



## Fair Business Banking

### Statement from the All-Party Parliamentary Group on Fair Business Banking

30 November 2018

#### UK Finance Response to the Walker Review

UK Finance have released their response to the Walker Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market. The APPG appreciates their response and welcomes the dialogue that it generates. We will continue to contribute to the dialogue and help shape the rules and processes of the dispute resolution systems proposed. However, we have a number of crucial concerns, outlined below, which must be addressed before we can move forward.

#### Extension of the FOS and a Voluntary Extended ADR Mechanism

As any scheme will take time to set up, we would encourage the banks to open their internal complaints processes to complainants with a view to potentially resolving complaints faster.

##### *We Support:*

The principle of an extended FOS, but only if it is an entirely new, business focused unit that carries none of the baggage from the issues highlighted by the Richard Lloyd Review and the Treasury Select Committee (TSC).

##### *Our Concerns:*

It is misleading to suggest that the FOS currently has a robust and respected mechanism to resolve complaints. The response from UK Finance incorrectly states that the FOS has the powers to disclose information from the banks. The Treasury Select Committee concluded in their *SME Finance* inquiry<sup>1</sup> that "*the Ombudsman's powers and procedures are unlikely to be appropriate for the resolution of large and complex cases. The Ombudsman lacks the power to take evidence under oath, compel the attendance of witnesses, or test evidence by cross-examination.*"

We therefore believe that those who have previously gone to the FOS were not afforded the skill and capability required to determine their case fairly and accurately, and should therefore be eligible for any historic scheme.

#### Eligibility for Historic Cases

##### *We support:*

The inclusion of guarantors as eligible complainants. The acknowledgment that shareholders/directors of insolvent companies need to have the right to bring a claim and that this must still be addressed.

##### *Our Concerns:*

<sup>1</sup> House of Commons Treasury Committee, SME Finance Inquiry, October 2018

The APPG will not accept limiting the historic scheme to complaints from 1<sup>st</sup> January 2008 onwards. This will exclude the mis-sale of swaps prior to this date and will therefore exclude a large number of potential claimants who have previously been excluded from any independent redress.

The APPG has made it clear that the Griggs review is not fit for purpose, and that the victims of the HBOS Reading fraud require truly independent arbitration. The APPG has also consistently expressed its concerns over the construction and creation of the FCA's IRHP scheme and RBS's GRG scheme. Similarly, we have expressed our concerns on many occasions over the capability and knowledge of the FOS to decide complex business banking cases. We therefore cannot accept a scheme so limited in scope as to not include claimants from the above schemes.

The APPG is clear that any historic compensation scheme must allow the directors and shareholders of insolvent businesses the ability to bring claims. Although the businesses may have gone through a process and accepted a claim, this may have been brought by an Insolvency Practitioner who refused to assign on or pursue a claim, to the detriment of the directors and shareholders. We acknowledge that this has been touched upon by UK Finance, but we are very clear that we are speaking on behalf of directors and shareholders of insolvent businesses who have been denied justice and must be included in any historic scheme.

*Our Solutions:*

We will be willing to engage with financial institutions as part of a Steering Group if there is scope within that Steering Group for a fact-based discussion over the eligibility requirements of a historic scheme and we accept that this may include bilateral/trilateral talks with financial institutions.

Furthermore, businesses that have gone through court processes but with new evidence should be eligible for the historic scheme. In cases where debt has been sold on to a third party, if the claim originates with the original bank then the individual must have the right to bring a claim against the original bank.

**Award Limits for Historic Cases**

*Our Concerns:*

UK Finance's proposals include a variation in the claim limit between the historic and prospective schemes. The prospective scheme will have a binding award limit of £600,000, whereas the retrospective scheme will have an award limit of £350,000. This is unacceptable as it would ensure that all the cases the APPG deal with, and all the cases raised in debates in the past, will fall outside of this claim limit. In fact, the APPG sees UK Finance's proposals as a step-backwards from the Walker report, which does not mention a limit to the award level for historic cases.

