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## BBRS Starters for 10 Proposals and Banks' Response

6 messages

**Rachel Couter** <rachel.couter@osborneclarke.com>

22 April 2020 at 15:42

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All

As foreshadowed earlier in the week, please find attached the document we have received from the BBRs in anticipation of our discussion tomorrow morning. The document is lengthy (32 pages) setting out (i) the BBRs' "starter for 10" discussed with us on 11 March 2020; (ii) the Banks' response; and (iii) the BBRs' commentary following the discussions that the BBRs has had thus far with the Banks in an aim to obtain clarification and explanations of the Banks' positions.

### (A) Executive Summary:

In short, despite the Banks having had some 4 weeks to discuss their responses to the BBRs' "starter for 10", this is a very disappointing effort. In particular, their responses do not yet show much attempt to narrow the issues: either:

(a) (detailed) proposals / comments are still awaited:

- i. independent schemes;
- ii. consequential loss;
- iii. D&I / payments to directors / shareholders outside the strict legal corporate structure (although there is implicit acknowledgement that this should happen in principle); and
- iv. banking confidentiality / disclosure of documents; or

(b) their positions remain entrenched:

- i. no exceptions where complainants have had access to independent schemes; and
- ii. claims in an insolvency situation should only be brought by or with the authorisation of the IP and awards should only be paid to the IP, with no proposals as to how to get compensation to the individuals affected.

The only "new" point here (which is not a positive step) is their position in relation to whether dissolved companies can be restored or not: the Banks' position appears to be that awards should potentially never be made to dissolved companies (or the process paused to see if restoration is possible and can take place), unless companies have in fact been restored. They do not even agree that awards to dissolved companies that cannot be restored should be paid bona vacantia to the Crown, but have suggested that they would be prepared to pay an equivalent amount to charity. Obviously, these proposals are non-starters.

We have provided some further detail and comments in (C) below, although (if time permits) this is not a substitute for reading the document itself.

## (B) Tomorrow's Meeting:

For the purposes of tomorrow (and given the very clear instructions that you all gave to the BBRs back in February and we have repeatedly emphasised to the BBRs), we think that the meeting should:

- in the first instance, be used to listen to the BBRs' take on the Banks' responses – in some instances, they are already at least partially onside; and
- for us to reiterate some points about some of the key issues (focussing probably on eligibility / independent schemes, consequential loss and the need to get compensation to the right people in an insolvency context).

## (C) Comments on the Starter for 10 Bank Responses:

- **Independent Schemes** – further consideration is being undertaken by the Banks of what should amount to an independent scheme and whether there should be any exceptions. **Their** starting point, however, is that BBRs should not have jurisdiction / there should be no exceptions, with the BBRs referring such complainants back to their Banks. They further do not consider that any Settlement Agreement or offer accepted by complainants should ever be unwound. The Banks do agree that further clarification is needed of the Boundary process (e.g., where FOS has rejected complainants) and is proposing to provide proposals with its comments on the Scheme Rules.

- **BBRS** considers there should be some exceptions, but considers that they should be in "exceptional cases where there is a serious claim of misconduct by a Bank that is alleged to have materially affected a settlement" or "exceptional circumstances where it is shown that a previous settlement reached directly was based on the bank acting egregiously i.e. deciding not to share material documents they were obligated to share or misrepresentation" and only where settlement has been reached outside of an independent body (i.e., not FOS because of s231 FSMA power to require information / Court)

- **OC preliminary comments:** does not take into account SME's wider requirements for eligibility as per AK email, in particular where material evidence by Banks has not been disclosed and irrespective of the forum (i.e., FOS as well as independent reviews); and (ii) BBRs's suggested approach only deals with situations where a settlement has been reached elsewhere and not where, for example, a redress offer was not accepted by a complainant because they did not believe the offer was fair / the redress scheme was a fair process. We agree that the Boundary process is not well-defined at present and it may be that some of the concern about the strict application of the core eligibility rules can be addressed by a clearer understanding of what will constitute an 'exception' and how broad that category will be.

