PART I

Banks and Banking Business

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1

The Structure of the British Banking World

1 The problem in context

The public tends to regard banks as comprising a single group. Usually, banks are contrasted with rival institutions, such as building societies, finance companies, and credit unions. In reality, the banks themselves can be divided into a number of groups on the basis of different criteria. A discussion of the classification of the different types or categories of bank operating in the United Kingdom, and of their respective organizations, is of considerable importance, as it provides the background to the analysis of the general legal principles governing the activities of banks in the United Kingdom in subsequent chapters. In classifying the different types of bank, however, the criteria that one might use tend to change over time and new criteria tend to emerge. For example, it was once possible to differentiate between banks operating within the United Kingdom by reference to their geographical location, separating the banks of England and Wales from those of Scotland and Northern Ireland. Nowadays, this division seems increasingly inappropriate, especially given the acquisition of the National Westminster Bank by the Royal Bank of Scotland and the merger of Halifax plc and the Bank of Scotland to form Halifax Bank of Scotland plc (or HBOS plc), which in turn was acquired by Lloyds TSB Bank plc in 2009 to form Lloyds Banking Group plc. Given the inability of geographical location to provide a satisfactory framework for classification, an alternative might be to adopt a functional classification according to the respective business activities undertaken by the different banks. The increasing overlap in the business activities of banks that traditionally specialised in different aspects of banking business, however, creates certain difficulties in the way of this providing a sound conceptual basis for classifying British banks. Nowadays, many banks are multifunctional institutions engaged in a wide range of business activities extending well beyond their traditional core activities of deposit-taking and lending.[1] Indeed, many modern banks commonly engage in activities as diverse as securities dealing, investment management, insurance, and estate agency, usually through different subsidiary companies within the same banking group. One possible way of overcoming this increasing overlap in the business activities of banks traditionally operating in different areas of banking business, however, may be to have regard to the umbrella organizations to which the particular bank belongs. Each of these organizations represents the interests of its members and is in turn represented on the British Bankers' Association (BBA). Generally, the members of each umbrella organization follow a

[1] Nowadays, the provision of payment services should also be regarded as an aspect of 'core' banking activity as a result of the Payment Services Regulations 2009, S.I. 2009/209 (PSR 2009), implementing Directive 2007/64/EC on Payment Services in the Internal Market [2007] OJ L319: Ch. 2, Sect. 6 & Ch. 13, Sect. 5 below.

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defined general pattern in their business activities, although naturally there remain certain variations in business practice even among the members of a given organization.

Subject to these observations, it appears possible to divide virtually all the banks with a presence in the United Kingdom into six broad groups. First and foremost is the group comprising 'the clearing banks' or the 'clearers', which term encompasses not only the major retail banks, but also any retail bank or institution whose activities include an involvement in the clearing procedures. The largest clearing banks are Barclays Bank, Lloyds Banking Group plc (formed as a result of the acquisition of HBOS plc by Lloyds TSB Bank plc in 2009), HSBC Bank (formerly Midland Bank), and National Westminster Bank (part of the Royal Bank of Scotland Group since March 2000). These four banks, together with Williams and Glyn's Bank, were the traditional members of the Committee of London Clearing Banks (CLCB). The operational responsibilities of the CLCB for the clearings were taken over in 1985 by the Association for Payment Clearing Services (APACS), which was in turn replaced by the UK Payments Administration Ltd (UKPA) on 6 July 2009. In addition, the four major clearing banks are members of the three clearing companies that operate under the aegis of UKPA (although other banks, including some foreign banks and one building society, are represented as well)[2] and continue to play their traditionally major role in the activities of the BBA.[3]

The second group of banks comprises the 'merchant banks', which are nowadays more commonly referred to as 'investment banks'.[4] Originally, the banks in this group had two umbrella organizations, the members of which were, respectively, the accepting houses and the issuing houses. In 1988, the two organizations merged into the London Investment Banking Association (LIBA), formerly the British Merchant Banking and Securities Houses Association. Its members, who do not maintain branch networks, are engaged in the traditional activities of merchant or investment banking, which comprises the financing of international trade and all types of transaction related to capital issues. The third group is made up of those banks operating in the wholesale money markets. The London Money Market Association (LMMA) represents the interests of those banks and other financial institutions that operate in the sterling money market. Discount houses used to operate in the short-term money markets, but changes in Bank of England practices, in particular the sanction of the gilt repo as an approved instrument for Open Market Operations and the widening of the Bank of England's list of approved counterparties, resulted in the disappearance of these houses and their representative body, the London Discount Market Association. The fourth group comprises the foreign banks. Until 1996, this group could be divided between those banks that were members of the British Overseas and Commonwealth Banks Association (BOCBA) and those that were members of the Foreign Banks and Securities Houses Association (FBSA). The BOCBA banks carried out their main activities in Commonwealth countries and former British protectorates and included the Standard Chartered Bank, the major Australian banks, and certain South East Asian and Far Eastern banks. Other foreign banks were members