The proposals presented by UK Finance will leave the courts as the only appeal mechanism for complainants. This will put us back to square one, as the courts are inaccessible to all but the very largest businesses and decisions will not be determined on a 'fair and reasonable' basis.

*Our Solutions:*

The binding award limit should be raised to £600,000 in line with the prospective proposals.

The APPG proposes that an independent arbitration mechanism, modelled on a tribunal, should be used as an appeal mechanism.

The basis of decisions within this tribunal should be as in our proposals<sup>2</sup> and financial institutions must agree to voluntarily extend the principles of S138d of the Financial Services and Markets Act (FSMA) to ensure claims are decided on a ‘fair and reasonable’ basis.

### **Governance**

*We support:*

The creation of a steering committee with representative and technical expertise to create an independent model for compensation.

*Our Concerns:*

The APPG is concerned at the structure of the Independent DRS Implementation Steering Group, as there is over-representation by financial institutions, who are in greater numbers than those organisations representing businesses. This is a danger as UK Finance’s proposals suggest that “*should consensus not be possible, decisions will be taken on a majority basis.*”

In its proposed structure, the Steering Group will be biased in favour of financial institutions and the APPG will therefore be denied a meaningful vote on contentious issues. The Chair can also terminate the Steering Group if s/he considers it is not working effectively or meeting its objectives, and the Chair is to be appointed by the banks.

*Our Solutions:*

The imbalance of representation within the Steering Group can be rectified if the financial industry had one vote between them, or if they were represented collectively by UK Finance.

The Chair must be appointed by a representative committee that includes the APPG and business representatives. The APPG must also be part of the independent board of directors for the Dispute Resolution Service, alongside the FSB and the British Chambers of Commerce.

### **The Remaining Gap for Prospective Dispute Resolution**

*Our Concerns:*

The numbers presented in the report are misleading. In relation to the prospective scheme, UK Finance claim that 99.5% of business will now be covered by the prospective dispute resolution mechanism. This figure is skewed by a large number of small businesses, and does not take into account the size of a claim nor the fact that those businesses that are not represented by the prospective mechanism employ 52% of employees and generate 64% of revenue<sup>3</sup>.

Furthermore, the FCA’s consultation on SME Access to the FOS<sup>4</sup> clearly states that a new limit of £600,000 **would still exclude 41% of complainants** who would have claims above £600,000. This gap in the redress landscape will need to be filled. For the avoidance of doubt, no cases that the APPG has seen would be helped by this limit.

The APPG has put forward proposals for a Financial Services Tribunal, which has support from the FCA, the Treasury Select Committee, the Small Business Commissioner, TSB and Metro Bank. These proposals will fill the gap in accessing justice for businesses in the UK and will increase accountability

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<sup>2</sup> Kevin Hollinrake MP, Fair Business Banking for All, July 2018.

<sup>3</sup> Department for BEIS, Business Population Estimates for the UK and Regions 2018, October 2018.

<sup>4</sup> FCA, Consultation on SME access to the Financial Ombudsman Service and Feedback to DP15/7: SMEs as Users of Financial Services, January 2018.

in the largely unregulated business lending market. UK Finance have not explained in this response why they do not believe our proposals for a tribunal will generate a satisfactory outcome for businesses in the UK.

In particular, the basis of decisions in the tribunal proposals, from an amendment to S138d, would effectively allow for decisions to be made on a ‘fair and reasonable basis’, and that decisions would need to take account of voluntary codes of conduct. In 2015 Ireland extended similar regulatory protections to businesses. Data from the Central Bank of Ireland shows that introducing regulation into the SME lending market does not curb lending. Indeed, it has been rapidly increasing over recent years<sup>5</sup>. Further information on lending in Ireland can be found at the bottom of this document.

UK Finance’s proposals are also voluntary. There are no legislative requirements for financial institution to sign up to their proposed prospective scheme and therefore it is unlikely to capture unregulated entities.