- **Eligibility to be assessed at act or omission date or date of complaint** – further consideration needed with majority of the Banks preferring date of act or omission; minority preferring date of complaint:

- **BBRS** prefers date of act or omission

- **OC preliminary comments:** do we have a preference from the cases we have seen? The date of act or omission seems the most logical (similar to the accruing of a cause of action), and is the same as FOS, although it needs to be expanded to include "behaviour" more generally. BBRs seem to think the issue of "Cliff Edge" (i.e., timeframe for historical complaints and steps required before application of the 6-month period after a final response letter is sent commenced) is

resolved by the current draft Eligibility Policy, but not clear how (this may become clearer when we receive the Banks' feedback on draft Scheme Rules / Eligibility Policy: as it stands, the need to refer within 6 months of final response does not work at all for the Historical Scheme (or complaints rejected in the period whilst the BBRS is being set up). The current draft Eligibility Policy does say that the 6 month period applies only where the Bank has clearly communicated to the complainant that the BBRS is available, although that does not appear in the Scheme Rules.

The Banks appear to accept that the 6 month period does not work for the Historical Scheme and are considering a backstop date for referral of historic complaints to the BBRS. Further, there is a lacuna with the applicable timeframes for the schemes: General Scheme applies to acts or omissions post 1 April 2019; Historical Scheme applies to acts or omissions pre 1 April 2019, but only where a complaint has been made in that period: gap where act or omission took place pre 1 April 2019 but no complaint was made before then, e.g., an act / omission on 30 March 2019 would not be covered). 3 yr / 6 yr limitation period is also potentially problematic for Historical Scheme.

- **Eligibility of shareholders / directors in insolvency** – Banks consider an authorisation process to directors / shareholders on behalf of the company rather than assignment by IPs should be used to avoid the risk of claims being assigned to individuals that were not the business that suffered the loss at the time and issues of insolvency priorities being overridden. This should be subject to exceptional circumstances, i.e., where an assignment is the only mechanism which will allow the complaint to be referred to the BBRS (e.g., if IP refuses to bring a complaint or refuses to allow director / shareholder to bring a complaint on behalf of the company)

- **BBRS** makes no real comment other than to say that authorisation v assignment should be discussed through the Legal Trinity.

- **OC preliminary comments:** discussions have already been had with AG around the question of authorisation v assignment to directors / shareholders by IPs (the Banks do not appear to have fully articulated their fundamental objection to assignments, although AG admitted that they had not considered assignments in any detail when we spoke to them). The question of authorisation v assignment is a legal issue and needs further discussion. No consideration has yet been taken of the numerous practical points that have already been raised by us in the insolvency context, although the Banks are proposing to provide further clarification through detailed review of the various policy documents / Scheme Rules. No proposal has yet been made as to how to get redress to those individuals who have been impacted by Banks' behaviour where the loss has been suffered by the (insolvent) company (as opposed to individually)

- **Banking confidentiality / disclosure issues for dissolved companies** - Banks are taking advice.

- **BBRS** makes no comment

- **OC preliminary comments:** discussions have already been had with AG around this point. Banking confidentiality is a legal issue (which we believe, like the BBRS, not to be an issue) and needs further discussion. The Banks have yet to provide the proposed "shopping list" of documents they would (subject to consent etc) be prepared to provide as standard or how else they would ensure proper disclosure of relevant documents to the BBRS.

- **Awards for dissolved companies** - The Bank's response here surprised me and appears to be a retraction of positions previously articulated? Specifically, the Banks do not agree that, where dissolved companies cannot be restored, award monies should be paid bona vacantia. Further, Banks do not agree that awards should be made to dissolved companies even if they can be restored (given the practical difficulties, the time / pause that would be needed and costs of doing so), although they seem to accept that awards could be made if dissolved companies are in fact restored. Banks would be willing to consider awards to dissolved companies being directed to be paid to registered UK charities.

- **BBRS** makes no real comment.

- **OC preliminary comments:** Paying to charities is a non-starter. Not paying awards to dissolved companies at all is also a non-starter, in the absence of proposals to properly compensate the individuals affected.
  
- **Consequential loss / awards to directors / shareholders (including D&I) more generally** – Bank proposals to follow, including comments on the Scheme Rules and policy documents.
  - **BBRS** makes no real comment
  
  - **OC preliminary comments:** Nothing really to add at this point. But we note that the current draft of the Consequential Loss policy is far too legalistic and applies a strict legal approach to the burden (and standard) of proof and reasonably foreseeability, which is not applied by the FOS, which makes awards on the basis of what is fair and reasonable in all the circumstances "*taking account of relevant law*".
  
- **Appeals** – Bank proposals to follow, but the Banks want a "formal" appeals process ala FOS.
  - **BBRS** wants a more informal appeals process.
  
  - **OC preliminary comments:** Do we have a view? The important point is that the BBRS should have the flexibility to reach a fair and reasonable outcome. How it gets there is less important.

