards can be placed for review in courts and are appealable by consumers unlike that of an arbitrator whose awards are final and binding. Moreover, ombudsman's decisions unlike (most) arbitration awards can be published (Schwarcz, 2009)."[8]

Assessing the impact of for profit versus not for profit with respect to a one-dimensional output does not fully address the qualitative or quantitative issues associated with an effective ECB system.

Kerton and Ademuyiwa[9] (2018) talk about consumer protection frameworks:

> "The financial consumer protection framework in Canada needs to be geared towards having a comprehensive financial consumer code which adopts basic principles such as commitment to consumers' interests; facilitating access to financial services; ensuring significant levels of transparency; responsible business conduct; and practices by financial institutions and providing efficient avenues for redress."

Christopher Hodges in an article on the costs of Major CADR Schemes[10] notes that "The Nordic model appears to be exceptionally effective in achieving both avoidance and early resolution of disputes through accessible advice systems on the demand side."[11]

Question 4 – Assessment Formula

To what extent could an ECB's assessment formula impact the real or perceived impartiality and independence of the ECB?

Question 4 addressed the differences in fee structures between the OBSI and the ADRBO, which again are correlated with the FCAC deficiencies. But perhaps the lack of investigative thoroughness and other process deficiencies in the ADRBO model are more relevant than the fee structure itself. If either one of the fee structures fails to properly price the process and the function, then that is surely the more relevant.

Volume based processes, or service processes with centralised decisions and rules (usually derived from a learning process) are more likely to charge well defined prices for service. Those that rely more on the case at hand and are difficult to process and define are more likely to be priced at an hourly rate. Additionally, if you are employing individuals, you are more likely to need certainty with respect to revenue and hence your modelling will be based on capacity and expected volumes with allowances for complexity at the extremes. If you are employing independent contractors then you are more likely to include an hourly component, unless your contractors charge otherwise.

[8] https://www.ombudsassociation.org/assets/docs/JIOA_Articles/JIOA_2019-F.pdf

[9] Kerton Robert R and Idris Ademuyiwa. (2018). Financial Consumer Protection in Canada: Triumphs and Tribulations In Tsai-Jyh Chen (ed), An International Comparison of Financial Consumer Protection, (85- 132), Springer.https://www.researchgate.net/publication/325935624_Financial_Consumer_Protection_in_Canada_Triumphs_and_Tribulations

[10] https://www.law.ox.ac.uk/sites/files/oxlaw/-_data_on_the_costs_of_consumer_adr_schemes.pdf

[11] https://www.law.ox.ac.uk/sites/files/oxlaw/-_data_on_the_costs_of_consumer_adr_schemes.pdf

The deficiencies in the review tend to confirm that ADRBO lacks well defined processes and centralised decision rules that could support the need for hourly charges as opposed to case and case volume levies. An organisation focused on dealing with a large volume of complaints, that is looking to learn from complaints processed and to pass on the benefits of such learning is more likely charge more uniform rates and levies.

A base cost to cover system and public interest issue costs (and say a certain number of complaints) and an additional fee to cover either the number of complaints or their specific complexity seems reasonable. An hourly charge out rate per piece seems more relevant to operations where each case is worked from the ground up and or work is subcontracted out to independent operators/experts/consultants. Within a process efficient ombudsman which needs to budget forward and to build in accountability for case processing costs, an hourly ex post charge out rate may not be viable. In this case a per case levy or some such similar formula may be the most appropriate. These things however evolve, and each operation should be able to determine its own charging structure.

It may well be easier for a non profit ombuds to plan and budget for increased certainty in costs and volume than a for profit operator reliant on independent contractors.

Question 5 – Benefits of non-bank dispute resolution

What are the benefits to consumers from a banking ECB that provides non-bank dispute resolution services? Are there drawbacks?