For further details of the APPG’s position, please see the extended position statement below.

**Co-Chairs:**

Kevin Hollinrake MP and the Rt Hon Norman Lamb MP

**Vice-Chairs:**

The Earl of Lindsay, Lord Cromwell, the Rt Hon Sammy Wilson MP, Dr Lisa Cameron MP, Martin Whitfield MP, Luke Graham MP and Stephen Kerr MP

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*An All- Party Parliamentary Group (APPG) is an interest group that occupies a strategic and effective position within Parliament. It is cross-party, with a minimum number of parliamentarians from the Government and the official opposition, and cross-house, made up of both peers and MPs. The APPG on Fair Business Banking is a platform through which businesses, professionals and trade bodies can discuss issues regarding commercial banking and its role in the life cycle of a business, and through which parliamentarians can access information on banking, finance and related issues, including business rescue and insolvency, on behalf of constituents. As a cross-party group, the APPG is an effective vehicle to effect meaningful change via the Parliamentary system. The Group’s status is that of an APPG is bound by the rules set out by [The Office of the Parliamentary Commissioner for Standards](#). It does not have charitable status, or official status in the House, nor is it funded by Parliament. It relies wholly on the participation and contribution of parliamentarians, industry members and stakeholders committed to creating a strong platform for business in the UK to thrive. The APPG is co-ordinated and administered via the APPG on Fair Business Banking Secretariat.*

<sup>5</sup> Central Bank of Ireland, SME Market Report, August 2018



## Fair Business Banking

Position Statement from the All-Party  
Parliamentary Group on Fair Business Banking  
Release: 14 November 2018

### Introduction

We have an opportunity to secure the future relationship between businesses and their lenders, and the decisions we take in these next months will define the landscape for businesses in the UK for years—even decades—to come. It is imperative that we get these next steps right, and that we don't wait for the next crisis to discover that we squandered this opportunity.

We maintain our position, supported by the FCA and the Treasury Select Committee (TSC), that both a robust tribunal **and** an extended ombudsman are required and are complementary. This has overwhelming cross-party support in the House.

We would be foolish and naïve to say that abuses of power will never occur again and we agree with the TSC that it would be reckless and irresponsible to ignore the overwhelming evidence that confronts us at this point in time. Parliamentarians and Government have a critical role to play in providing a comprehensive solution for the future. Let's not forget [the National Audit Office reports that UK taxpayers](#) provided over £1.1 trillion in support to UK banks, including £532 billion to recapitalise Lloyds and RBS and £106 billion to nationalise Northern Rock and Bradford and Bingley. Some banks have used taxpayers' money to fight legal cases when they know that they have done wrong but that their victims do not have the resources to take them all the way through courts.

There are many difficult issues that simply will never be addressed by an ombudsman. Insolvent businesses, disputes with financial institutions that operate outside the regulatory perimeter and large and therefore complex claims. Over 90% of the cases the APPG sees have claim values greater than £600,000.

Crucially, it is time for industry to demonstrate to the country that it is not afraid of being held to account for its behaviour, and that it is committed to not just the rhetoric of social responsibility, but to action. We have been told many times since the financial crisis that 'things have changed'. If that is the case, then there is nothing to fear from a tribunal. This is about social responsibility, and the financial services industry must demonstrate leadership here. Confidence in the sector is of paramount importance, and this will not be achieved with institutions shirking from their responsibilities. We encourage them to step up to the plate and show the country they are ready to move forward.

It is only with the tackling of these issues and the introduction of a Financial Services Tribunal that businesses and the financial industry will be able to move forward and focus on what they do best: using capital, knowledge and experience to enable business development and economic prosperity.

Our greatest danger now is only extending the FOS, and ignoring the difficult disputes that would be dealt with by a tribunal.