Kind regards

Rachel

**Rachel Couter**

Partner

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**10/09/2020 Draft Scheme Rules altered without SME consultation ‘OR’ becomes ‘AND’**

- 1 Following are extracts from two versions of BBRS Draft Scheme Rules which run to 67 pages in total. The extracts show a simple but virtually undetectable
- 2 alteration of one word to the ‘eligibility’ rules made a significant difference to the ‘eligibility’ criteria. The alteration was not discussed with the SME
- 3 Stakeholders or at ISG. The alteration was ‘OR’ became ‘AND’ see pages 7 and 8 below with a single question to the BBRS Executive at page :

| 10/09/2020 Draft Scheme Rules |   | 05/02/2021 Draft Scheme Rules                     |  |
|-------------------------------|---|---|--|
| <b>EL 5</b>                   | The Historical Scheme Conditions are:   | <b>EL 2 The Historical Scheme Conditions are:</b> |  |
| (1)                           | Subject to (2),   | (1)Subject to (2),                                |  |
| (a)                           | The person making the Complaint to the BBRS must be a Complainant;                      | (a)   | The person making the Complaint to BBRS must be a Complainant; |
| (b)                           | The person dealing with the BBRS on behalf of that Complainant must be Duly Authorised; |   |  |

|     |   |     |  |
|-----|---|-----|--|
| (c) | The Complaint must relate to a Banking Service;   | (b) | The person dealing with BBRS on behalf of that Complainant must be Duly Authorised;  |
| (d) | The Complaint must not relate to, or have been eligible for consideration under, an Excluded Scheme (whether or not the Complaint was actually considered under it);  | (c) | The Complaint must relate to a Banking Service;  |
|     |   | (d) | Subject to (e), the Complaint must not relate to, or have been eligible for consideration under, an Excluded Scheme (whether or not the Complaint was actually considered under it); |
|     |   |     |  |
| (e) | The Complainant must have started the Complaint at the BBRS in accordance with these Scheme Rules on or before [GO LIVE + 2 YEARS]  |     |  |
| (f) | The Complaint must relate to an act or omission of a Respondent or a Predecessor Firm that occurred between 1 December 2001 and 31 March 2019.  |     |  |
| (g) | The Complainant must have brought a complaint about that same act or omission to the relevant Respondent or Predecessor Firm between 1 December 2001 and 30 September 2019, and within the time limits set out in [EC2(2)]. |     |  |

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|  | (e)  | Condition EL 2(1)(d) alone will not prevent BBRS from considering a Complaint where:  |
|  | (i)  | the Complainant complains only of distress or inconvenience caused by poor quality customer care whilst their matter was being dealt with by the Excluded Scheme; or  |
|  | (ii) | BBRS has received a Complaint, part of which relates to an Excluded Scheme and part of which does not. In this case, condition (d) alone will not prevent BBRS from considering that part of the Complaint which does not relate to an Excluded Scheme. |
|  | (f)  | The Complainant must have registered the Complaint with the BBRS in accordance with these Scheme Rules on or before <b>[DATE TO FOLLOW: GO LIVE + 2 YEARS]</b> ;  |
|  | (g)  | The Complaint must relate to an act or omission of a Respondent that occurred between 1 December 2001 and 31 March 2019;  |
|  |      |   |

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|-------|--|---|
| (h)   | <b>The Complainant:</b>  |   |
|       | (i)  | must not have been eligible to complain about that same act or omission to the FOS at any time (whether or not the complaint has been referred to the FOS, and whether or not the FOS has issued any decision in relation to it); |
|       | (ii)   | must not be in Relevant Litigation with the Respondent or Predecessor Firm;   |
| (iii) | must not have settled a complaint about that same act or omission in the past (for example by the Complainant accepting compensation from, or entering into a settlement agreement with, the relevant Participating Bank or Predecessor Firm). |   |

  

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| (h)  | The Complainant must have brought a complaint about that same act or omission to the relevant Respondent: |   |
| (i)  |   | for acts/omissions occurring on or before 1 <sup>st</sup> October 2017, by the earlier of 1 <sup>st</sup> April 2019 and the last day of the applicable period under <b>EL 2(2)</b> ; or  |
| (ii) |   | for acts/omissions occurring after 1 <sup>st</sup> October 2017 but before 1 <sup>st</sup> April 2019, before the expiry of 18 months following the day of the occurrence of those acts/ omissions;                               |
| (i)  | <b>The Complainant:</b>   |   |
| (i)  |   | must not have been eligible to complain about that same act or omission to the FOS at any time (whether or not the complaint has been referred to the FOS, and whether or not the FOS has issued any decision in relation to it); |
| (ii) |   | must not be in Relevant Litigation over the subject matter of the Complaint with the Respondent; and  |