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[2] For example, the Nationwide Building Society is a member of the Cheque and Credit Clearing Co. Ltd and BACS Payment Schemes Ltd, and Citigroup is a member of the CHAPS Clearing Co. Ltd. Even certain non-United Kingdom-based banks have become members of UKPA organizations, such as Danske Bank, which is a member of BACS Payment Schemes Ltd and CHAPS Clearing Co. Ltd, and Deutsche Bank AG and UBS AG, which are both members of CHAPS Clearing Co. Ltd.

[3] In 1988, the British Bankers' Association replaced the Committee of London and Scottish Banks (CLSB), which was formed as a trade association for the clearing banks in 1986.

[4] The global credit crisis has had a significant impact on the investment-banking model in the United Kingdom and the United States: Ch. 2, Sect. 1 below.

of the FBSA. In 1996, the BOCBA was absorbed into the FBSA to form the Association of Foreign Banks (AFB). The AFB represents the interest of over 180 member banks and securities houses whose ultimate ownership is outside the United Kingdom, or whose activities are principally international in focus. The fifth and sixth groups are respectively the United States banks, whose organization is the American Financial Services Association (formerly the American Banking and Securities Association in London) and the Japanese banks, whose organization is the Japanese Bankers Association.[5] This sixfold classification informs the structure of the discussion below.

In addition to the banking organizations considered above, there are a number of other organizations, trade associations, or statutory bodies that are relevant to banks. Probably the most important is the Financial Services Authority (FSA), which, as discussed subsequently,[6] is responsible for the regulation and prudential supervision of United Kingdom banks. Next in terms of importance is probably the BBA, which, as discussed below,[7] is a trade association the membership of which is open to all banks with a presence in the United Kingdom and which is designed to promote the interests of, and represent, the United Kingdom banking industry. In addition, there are a number of bodies representing entities that engage in different types of banking activity, such as the Council of Mortgage Lenders, the UKPA, the Payments Council, and the UK Cards Association to name but a few. These bodies *inter alia* will be discussed in subsequent chapters where relevant.

2 The clearing banks[8]

(i) **The London scene**

Historically, the clearing banks—the institutions generally regarded by the public as 'the banks'—are the successors of the joint-stock banks. The development of the major clearing banks can be traced back to the late eighteenth century, although their influence and financial strength became paramount during the last three decades of the nineteenth century. It was around this time that they became known as the 'clearing banks' or 'clearers'. Nowadays, apart from the (now) four major clearing banks—Barclays Bank plc, Lloyds Banking Group plc (formed after Lloyds TSB Bank plc acquired the fifth major clearing bank, HBOS plc, in 2009), HSBC Bank, and National Westminster Bank plc—there are a number of smaller clearing banks operating in England and Wales. These include Abbey National plc (part of Grupo Santander since July 2004 and rebranded 'Santander' on 11 January 2010),[9] Clydesdale Bank (which acquired Yorkshire Bank in 2001), Co-operative Bank plc, (which absorbed the Britannia Building Society in August 2009) Alliance & Leicester Commercial Bank (part of Grupo Santander since October

[5] In addition to these groups, which are concerned with the activities of banks centred in London, there are the Committee of Scottish Clearing Bankers and the Northern Ireland Bankers' Association, which are represented as groups on the BBA.

[6] Ch. 2, Sect. 4 below. [7] Sect. 6 below.

[8] For the position up to 1970, see The London Clearing Banks, *Evidence Submitted by the Committee of London Clearing Bankers to the Committee to Review the Functioning of Financial Institutions* (November 1970).