The enclosed position statement from the APPG outlines a framework of proposals to deal with the following issues that pervade the business banking sector:

1. How to deal with the legacy cases where the individuals involved are yet to access justice that is fair and accessible.
2. How we can future-proof dispute resolution for businesses in the UK to ensure that future generations of entrepreneurs are protected from business banking abuses.

## **The APPG's Position:**

- This statement follows the release of reports into dispute resolution for businesses in the UK from the [Treasury Select Committee \(TSC\)](#), [Simon Walker](#), the [Financial Conduct Authority \(FCA\) Policy Statement PS18/21](#) and the APPG on Fair Business Banking's [Fair Business Banking for All](#) report.

The APPG maintains the position that we require a robust, judicial process for dispute resolution in the form of a tribunal. We are delighted that we have broad support from the TSC, the FCA, SME Alliance, the Small Business Commissioner, Federation of Small Businesses and individual financial institutions.

## **The key points are as follows:**

### **1. Extension of the Ombudsman**

- The APPG supports the expansion to the remit of an Ombudsman as proposed by both the [FCA](#) and in [Simon Walker's report](#).
- We endorse the evidence and recommendation in Simon Walker's "eligibility" proposal to increase the turnover threshold from £6.5m to £10.0m.
- The APPG supports the FCA's proposals<sup>6</sup> to create a separate, ring-fenced, specialist unit to handle complaints from SME customers. Any specialist unit that is set up must not be staffed by the current staff from the FOS. (Annex P.8) A clean break and fresh start are required. The FCA should place this unit within its own remit, separate from the FOS.
- The system must have the necessary specialist knowledge and skills to deal with more complex business banking cases and it needs to be supported by a panel of experts who can support SME complaints.
- We share the concerns of the TSC<sup>7</sup> and many others<sup>89</sup> that:
  - the ombudsman as it stands is not up to this job, and that the FOS does not currently command the confidence required to proceed with a new mandate. John Glen MP noted this in his TSC evidence session<sup>10</sup>.
  - The FOS has a track record of dubious decisions<sup>11</sup> and no appeal process.
  - Its powers are limited. For example, it cannot compel witnesses or insist on the disclosure of evidence. It is not equipped to deal with claims from the directors and shareholders of insolvent businesses.
  - The challenges of FOS restructuring after the drop in PPI claims next year will be substantive and we remained concerned about their ability to adequately scale up to effectively deal with business customers.
- The settlement limit of £350,000 (FCA) or £600,000 (Simon Walker) are below the level of compensation claims in around 90% of the cases we deal with. It is accepted that claims above

<sup>6</sup> [FCA, SME access to the Financial Ombudsman Service – near-final rules, p.15 Side Box, 16 October 2018](#)

<sup>7</sup> [Treasury Committee, SME Finance, paragraph 131-134, 26 October 2018](#)

<sup>8</sup> [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q369-375](#)

<sup>9</sup> [Treasury Committee, SME Finance, paragraph 92, 26 October 2018](#)

<sup>10</sup> [Treasury Committee, Oral Evidence: SME Finance, HC 805, Q297, 27 June 2018](#)

<sup>11</sup> [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q369-375](#)

this limit need to have a judicial basis for decisions<sup>12</sup><sup>13</sup>. Therefore, a Financial Services Tribunal is required to assess claims above this level.

## 2. Financial Services Tribunal

The APPG welcomes the public support of key stakeholders including the TSC, the FCA, SME Alliance, the FSB, TSB bank, Metro bank and the Small Business Commissioner.