|  |  |       |   |  |
|--|--|-------|---|--|
|  |  | (iii) | must not have settled a complaint about that same act or omission in the past (for example by the Complainant accepting compensation from, or entering into a settlement agreement with, the relevant Respondent);  |  |
|  |  | (j)   | <p>Except where the Complainant is a Recognised Assignee or Guarantor, the Complainant must have had, at the time the complaint mentioned in paragraph (h) was made to the Respondent, the financial characteristics set out in EL 3.</p> <p>(2)The Chief Adjudicator cannot consider a Complaint under the Historical Scheme if the Complainant brought the complaint mentioned in paragraph (h) to the Respondent more than:</p> <p>(a) six years after the act or omission complained of; or (if later)</p> <p>(b) three years from the date on which the Complainant became aware (or ought reasonably to have become aware) that it had cause for complaint,</p> <p>unless the Complainant referred the Complaint to the Respondent within that period and has a written acknowledgement or some other record of the complaint having been made, or in the view of the Chief Adjudicator</p> |  |

|     |  |  |
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|     |  | the failure to comply with these time limits was as a result of exceptional circumstances.   |
|     |  |  |
| (i) | The Complainant must have had, at the time the complaint mentioned in paragraph (g) was made to the Respondent or the Predecessor Firm:  | <p><b>EL 3</b> The financial characteristics mentioned at <b>EL 2(1)(j)</b> are:</p> <p>(1) If the Complaint mentioned in <b>EL 2(1)(h)</b> was made (or the contract to which the Complaint relates) on or before 31 October 2009:</p> <p>(a) where the Complainant is a sole trader or Business Organisation other than a trust or charity:</p> <p>(i) a group annual turnover of at least £1million but less than £6.5million;<br/>and</p> <p>(ii) a balance sheet total of less than £5million;</p> <p>(b) where the Complainant is a trust, a net asset value of at least £1million but less than £5million;</p> <p>(c) where the Complainant is a charity, an annual income of at least £1million but less than £6.5million;</p> <p>and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner</p> |
|     | (i) where the complaint was made on or before 31 October 2009, a group annual turnover of at least £1 million; <b>or</b>   |  |
|     | (ii) where the complaint was made on or after 1 November 2009, a turnover <b>OR</b> annual balance sheet of at least €2 million; and   |  |
|     | (iii) in either case a group annual turnover of less than £6.5 million; and  |  |
|     | (iv) total assets not exceeding £5 million,  |  |
|     | and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation). |  |

|   |   |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
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|   | enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).   |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
|   |   |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;"></td> <td style="width: 10%; text-align: center;">(ii)</td> <td>where the complaint was made on or after 1 November 2009, a turnover or annual balance sheet of at least €2 million; and</td> </tr> <tr> <td></td> <td style="text-align: center;">(iii)</td> <td>in either case a group annual turnover of less than £6.5 million; and</td> </tr> <tr> <td></td> <td style="text-align: center;">(iv)</td> <td>total assets not exceeding £5 million,</td> </tr> <tr> <td colspan="3">and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).</td> </tr> </table> |   | (ii)   | where the complaint was made on or after 1 November 2009, a turnover or annual balance sheet of at least €2 million; and |  | (iii) | in either case a group annual turnover of less than £6.5 million; and |  | (iv) | total assets not exceeding £5 million, | and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation). |  |  | <p>(2) If the Complaint mentioned in <b>EL 2(1)(h)</b> was made on or after 1 November 2009:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">(a)</td> <td colspan="2">where the Complainant is a sole trader or Business Organisation other than a trust or charity:</td> </tr> <tr> <td></td> <td style="width: 5%; text-align: center;">(i)</td> <td>either employs 10 or more persons or has a turnover and annual balance sheet each of over €2million;</td> </tr> <tr> <td></td> <td style="text-align: center;">(ii)</td> <td>the annual turnover must be less than £6.5million; and</td> </tr> <tr> <td></td> <td style="text-align: center;">(iii)</td> <td>the balance sheet must be less than £5million;</td> </tr> <tr> <td style="text-align: center;">(b)</td> <td colspan="2">where the Complainant is a trust, a net asset value of at least £1million but less than £5million;</td> </tr> <tr> <td style="text-align: center;">(c)</td> <td colspan="2">where the Complainant is a charity, an annual income of at least £1million but less than £6.5million.</td> </tr> </table> | (a) | where the Complainant is a sole trader or Business Organisation other than a trust or charity: |  |  | (i) | either employs 10 or more persons or has a turnover and annual balance sheet each of over €2million; |  | (ii) | the annual turnover must be less than £6.5million; and |  | (iii) | the balance sheet must be less than £5million; | (b) | where the Complainant is a trust, a net asset value of at least £1million but less than £5million; |  | (c) | where the Complainant is a charity, an annual income of at least £1million but less than £6.5million. |  |  |
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|   | (iii)   | in either case a group annual turnover of less than £6.5 million; and  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
|   | (iv)  | total assets not exceeding £5 million,   |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).  |   |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| (a)   | where the Complainant is a sole trader or Business Organisation other than a trust or charity:        |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
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|   | (ii)  | the annual turnover must be less than £6.5million; and   |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
|   | (iii)   | the balance sheet must be less than £5million;   |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| (b)   | where the Complainant is a trust, a net asset value of at least £1million but less than £5million;    |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| (c)   | where the Complainant is a charity, an annual income of at least £1million but less than £6.5million. |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |
| <p style="background-color: #00FF00; display: inline-block; padding: 5px;"><b>Repeated with emphasis</b></p>  |   |  |  |  |       |   |  |      |  |  |  |  |  |     |  |  |  |     |  |  |      |  |  |       |  |     |  |  |     |   |  |  |