[9] In September 2008, Abbey National plc acquired the savings business and branches of Bradford & Bingley plc, which were similarly rebranded 'Santander' in January 2010. The remainder of the bank was nationalized and merged on 1 October 2010 with Northern Rock (Asset Management) plc under a single holding company, UK Asset Resolution Ltd.

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2008),[10] and Northern Rock plc.[11] Special mention must also be made of the Royal Bank of Scotland Group, which acquired the National Westminster Bank and its wholly-owned subsidiary, Coutts, in March 2000.[12] As the Royal Bank of Scotland had previously amalgamated with Williams and Glyn's Bank (an established member of the CLCB),[13] its role as a clearer is as well entrenched as that of any of the (now) four major clearing banks.

The major clearing banks of London used to number more than the current four. In the early 1960s, there were in fact ten,[14] but their number decreased with the mergers that took place in the late 1960s and early 1970s. Prior to that time, banks were dissuaded from attempts to merge by the Report of the Colwyn Committee on Bank Amalgamations, which had expressed concern in 1918 about the concentration of banks in the hands of a limited number of powerful houses. Following this report, a bank merger would only generally obtain the required approval of the Treasury and Bank of England if the banks involved were not in direct competition with one another. For example, under this regime, the first significant merger was proposed because the District Bank had its main network of branches in North-west England, whereas the National Provincial Bank was relatively inactive. The scene was cleared for further mergers in 1967, however, when the Report on Bank Charges, prepared by the National Board for Prices and Incomes, advised that the Bank of England and the Treasury had made it plain that they would not obstruct some further amalgamations if the banks chose this course.[15] This policy statement initiated a number of mergers,[16] at the conclusion of which the City was left with the four current

[10] Alliance & Leicester Commercial Bank, formerly known as Girobank, was a founding member of APACS, the functions of which were taken over by UKPA on 6 July 2009. It was also a member of the three associated clearing companies, but left the Clearing House Automated Payments System (CHAPS) in June 1999. In view of its restricted activities—principally the acceptance of deposits from corporate customers—Alliance & Leicester Commercial Bank is not generally regarded as a typical clearer, but as it remains a member of two of the clearing companies operating under the UKPA umbrella—the Cheque and Credit Clearing Co. Ltd and BACS Payment Schemes Ltd—and plays a role in the clearing systems, it has the status of a clearing bank. As a result of its acquisition by the Spanish banking group, Grupo Santander, the bank transferred its business to Santander UK in May 2010 and has been rebranded accordingly.

[11] Northern Rock plc was one of the biggest United Kingdom casualties of the global credit crisis that started in 2007. Following an agreement on 3 September 2007 by the FSA, Bank of England, and the Treasury to provide financial support to Northern Rock plc so that it could maintain its liquidity, there was a 'run' on the bank between 14 and 17 September 2007. On 22 February 2008, the Northern Rock plc was temporarily nationalized by the British Government pursuant to the terms of the Banking (Special Provisions) Act 2008 and the Northern Rock plc Transfer Order 2008, S.I. 2008/432. Compensation to former shareholders in Northern Rock plc was to be determined according to the terms of the Northern Bank plc Compensation Scheme Order 2008, S.I. 2008/718: see generally *R (on the application of SRM Global Master Fund LP)* v. *Treasury Commissioner* [2009] EWHC 227 (Admin), affd. [2009] EWCA Civ 788. The bank was subsequently managed at arm's length through UK Financial Investments Ltd and, on 1 January 2010, was split into a 'good bank' (Northern Rock plc) with responsibility for deposit-taking and new lending and a 'bad bank' (Northern Rock (Asset Management) plc) with responsibility for existing mortgages and the repayment of government lending. On 1 October 2010, this 'bad bank' was merged with the nationalized part of the Bradford & Bingley plc under a single holding company, UK Asset Resolution Ltd. See generally D. Singh, 'Northern Rock, Depositors and Deposit Insurance Coverage: Some Critical Reflections' [2010] *JBL* 55. See further Ch. 2, Sect. 1 below.

[12] The British Government was forced to take a controlling stake in the Royal Bank of Scotland Group in November 2008 when the bank's attempt to raise fresh capital from the public was undersubscribed. The Government's stake in the bank was increased in January 2009 and then increased even further in November 2009.

[13] Glyn, Mills & Co., which merged to form Williams and Glyn's Bank in the 1960s, was one of the oldest commercial and clearing banks in England.

[14] The London Clearing Banks, n.8 above, 21.