The APPG has set out the key characteristics that a tribunal requires to be effective<sup>14</sup>. These include:

- The extension of s138D of FSMA (2000) to include limited companies and partnerships;
- All decisions taken through lens of any public promises/codes of conduct;
- Qualified one-way cost shifting;
- Inquisitorial powers;
- Panel professional advisors and system to assist with compilation of claims at point of entry and to filter egregious claims
- Access for shareholders/directors of insolvent companies

*(This will be set out in detail by the APPG in its comprehensive proposals for the framework of the Financial Services Tribunal).*

The introduction of a tribunal and an enhancement to the legal rights of SMEs will require legislative time, but as stated by the Treasury Select Committee “*there is strong cross-party support for the creation of a Financial Services Tribunal and the Government must not hesitate when it comes to bringing forward the appropriate legislation, even at a time when there may be other significant demands on parliamentary time*”.<sup>15</sup>

## 3. Restitution/Legacy Cases

Justice delayed is justice denied. It is now an accepted fact that the landscape of dispute resolution for businesses is fundamentally flawed and has been for decades. This has been taken advantage of by financial institutions and reached its peak during the aftermath of the financial crisis. The taxpayer bailed out institutions, and banks shored up their balance sheets on the back of the SMEs in this country. Businesses and the taxpayer kept institutions afloat whilst they were being pushed to the wall. It is only right that there is compensation for the pain and loss inflicted.

The APPG supports the following:

Construction:

- A steering committee of key stakeholders, including the APPG, is set up to identify all the parameters of the scheme, which must be 100% independent.
- The APPG is working on a detailed proposal for a voluntary, but legally binding, adjudication mechanism with the banks, based on a Financial Services Tribunal, that will provide a credible and fair method of dealing with the cases from the past and will also act as a pilot during the legislative time required to establish a tribunal. This will be available for stakeholder review after w/c 3<sup>rd</sup> December.

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<sup>12</sup> [Treasury Committee, RBS GRG and its treatment of SMEs Oral Evidence Session HC, Q192, 30 January 2018](#)

<sup>13</sup> [Treasury Committee, SME Finance Inquiry Oral Evidence Session HC805, Q387, 23 October 2018](#)

<sup>14</sup> [APPG on Fair Business Banking, Fair Business Banking for All, July 2018](#)

<sup>15</sup> [Treasury Committee, SME Finance, 26 October 2018](#)

- Banks are given a period of 6 months to process complaints through their normal complaints system. There will be no judge, jury and executioner internal redress schemes such as the Griggs Review and GRG Review.
- For those cases that are not resolved within this six month timeframe, there will be a duty of disclosure of documentation by the Banks, which will be in accordance with the legal Civil Procedure Rules (CPR) 31<sup>16</sup>, 31A<sup>17</sup> and 31B<sup>18</sup> and certified by the appropriate person under the [FCA's Senior Managers and Certification Regime \(SM&CR\)](#) and the case moves to independent dispute resolution.

### **Key Points**

A. Complaints are eligible from 1 May 1997 with “light touch” financial regulation AND for those SMEs which have a turnover of less than £10M (*as per Simon Walker’s recommendations rather than the £6.5M in PS18/21*) and below only one of either the headcount threshold of 50 employees or the balance sheet total threshold of £5m.

B. Claims are admissible from both solvent companies and companies made Insolvent by Banks. This includes any shareholders/directors of businesses that were insolvent and did not have their claims assigned on to them (in this case, the IP may have accepted redress that went back to the bank). This would also include businesses/shareholders /directors who have had debts sold on to third parties. Of particular note are CYBG and Ulster (RBS), who have sold their entire CRE portfolio to Cerberus.

The issue of insolvent businesses bringing claims was discussed in 2014 by Vince Cable when he was business secretary: "*We are now working on unresolved issues surrounding the mis-selling scandal, including how businesses have been forced to close because of the products the banks sold in the first place....This includes deciphering who will be able to help the businesses in administration, when their assets have been taken away from them, and who will be in charge of finding a solution for them. This hasn't been done before.*"<sup>19</sup> This issue has never been resolved, and the issues extend not only to IRHPs, but also to RBS GRG and any other situation where a company was made insolvent". This clearly requires a solution now.

C. A maximum compensation limit of £10M, except when it is unanimous view of all three members of the Financial Services Panel that a higher award is appropriate in an individual case and where the initial claim is supported by a forensic accounting submission to the Financial Services Tribunal.