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| <table border="1"> <tr> <td data-bbox="203 523 315 692">(ii)</td> <td data-bbox="315 523 1034 692">where the complaint was made on or after 1 November 2009, a turnover <b>or</b> annual balance sheet of at least €2 million; and</td> </tr> <tr> <td data-bbox="203 692 315 831">(iii)</td> <td data-bbox="315 692 1034 831">in either case a group annual turnover of less than £6.5 million; <b>and</b></td> </tr> <tr> <td data-bbox="203 831 315 900">(iv)</td> <td data-bbox="315 831 1034 900"><b>total assets</b> not exceeding £5 million,</td> </tr> <tr> <td colspan="2" data-bbox="203 900 1034 1145">and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).</td> </tr> </table> | (ii)  | where the complaint was made on or after 1 November 2009, a turnover <b>or</b> annual balance sheet of at least €2 million; and | (iii) | in either case a group annual turnover of less than £6.5 million; <b>and</b> | (iv) | <b>total assets</b> not exceeding £5 million, | and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation). |  | <p>(2) If the Complaint mentioned in <b>EL 2(1)(h)</b> was made on or after 1 November 2009:</p> <table border="1"> <tr> <td data-bbox="1167 421 1294 560">(a)</td> <td data-bbox="1294 421 1899 560">where the Complainant is a sole trader or Business Organisation other than a trust or charity:</td> </tr> <tr> <td data-bbox="1167 560 1294 730">(i)</td> <td data-bbox="1294 560 1899 730">either employs 10 or more persons <b>or</b> has a turnover <b>and</b> annual balance sheet each of over €2million;</td> </tr> <tr> <td data-bbox="1167 730 1294 869">(ii)</td> <td data-bbox="1294 730 1899 869">the annual turnover must be less than £6.5million; <b>and</b></td> </tr> <tr> <td data-bbox="1167 869 1294 975">(iii)</td> <td data-bbox="1294 869 1899 975"><b>the balance sheet</b> must be less than £5million;</td> </tr> <tr> <td data-bbox="1167 975 1294 1114">(b)</td> <td data-bbox="1294 975 1899 1114">where the Complainant is a trust, a net asset value of at least £1million but less than £5million;</td> </tr> <tr> <td data-bbox="1167 1114 1294 1257">(c)</td> <td data-bbox="1294 1114 1899 1257">where the Complainant is a charity, an annual income of at least £1million but less than £6.5million.</td> </tr> </table> | (a) | where the Complainant is a sole trader or Business Organisation other than a trust or charity: | (i) | either employs 10 or more persons <b>or</b> has a turnover <b>and</b> annual balance sheet each of over €2million; | (ii) | the annual turnover must be less than £6.5million; <b>and</b> | (iii) | <b>the balance sheet</b> must be less than £5million; | (b) | where the Complainant is a trust, a net asset value of at least £1million but less than £5million; | (c) | where the Complainant is a charity, an annual income of at least £1million but less than £6.5million. |
| (ii)  | where the complaint was made on or after 1 November 2009, a turnover <b>or</b> annual balance sheet of at least €2 million; and |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (iii)   | in either case a group annual turnover of less than £6.5 million; <b>and</b>  |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (iv)  | <b>total assets</b> not exceeding £5 million,   |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).  |   |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (a)   | where the Complainant is a sole trader or Business Organisation other than a trust or charity:                                  |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (i)   | either employs 10 or more persons <b>or</b> has a turnover <b>and</b> annual balance sheet each of over €2million;              |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (ii)  | the annual turnover must be less than £6.5million; <b>and</b>   |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (iii)   | <b>the balance sheet</b> must be less than £5million;   |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (b)   | where the Complainant is a trust, a net asset value of at least £1million but less than £5million;                              |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| (c)   | where the Complainant is a charity, an annual income of at least £1million but less than £6.5million.                           |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |
| <p><a href="https://thebbrs.org/general-criteria/historical-scheme/">https://thebbrs.org/general-criteria/historical-scheme/</a></p>  |   |   |       |  |      |   |  |  |  |     |  |     |  |      |   |       |   |     |  |     |   |