[15] Ibid., 20 ff.

[16] Mergers took place between Barclays Bank and Martins Bank; National Provincial Bank (which had already amalgamated with the District Bank) and Westminster Bank; and Williams Deacon & Co., Glyn Mills & Co., and the National Bank.

major clearing banks, plus Williams and Glyn's Bank. A merger of Barclays and Lloyds was, however, opposed by the Monopolies Commission, which was concerned about the effect that such a development was bound to have on competitiveness in the banking world. When Williams and Glyn's Bank became fully amalgamated with the Royal Bank of Scotland, the latter acquired the former's seat on the CLCB. Seats on the CLCB were offered also to the Bank of Scotland and, subsequently, to the Standard Chartered Bank.

The clearing banks used to be the only active participants in the clearing-house activities. The position changed in the 1980s when three additional banks—the Trustee Savings Bank of England and Wales (subsequently part of Lloyds TSB Bank, which in turn became part of Lloyds Banking Group plc in January 2009), the Co-operative Bank, and the National Girobank (now Alliance & Leicester Commercial Bank, which has in turn been part of Grupo Santander since October 2008)—became functional members of the clearing house, although they were not offered seats on the CLCB. Basically, this meant that the functional clearers acquired direct access to the clearing house through their own clearing departments, but they were denied a direct role in the formulation of the relevant policies and in the periodic reviews of the Clearing House Rules,[17] both of which were the domain of the CLCB.

The scene changed altogether following the recommendations of the Child Report in December 1984,[18] which reviewed the organization, membership, and control of the clearing system's various elements. Three independent systems were at that time in existence. The first was the clearing house itself, which was responsible for the 'general clearing' of cheques and paper-generated giro credits issued in England and Wales and for the 'town clearing', which was used solely for the same-day clearing of effects of not less than £10,000 (raised to £500,000 by 1992) drawn on a branch within the boundaries of the City of London and collected by another City branch.[19] The clearing house was under the CLCB's direct control, although ownership was vested in a company, in which the major clearing banks were the principal shareholders. The remaining two clearing systems were under the CLCB's indirect control and were owned by separate companies: the Bankers Automated Clearing Services (BACS),[20] which cleared all types of electronically generated payment, such as periodic payments and direct debits; and the Clearing House Automated Payment System (CHAPS), which effected the electronic transfer of substantial amounts[21] on a same-day clearing basis throughout the United Kingdom. The Child Report's main recommendation was that these three clearing systems, each of which should be under the control of a separate company, should be brought

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17 For the legal implications of the Clearing House Rules, see Ch. 10, Sect. 2 & Ch. 13, Sect. 1(v) below.

18 *Payment Clearing Systems, Review of Organisation, Membership and Control*, Report of a Working Party appointed by the Ten Member Banks of the Bankers Clearing House (Banking Information Services, 1984; 2nd reprint by APACS, 1990).

19 The 'town clearing' was abolished in February 1995.

20 In 1986, the company was renamed 'BACS Ltd' and, in December 2003, BACS was divided into two separate companies: BACS Payment Schemes Ltd manages the scheme, whilst VocaLink Ltd (formerly BACS Ltd and then Voca Ltd) physically processes payments and maintains the network. The BACS clearing system operates under the UKPA umbrella: www.ukpayments.org.uk. See further Ch. 13, Sect. 3(iii) below.

21 Although the CHAPS clearing was initially used for payments over £10,000, the last financial restriction on the value of CHAPS Sterling transfers was removed in January 1993. Nevertheless, the system is still mainly used for high-value transactions, although there is increasingly evidence of low-value payments (for less than £10,000) passing through the CHAPS Sterling system: APACS, *In Brief—Payments Market Briefing 2000*, 11. In 2004, the average value of a CHAPS transfer was £1.86 million, which was down from £1.9 million in 2003, 'indicating that the growth in volume is derived from the lower-value non-financial customer sector': APACS, *CHAPS Sterling and CHAPS Euro Volumes and Values (www.apacs.org.uk)*. As a result of this trend, and in order to speed up low-value transfers, APACS (now UKPA) launched the 'Faster Payment Service' in May 2008. This new service appears to be having a significant impact on traditional CHAPS Sterling transfers, with volumes declining at an annual rate of 2.6 per cent and values at an annual rate of 12 per cent: UK Payments Administration, *Statistical Release—9 September 2010*, (London, 2010), 7. See further Ch. 13, Sects. 1 & 3(iv) below.