D. Where a claim moves to “independent” dispute resolution, businesses/claimants which continue to trade with a claim of less than £600,000 have the choice of whether they proceed to a Financial Services Tribunal or the Ombudsman (*FCA: predicated on S228.2 – “fair and reasonable in all circumstances of the case” grounds*).

### **4. Data Collation**

- The APPG supports Simon Walker’s proposal for a real-time data collation system
- As the APPG supports both ombudsman and a tribunal, the system will require a single point of entry, with signposting to other options after that point based on individual cases

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<sup>16</sup> [Ministry of Justice, Civil Procedure Rules, Part 31](#)

<sup>17</sup> [Ministry of Justice, Civil Procedure Rules, Part 31a](#)

<sup>18</sup> [Ministry of Justice, Civil Procedure Rules, Part 31b](#)

<sup>19</sup> [International Business Times, Vince Cable mis-selling derivatives to SMEs: Vince Cable says scandal is ‘tip of iceberg’, 1 July 2014](#)

## **5. Public Inquiry/Truth and Reconciliation**

The primary issue faced by the APPG has been the treatment of businesses in distress. The cause of this distress was quite often the behaviour of banks or a direct result of the mis-selling. There have been no reforms to this system and it remains open to mis-use and abuse. It is imperative that there is a forensic examination of this eco-system with a full cross-departmental statutory public inquiry, which must include the input of the APPG in terms of parameters. The Inquiry will have a particular emphasis on:

- Triggers for financial distress and entry into turnaround units
- Creditor misconduct and the rights of shareholders and directors to challenge
- The role of LPA Receivers, Insolvency Practitioners, Solicitors, Valuers and conflict of interest including assignment of claims by IPs for actions against creditors and the use of gagging clauses
- Section 348 of FSMA 2000
- Sale of debt to 3<sup>rd</sup> parties
- The role of senior management in the malpractice.

Outcomes:

- Comprehensive industry standards for turnaround units with agreed gating factors
- Recommendations for insolvency reform, including the regulatory environment
- Recommendations for LPA receiver reform, including the regulatory environment
- Recommendations for managing conflicts of interest
- Recommendations for resolving disputes with IPs, solicitors, LPA receivers, etc
- Recommendations re contractual issues
- Holding to account those responsible for the malpractice.

Without the above, the APPG does not believe that Simon Walker's proposals for a formal "reconciliation and closure" event<sup>20</sup> has any substantive merit.

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<sup>20</sup> [Simon Walker, Review into the complaints and ADR landscape of the UK's ME market, p.22, 23 October 2018](#)



To XXXXXXXXXXXXXXXXXXXXXXX  
From XXXXXXXXXXXXXXXXXXXXXXX  
Economic Policy and Statistics Ref 2018/11/149-EPAS  
Date 20 November 2018

## SME lending in Ireland

You asked about the big increase in lending to SMEs in Ireland.

The first thing to note is that although there has been an increase in SME lending in Ireland, this **began before the introduction of the regulations mentioned in the article** you linked to. The regulations that the article mentions were introduced in early 2015. The upward trend in lending began in late 2013. But the regulations may well have helped to embed and encourage this trend.

The following chart shows new lending to SMEs in Ireland since the end of 2010 (data from the Central Bank of Ireland [SME market reports](#)). To view the data used in this chart, download the [2018 datasheet](#), and go to Tab 1.