In order to be eligible for our Historical Scheme, your business must meet the following financial criteria:

| Date   | Businesses (sole trader, company, partnership, friendly or other co-operative society) | Charities  | Trusts  |
|--|--|--|---|
| Complaint made to Bank between 1 December 2001 and 31 October 2009 | Annual turnover: At least £1 million but less than £6.5 million                        | Balance Sheet: Less than £5 million**                          | Annual income of at least £1 million but less than £6.5 million |
| Complaint made to Bank between 1 November 2009 and 31 March 2019   | Annual turnover: More than €2 million but less than £6.5 million*                      | Balance Sheet: More than €2 million but less than £5 million** | Net asset value of at least £1 million but less than £5 million |

\* Businesses who made complaints on or after 1 November 2009 with a turnover or annual balance sheet not exceeding €2 million may also be eligible if they employed 10 or more persons.

4 Comments and Question:

- 5 • There was no discussion between BBRS and the SME reps or any notice from Osbourne Clarke, that the €2M Turnover OR Annual Balance  
6 sheet for the complaints after 01/11/2009 BBRS eligibility criteria had been changed to AND.
- 7 • I have checked all my records and there is absolutely nothing mentioned anywhere.
- 8 • The BBRS cannot claim that SME Reps agreed to this pivotal change in the eligibility criteria on that basis that it was changed without  
9 notification or further discussion and the SME Reps did not notice the change within the 67 pages of scheme rules issued shortly before the  
10 final ISG meeting.

11 Question to BBRS Executive:

- 12 • Were there discussions within any BBRS 'working group' about the amendment of the following Draft Scheme rules (67 pages) from i.e. the  
13 'OR' which was acceptable, to 'AND' which was/is definitely unacceptable and which rules out 'eligibility' for most if not all complainants  
14 from 1<sup>st</sup> November 2009 onwards?

| 10/09/2020 Draft Scheme Rules |   | 05/02/2021 Draft Scheme Rules  |  |
|-------------------------------|---|--|--|
|                               |   | (2) If the Complaint mentioned in EL 2(1)(h) was made on or after 1 November 2009:                       |  |
|                               | (ii) where the complaint was made on or after 1 November 2009, a turnover or annual balance sheet of at least €2 million; and | (a) where the Complainant is a sole trader or Business Organisation other than a trust or charity:       |  |
|                               | (iii) in either case a group annual turnover of less than £6.5 million; and   | (i) either employs 10 or more persons or has a turnover and annual balance sheet each of over €2million; |  |
|                               | (iv) total assets not exceeding £5 million,   | (ii) the annual turnover must be less than £6.5million; and  |  |

|   |  |       |   |
|---|--|-------|---|
| <p>and in determining whether these criteria are met, the Chief Adjudicator will apply Articles 3 and 6 of the Annex to the Micro-enterprise Recommendation, taking into account in particular the Complainant's 'partner enterprises' or 'linked enterprises' (as those are defined in the Micro-enterprise Recommendation).</p> |  | (iii) | the balance sheet must be less than £5million;  |
|   |  | (b)   | where the Complainant is a trust, a net asset value of at least £1million but less than £5million;    |
|   |  | (c)   | where the Complainant is a charity, an annual income of at least £1million but less than £6.5million. |

15



Date: 31/01/2023

To: BBRs

SME Alliance  
 White Horse Stables  
 High Street  
 Stetchworth  
 Newmarket  
 CB8 9TJ  
 Contact: Andy Keats  
 Mobile: 07787 800 436  
 Email: andy.k.smealliance@gmail.com

## BBRS Data figures Nov 2022

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1 <https://thebbrs.org/news/bbrs-reporting-data-as-of-the-close-of-business-30-november-2022/>