The preamble to question 5 alludes to the fact that ADRBO handles disputes in other areas. Are we being asked to consider whether the ADRBO could also handle a bank's investment complaints? Again, the FCAC review suggests that ADRBO's deficiencies with respect to complaint handling are the most pressing issue. If these are both correlated with and caused by fundamentals within the ADR approach and structure, why should we extend the associated problems to investment complaints? Why place an organisation that has arguably addressed complaints more effectively (in terms investigation, evidence and accessibility) at risk? Is this in the public interest?

The literature on the differences between an ombudsman and other formal ADR approaches that include arbitration and mediation indicate the importance of subject matter expertise and the process differences between say formal arbitration and an ombudsman's process. Note Gill (2016) [12] commentary on the difference between an ombuds and generalist legal expertise of the courts:

> "further difference in terms of decision making is that consumer ombudsmen tend to have significant expertise in the areas upon which they adjudicate (Brooker 2008), in contrast to the generalist legal expertise of the courts."

The ADRBO, based on the FCAC review do not appear equipped to process banking complaints effectively, so why should we extend this to investment and other complaints. While the OBSI hires individuals with industry expertise, the ADRBO appears not to.

In Canada we did at one point have one organisation addressing both investment and banking. Arguably, the OBSI appears to be the most experienced at processing complaints per se.

[12] https://eresearch.qmu.ac.uk/bitstream/handle/20.500.12289/4556/Defining-Consumer-Ombudsmen-Report-2016.pdf;jsessionid=4568D05E11A2E6A2B78A689F215FE0C6?sequence=1

Providing competition for investment complaints would suggest that the DoF is looking at a more narrowly focused external dispute resolution provider with narrow function and scope. Can ADR move towards an ombuds model with systemic and strategic remit?

Economies of scale are dependent on consistency of process and procedures and the FCAC report noted deficiencies in this respect. While informal mediation and conciliation are part of an ombud's armoury, ADR's experience appears to be in the area of more formal mediation and arbitration. Is this relevant and effective for most financial services complaint handling?

Having ADRBO provide investment complaint resolution would create, inter alia, a number of issues:

- The formal arbitration and mediation models may well be more formal and higher cost, less transparent and may also suffer from accessibility issues. Increasing the volume of complaints to be addressed efficiently and effectively would likely require a more informal model as followed by many of the financial Services ECBs. This means that in order to be effective ADRBO would need to become more ombuds-like.

- More debilitating and imperfect competition and more confusion as to what and what about an individual can complain to.

- Lower economies of scale with respect to both complaint handling and the wider public interest mandate of an ombudsman.

- The loss of the public interest dividend, in exchange for what?

This question makes you wonder why deviate from the original ombudsman model that was evolving within Canada to what is now arguably an inferior system offering? The trend globally is to assimilate and consolidate ECB activity and to expand the scope and reach of external complaint bodies to wider systemic issues, assistance and earlier resolution.

Question 6 – Complainant assistance

Should an ECB be required to provide complainant assistance, and what type of complainant assistance should be provided?

The ability to provide advice and assistance to consumers is one of the key functions of a modern ombudsman and/or progressive dispute resolution provider considerate of systemic issues and in coproduction with regulators and firms focused on treating consumers fairly.

As ECBs evolve the provision of assistance is becoming more prevalent and the effectiveness of assistance is becoming clearer. Hodges (2012)[13] noted that "those states that provide effective and easily accessible information and advice to consumers (and traders) seem to have lower levels of problems" and that "triage, information and advice should be the initial stage of a CDR scheme".

[13] Hodges, Christopher, New Modes of Redress for Consumers: ADR and Regulation (2012). Oxford Legal Studies Research Paper No. 57/2012, Available at SSRN: https://ssrn.com/abstract=2126485 or http://dx.doi.org/10.2139/ssrn.2126485

Gill and Hurst (2016)[14] also note: "ombudsmen advise consumers on how to complain to organisations under their jurisdiction and seek to 'manage expectations' (Gilad 2008) with regard to the likely outcomes of their cases – such activities are similar to those performed by consumer advisers or lawyers in helping consumers assess their options, their routes to redress and their chances of success….although ombudsmen are explicitly not consumer advocates or consumer champions, their inquisitorial functions and the fact that they assist consumers in framing their complaints, can be seen as echoing the function of the consumer advocate or lawyer in allowing a consumer's best case to be put forward."