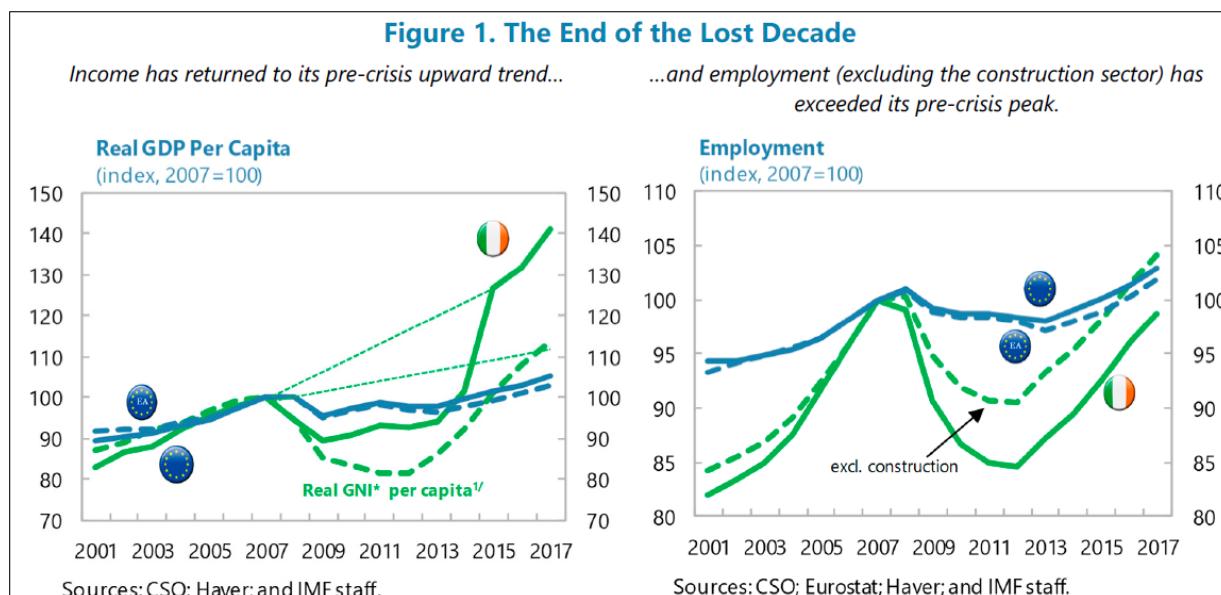
From the recent trough in new lending to SMEs in Q4 2013, to Q3 2015, new lending grew by 46%. From then to Q1 2018, new lending grew by 31%. Over the whole of the period from Q4 2013 to Q1 2018, new lending has grown by 92%.

The latest [SME lending report](#) from the Central Bank of Ireland reports that access to finance for SMEs has improved since 2013 by the second largest margin in the UK, after Spain ([see page 16](#)). Ireland ranks 15<sup>th</sup> in the EU28 (the UK is 1<sup>st</sup>) in terms of access to finance. Ireland's rank has improved by six places since 2013.

One major fact behind the growth in SME lending is the improvement in the Irish economy over the past five years. In the [IMF's most recent economic assessment of the Irish Economy](#) (published in July 2018) states that (on page 4):

Ireland has made remarkable strides in recovering from the 2008 bust of the credit driven real estate bubble. Strong ownership of its adjustment program, supported by IMF, EU, and bilateral loans, as well as a flexible and vibrant economic fabric were key to the turnaround. Public finances improved by broadening the tax base and containing expenditure, while protecting the most vulnerable. Wage cuts in the private and public sectors helped restore competitiveness. The banking sector was deeply restructured, and its financial soundness improved. As a result, economic growth resumed, initially led by exports, but, with time, more broadly based and job rich.

The IMF illustrates this point with the following charts, both of which show that the economic recovery began in 2013, at around the same time of the big increase in SME lending.



As economies grow, there is more demand for lending from businesses, as they seek to take advantage of more customers willing to spend. And banks are more willing to lend in an environment when a business is more likely to be successful and therefore banks are likely to see their loans repaid or good returns on their investments.

The regulatory and policy environment that SMEs operate in also has an impact on lending, but the broad context of economic growth and quickly improving economic sentiment are just as if not more important than other factors.

Other factors behind the rise in SME lending are discussed in an Irish Times article from February 2017: [Looking beyond the traditional sources of lending](#).