2 **Historic cases 515**

3 **Contemporary cases 182**

4 Unestablished date of complaint 188

5 Total cases 885

6 <https://thebbrs.org/news/bbrs-reporting-data-as-of-the-close-of-business-30-november-2022/>

7 • 885-185 = 697

8 • 74% historic

9 • 26% Contemporary

10 • Total= 100%

|              |            |
|--------------|------------|
| <b>Total</b> | <b>885</b> |
|--------------|------------|

13

|                     |            |            |
|---------------------|------------|------------|
| Live <sup>1</sup>   | 88         | 98         |
| Closed <sup>2</sup> | 797        | 775        |
| <b>Total</b>        | <b>885</b> | <b>873</b> |

- 14 •  $797 \times 74\% = 590$  Historic cases closed
- 15 •  $797 \times 26\% = 207$  Contemporary cases closed
- 16 • = total 797

|   |     |
|---|-----|
| Closed cases ineligible <sup>3</sup>              | 132 |
| Closed cases eligible <sup>4</sup>                | 9   |
| Closed cases non-eligibility reasons <sup>5</sup> | 656 |

- 17 1. As eligibility is under review throughout the entire BBRS process, most live cases  
18 appear in this category.
- 19 2. The number of cases found to be ineligible and remaining live, because the customer  
20 or bank may be appealing, they might be being considered for the concessionary case  
21 approach or pending closure.
- 22 3. The number of cases found to be ineligible for the BBRS through formal Eligibility  
23 Assessments that have completed their journey (i.e. the outcome can no longer be  
24 appealed).
- 25 4. The number of cases found to be eligible for the BBRS through formal Eligibility  
26 Assessments that have completed their journey (i.e. the outcome can no longer be  
27 appealed). Eligible cases that did not require a formal Eligibility Assessment are not  
28 in this category.
- 29 5. The number of cases that have completed their journey for reasons unrelated to  
30 eligibility.

31 **Note:**

32 The reference 4 appears to be meaningless. As far as I understand it, all cases have to be  
33 deemed eligible or ineligible i.e. there cannot be cases that do not require a formal eligibility  
34 assessment and yet are deemed eligible.

- 35 4. The number of cases found to be eligible for the BBRS through formal Eligibility  
36 Assessments that have completed their journey (i.e. the outcome can no longer be  
37 appealed). Eligible cases that did not require a formal Eligibility Assessment are not  
38 in this category.

39 **Historic cases**

- 40 • Historic cases eligible and closed =  $9 \times 74\% = 7$
- 41 • Historic cases closed 'ineligible' =  $132 \times 74\% = 98$
- 42 • Historic cases closed for other reasons e.g. 'Dismissal' =  $656 \times 74\% = 485$
- 43 • Total: 590.

44 **Contemporary cases**

- 45 • Contemporary cases eligible and closed =  $9 * 26\% = 2$
- 46 • Contemporary cases closed 'ineligible' =  $132 * 26\% = 35$
- 47 • Contemporary cases closed for other reasons =  $656 * 26\% = 170$
- 48 • Total: 207.



Date: 31/01/2023

To: BBRs

SME Alliance  
White Horse Stables  
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Email: andy.k.smealliance@gmail.com

## 27/01/2023 BBRs statements concerning the number of eligible historic complainants

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1 **Friday 27/01/2023 BBRs emailed the TTX as follows:**

- 2 1) *You suggest the BBRs's central purpose is to handle fairly a meaningful*  
3 *number of cases and you point to the original estimate that 60,000 cases*  
4 *were in scope.*
- 5 2) *PIR 2 found that original assumptions about the number and complexity*  
6 *of cases had been overestimated, as the BBRs team has long asserted.*
- 7 3) Indeed, research we commissioned more recently from Bayes Business  
8 School found there **are only 14,000 eligible cases**
- 9 4) **of which we could expect to see 1,200 - 1,400 register with the BBRs.**

10  
11 16/06/2020 Lewis-Shand Smith said in BBRs seminar:

12  
13 *"I think, if I can also come in on the historical scheme. Looking at the kind of*  
14 *numbers of cases historically as well. On the best information we have, we*  
15 *think there are probably round about 60,000 eligible cases and again from*  
16 *experience, we know that in ombudsman ADR type schemes, that they*  
17 *traditionally or typically see round about 10 per cent of eligible cases, which*  
18 *would mean 6,000 historical cases. I think it will be more than that, because of*  
19 *the levels of cash, the levels of money and the kind and the level of distress as*  
20 *well that has happened for so many people. I think the kind of quantity*  
21 *involved, in terms of the detriment, but also the kind of detriment in terms of*

22 *what people have gone through over those years, I think we will see it at a*  
 23 *higher percentage than that 10 per cent."*

24 Notes:

25 1) The Chancellor's 19/01/2019 directive was that a meaningful number of cases are resolved.  
 26 That is very different to 'handle fairly', a meaningful number of cases.