If we look internationally, we see models which specifically address registration and referral (notably Australia, but also Ireland and New Zealand), models that address very high levels of enquiries and specifically consumer vulnerabilities (UK FOS for example), models that have taken the function of early advice to very high levels notably Finland and also Taiwan and New Zealand's FSCL.

Clearly the answer is yes and the only approved ECB that has evolved to address consumer assistance is that of the OBSI.

Question 7 – Binding and non-binding

Do you have views on whether the decisions of an ECB should be binding or non-binding on banks? Please refer to the guiding principles to support your position.

Question 7 is critical: the 2016 OBSI Independent review noted that the ability to secure redress was vital in the OBSI's ability to raise efficiency so as "to devote more resources to helping prevent complaints and lift industry standards." Lack of binding authority also likely impacts an ombuds strategic influence. A binding decision states that the system is both accountable to and confident of its standards, and that institutions, regulators and legislators stand behind the system for the benefit of consumers. The sums that Canada's ECBs currently pay out are insignificant compared to the value of turnover and/or compared to other international jurisdictions.

Not all ECBs have binding authority. The Australian, the UK, the Irish, the New Zealand, many of the South African, Singapore and Taiwanese (to a limit), the Dutch (optional) have binding as a key component of the system.

The Nordic ECBs lack binding authority, but they also have much higher levels of system buy in to the importance of consumer resolution. Hodges states "all of the Nordic states have what might be described as an ADR culture, given that on a successive basis since the 1970s, all C2B claims have been handled by consumer complaint boards".

The European French, Spanish and Italian ECBs also lack binding, but they are also likewise evolving (especially the Spanish and Italian regimes).

Binding decisions (especially where the ECB lies outside of the regulatory model and where there lacks a history of consumer ADR buy-in) would appear important if we are looking towards process efficiency and for an ECB to be strategic and systemic – i.e., to be able to apply lessons learned, and for regulators to harness the knowledge base of its external dispute resolution providers. Binding is certainly a feature of those systems which have evolved along the ombudsman model, and which look to systemic efficiency. It is clear and unequivocal.

[14] Gill, C., & Hirst, C. (2016). Defining Consumer Ombudsmen: A Report for Ombudsman Services.

Firms which are adhering to regulatory and professional standards should have no fear of binding decisions. Indeed, the ombudsman model appears more predominant in regimes with best interest standards and an emphasis on professional competency and conduct.

The OBSI's issues with respect to low balling (gaming and delaying resolution) and the efficiency of the negotiation process are well documented and would clearly benefit from a binding decision. This is especially so within the Canadian environment which has been resistant to the introduction of public interest focused external dispute resolution providers – thanks to successive high quality independent external reviews these issues are well documented.

The DoF specifically asks for a reference to the guiding principles to support the position made. Binding decisions support independence but might not support independence in an imperfectly competitive marketplace. Binding decisions should help support timely and efficient complaint handling, and this is backed up by the 2016 OBSI Independent review.

Binding decisions should help enhance system accountability for represented standards and the expectations associated with regulation. It should save regulators time, enforce earlier resolution within the firm's own complaint handling and influence higher standards of advice, of advice oversight and internal complaint handling. The guiding principles are system principles and action should positively affect each principle at each stage of the complaint process.

Question 8 – Governance

Should the government establish requirements for representation on the board of directors of an ECB? To what extent should an ECB be required to make public its governance process?

What is the scope and function of the intended ECB system? If it is to be directed towards the public interest, if it is to fully satisfy the principles of accountability, transparency, effectiveness, accessibility, independence, impartiality and fairness, then it needs to have a governance structure that will compel the organisation to achieve its stated objectives while being fully compliant with its principles.

A 2020 analysis of the boards of the UK's FOS and Australia's AFCA noted the following:

The Australian AFCA board[f] has 11 members including the chair. Five are Industry Directors and five are Consumer Directors. Three of the Consumer Directors have strong consumer advocacy experience and have non legal/non finance-based credentials. Note the following:

> CD 1 – "involved with consumer issues for a number of years, including as the Director of Care Financial Counselling and the Consumer Law Centre of the ACT, as the Chair of Financial Counselling Australia and through her role on the boards of the National Information Centre on Retirement Investments and the Welfare Rights and Legal Centre."
>
> CD2 - "advocated for consumers' rights in financial services, telecommunications, and energy and water industries in her roles at CHOICE, the Australian Communications Consumer Action Network and the Public Interest Advocacy Centre….Elissa was previously Chair of the Financial Rights Legal Centre (formerly the Consumer Credit

> Legal Centre of NSW) and Manager of Consumer Policy at CHOICE. She is currently a Director in the ACCC's Financial Services Unit"
>
> CD3 – "the Director of Campaigns and communications at CHOICE and is a high profile and experienced consumer advocate. She regularly appears in the media to advocate for consumers using financial services and to educate them on their rights…. represents CHOICE on the ACCC Consumer Consultative Committee.."

Of the two lawyers serving as Consumer Directors, one also has a very strong history of consumer representation and engagement with consumer issues. The skillsets in the non-industry directors are very heavily weighted towards consumer issues and consumer representation.

The UK FOS has no industry representation. It has a 6-person board with a broad range of experience. One member has corporate finance expertise, another legal corporate, but the remaining 4 members have considerable public interest service and grass roots experience and knowledge with respect to, inter alia, Health Care, Racial Equality, Social Work, consumer advocacy work, public interest issues, consumer experience etc

Good governance should help reinforce trust and confidence not only in the external complaint body but in the system. A diverse and representative board should be naturally compelled to act in the overarching public interest associated with best practises for consumer ombudsman. International best practices in this respect provide comparable competitive benchmarks for a range of different but representative options.

Summary/conclusion

The FCAC review quite rightly highlighted issues within the present banking ECB model and system.

This document argues that the most appropriate ECB model for Canada is that of a consumer ombudsman for banking and investments, and prospectively also for insurance and other financial services. This is not only the model considered most effective by academics focusing on this area but it is also the model that Canada has the most experience with, and this view is informed by the OBSI's history and successive transparent independent reviews and by the revealed inadequacies of the current ECB structure focused solely, it would seem, on consumer dispute resolution.

The non-profit model, by virtue of the growing number of consumer ombudsman and the evolution of ECBs globally, provides more than enough comparatives to effect an accountable, competitive and effective single consumer ombudsman for financial services.

To expect that the change will happen overnight, and that there is not much work to be done to improve complaint handling culture and attitudes towards complaint handling generally, would be naïve. Canada lacks a fully effective and fully evolved ECB model and a fully evolved system capable of the necessary co-production that will drive system efficacy forward.

The public interest is a de facto dividend equivalent to the competitive market dividend of private competition and a key metric of efficacy and effectiveness. It should not be supplanted for a private, unaccountable, non-public, pecuniary dividend within a market place that cannot possibly replicate the conditions necessary for transparency and efficacy for all stakeholders. The public interest is where all these interests conjoin and the public interest is the relevant competitive metric for an ECB system.

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Appendix A – A conceptual model of regulatory and system expectations, system regime, enforcement resource allocation and rule contravention trade-offs.

The following is taken from Teasdale (2021) titled, "What is the Regulatory Resource Contravention Trade-Off? A Proposed Consumer Advocacy Position on IIROC's Minor Contravention Program".

The document addressed a conceptual model of regulatory and system expectations, system regime, enforcement resource allocation and rule contravention trade-offs:

There are four components to the model:

A. **The regulatory and legislative standards and their frameworks**; these are the acts, the rules, the notices etc; of relevance is their openness to change, their rate of change as well as comparisons with other jurisdictions. As discussed in section 4, these also present systematic issues as they codify minimum standards and baseline accountabilities with respect to conduct, standards of care and professional competencies (the latter having only recently been addressed). Research into the impact of sanctions also strongly suggests that professional standards of conduct, such as a best interest standard, have considerable value for compliance and may well be more effective than a fine. Professional standards are a key international regulatory and legislative theme.