However, I do of course expect the backward-looking scheme to carefully consider the merits of taking forward work on each case presented to it by a business. I would therefore appreciate reassurance that you will work with the banks, and those running the scheme, to ensure that each case that a business seeks to bring to the scheme is considered properly and carefully.

If it transpires that the scheme is not bringing resolution to a meaningful number of complaints, and as such is not going to achieve its objective of bringing closure to past complaints, then I would expect there to be further discussions around the scope of and eligibility for the backward-looking scheme. I do not, however, wish to prejudge the outcome of the scheme, and therefore look forward to receiving further updates on this point once the scheme is operational.

27

28 The bank's, UK Finance, Lewis Shand-Smith and the BBRS have all claimed that somewhere there  
 29 are 60,000 eligible historic complaints.

30 July 2020 I wrote a report which strongly suggested there could only be 600 – 1,000 Historic  
 31 Complaints which were not already excluded because they were IRHP complaints or had been  
 32 subjected to an excluded 'independent scheme' GRG etc.

33 August 2020 the BBRS engaged 2 x analysts who dismissed my claims entirely and the 60,000  
 34 figure went forward.

35 The complexity of cases is a fascinating pivot on what has gone before. During the BBRS set-up  
 36 The SMEA and APPG insisted that historic complaints were complex in nature. The bank's and  
 37 BBRS insisted they were simple and in the first instance each case was estimated to take 1.8 days  
 38 to resolve. I said more like 1.8 years and that is more likely the case with my complaint being in  
 39 eligibility stage for 21 months before being dismissed without considering the merits of the case!  
 40 (a couple of evidence and counsel opinion misrepresentations follow).

41 It is interesting that the BBRS now claims historic cases are not complex, inferring the BBRS  
 42 thought they would be.

43 This simply assists the BBRS and bank narrative that a meaningful number of cases have been  
 44 'handled fairly' i.e. found to be ineligible for BBRS review and that they are non-complex which  
 45 dumbs down gross banking malpractice to nothing to see here.

46 The most important point is that the BBRS has instructed the following:

47 5) Indeed, research we commissioned more recently from Bayes Business  
 48 School found there **are only 14,000 eligible cases**

49 6) of which we could expect to see 1,200 - 1,400 register with the BBRS.

50

51 **QUESTIONS THAT REQUIRE AN ANSWER:**

- 52
- What terms of reference were Bayes business School given by BBRS?

53 **How did Bayes Business School achieve the following:**

- 54
- Understand whether bank complaints were unresolved?
- 55
- Understand when the business first complained to the bank?
- 56
- Understand the Turnover and Gross assets of the complainant businesses at the time of
- 57
- complaint?

58 This, I suggest is all total nonsense that has to be uncovered.

59 The reality, I suggest, is that Bayes Business School undertook some research to discover how  
60 many SME's complained to banks during a set period and then applied some logic to determine  
61 the number of possible unresolved complaints. If I am correct this is useless for determining  
62 BBRS eligibility.

- 63
- Why did the Bayes Business School believe that only 8-10% of the 14,000 identified SME
- 64
- eligible complainants would register with the BBRS? (Bearing in mind that most of the
- 65
- complainants claim they lost their business as a result of bank malpractice!)
- 66
- BBRS is silent on this important point.

67 The reality is there are only 7 complainants that registered with the BBRS that are eligible for  
68 Review according to the BBRS November 2023 data.

- 69
- So where are the missing 13,993 eligible complaints?

70 The other reality is that circa 590 historic complainants registered with the BBRS and one by one  
71 they have all been deemed 'ineligible for review' for one reason or another.72 In my case, and my business partner Romek is on the call too, the BBRS claims that although the  
73 complaints were made to RBS, about RBS conduct, RBS did not provide the Banking Services, its  
74 wholly owned unregulated technology subsidiary WorldPay Ltd did! On that basis BBRS cannot  
75 investigate because the complaints have to arise from Banking Services provided by the bank!76 BBRS's Greg Barham has had to resort to misrepresenting our evidence and counsel opinion to  
77 conclude as he has and two examples of this follow.