    - Does regulation impact competition, innovation, accountability, representation positively or negatively? How does regulation guide or restrain or protect interests and whose interests? International regulation has moved clearly to define consumer interests and outcomes as core objectives of regulation but also to reflect the emergence of professional competencies and technology as core foundations of modern financial services.

B. **The system regime** (the overall system): the professional standards (professional and social norms and sanctions), competencies and accountabilities, firm processes and standards with respect to advice (as well as culture/social norms governing conduct), supervision, compliance and complaints (including external complaint resolution) that accompany regulatory standards. Are firms competitive, transparent, accountable? Do they compete to meet the best interests of their clients? Regulation and enforcement are connected to the system.

    - How does the regime address asymmetries, vulnerabilities, complexity, relationships, standards of conduct and competencies and importantly systematic and systemic issues? Whose interests are first and foremost? Professional standards emphasise clients' interests.

    - The regime also defines the competitive environment, its skills sets and technological profile. How advanced is the regime? An advanced regime is more likely to be able to track and measure deviations in consumer outcomes and hence reduce the number of contraventions at source.

    - Do regulators and legislators have an objective regime vision? Are they able to differentiate between that currently emerging and the preferred objective?

C. **The system and its regulatory representations and expectations** (consumer) – expectations may not always match A and/or B. Indeed, regulators the world over, at first glance, have similar investor protection mandates yet vastly different rules, regulatory frameworks, competencies, ethical and professional conduct standards and norms, inducement provisions etc. What regulators present as their mission and vision differ in some degree and these differences have systemic impact on systems via their effect and systematic foundation with respect to their intent.

    - Does the system promote trust and confidence? If it does, is it clear about the systems limitations and accountabilities, its actual standards (not its marketed standards)?

    - Are its communications clear or are they vague beyond the reach of the consumer to understand? How informed and inclusive are the regulators with respect to wider issues impacting the system? To whom is the regulator sending its clearest communications?

    - Where is the consumer actually positioned within regulatory deliberation? Given that most regulation involves connects directly with firms and their employees/registrants how does the regulator connect with the consumer side and communicate their understanding?

    - Is there a light touch? Does it favour markets, i.e., consumers and providers of services to define relationships, standards and accountabilities? What are the minimum standards of protection?

    - **Can A influence, enforce and deliver C? How vague is A and/or C? What is A actually committing to? Does C misrepresent A such that C represents a systematic liability?**

D. **The enforcement contravention detection and deterrence and resource allocation trade-off**. Enforcement is bound by the wider regulatory structure and may have a limited face to face relationship with the day to day. There is likely no clearer interpretation of the limits of regulation than the enforcement assessment of complaints and concerns that come through its doors. As such there is no clearer message to both consumers of financial services and its providers as to what the protections of regulation and the boundaries of contravention really are than what happens within enforcement.

    - What are enforcement's boundaries and limits of discretion?

    - How aware of the system is the enforcement capability? How does enforcement positively impact the system and how does it interact and collaborate with the various actors, including other regulatory components?

    - Is it open to its flaws and limitations? How is it evolving and assessing its environment, its scope and its caseload characteristics? Is it constrained by the regulated systematic?

    - What is its own self-assessment of contravention roots causes and other alternatives to fines, prosecution, suspension and banishment?

- If it is insufficiently effective what are its own views on the matter? How should enforcement evolve, what does the qualitative and quantitative research say?

- **Given the impact of the system on enforcement you cannot assess enforcement division operational efficiency on costs alone or with respect to its detection rates and ability to discipline and deter. The wider system and the effective resource constraints my override.**

The first three components (A, B, C) combine to define the system and to create system and regulatory effectiveness; these determine outcomes that represent the universe of potential enforcement cases that flow into enforcement as well as the universe of unaddressed outcomes.

Component D addresses issues that cannot be addressed by the system, or that are problematic for the system to enforce. Many of these may be due to systemic and systematic system issues. These need to be transparently addressed.