within the framework and control of an ‘umbrella organization’, membership of which was to be liberalized by being open to all settlement members and individual clearing companies. Other recommendations were that membership of the three clearing systems should be liberalized and that other appropriately regulated institutions using the clearing facilities through agent banks should be offered associate membership. These recommendations were implemented in full in 1985 with the formation of a single umbrella body, APACS, which acquired control of the various clearing systems and accordingly took over one of the CLCB’s major functions. One of the results of these structural changes was that access to the clearing house was no longer confined to banks, and membership of APACS was widened to include any bank or building society operating in the United Kingdom, as well as any credit institution based in other European Union, European Economic Area, or G10 countries.[22] Until 1997, every APACS member had also to be a member of one or more of the clearing companies, but membership was subsequently opened to any institution that was a principal member of a payment scheme that was widely used or otherwise significant in the United Kingdom (i.e. a payment scheme that handled more than one per cent of the United Kingdom’s payment volumes and/or more than 0.1 per cent of the United Kingdom’s payment values).[23] APACS also had a number of affiliate members that provided payment services to their customers through at least one of the APACS clearing systems via agency arrangements with a full member, or that otherwise issued payment cards in the United Kingdom.[24]

APACS ceased to exist on 6 July 2009, at which time it had 28 full members. APACS’ functions have now been taken over by a private company, UKPA, which ‘is not itself a membership body but the service company providing people, facilities and expertise to the UK payments industry’.[25] As the clearing banks, including two of the three former ‘functional clearers’, are members of all three companies,[26] the nature and activities of the clearing banks is very closely related to UKPA’s role in the clearing of cheques and other payment orders. Although UKPA services a significant part of the United Kingdom payments industry, its remit does not extend to Visa, MasterCard, LINK, or SWITCH Maestro. Its functions do, however, include operating as an umbrella body for four payment industry groups (Financial Fraud Action UK, the Payments Council, the UK Cards Association, and SWIFT UK) and for the three companies that are responsible for the various clearing systems. First, the Cheque and Credit Clearing Co. Ltd has taken over control of the general clearing, which comprises the clearing of cheques and paper-generated giro credits issued in England and Wales and which has since been extended to Scotland.[27] The company’s shareholders are the Bank of England, the clearing banks, and one building society.[28] Secondly, the CHAPS Clearing Co. Ltd is in charge of CHAPS Sterling, the United Kingdom’s real-time gross settlement, same-day value, electronic sterling credit transfer system, frequently used for high-value transfers.[29] Its members are all banks.[30] Previously, CHAPS also operated a Euro-denominated credit transfer system, but this was decommissioned on 16 May 2008.[31]

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[22] Additionally, APACS published certain membership criteria.

[23] APACS, *Annual Report 2003* (London, 2004), 46. See also *APACS Constitution* (July 2005), [6.1] & Appendix 1.

[24] There were 26 APACS Affiliate Members at APACS’ dissolution in July 2009.

[25] For this description, see www.ukpayments.org.uk.

[26] Alliance & Leicester Commercial Bank (now part of Grupo Santander) is not a member of CHAPS Sterling and was not a member of CHAPS Euro. All the clearers, large or small, are also members of the BBA, which represents the general interests of banks in the United Kingdom: Sect. 6 below.

[27] Ch. 10, Sect. 2 & Ch. 13, Sect. 3(i)–(ii) below.

[28] As at October 2010 (www.chequeandcredit.co.uk).

[29] For evidence of increasing use of CHAPS Sterling for lower-value payments, see n.21 above, although the ‘Faster Payments Service’ may now lead to some slowdown in this trend.

[30] As at October 2010 (www.chapsco.co.uk).

[31] Ch. 13, Sect. 3(iv) below.

In the same month, however, CHAPS introduced the 'Faster Payments Service', which was designed to extend the benefits of the CHAPS payment system to lower-value transactions, namely internet and phone payments for less than £10,000 and standing orders for less than £100,000. The principal advantages of this new system are that transfers can occur within minutes (or sometimes hours), rather than on the previous three-day cycle, and that such transfers can be made all day, every day. Apart from one building society, all 13 founding members are banks.[32] Thirdly, BACS Payment Services Ltd, has simply taken over the activities of the existing body, BACS Ltd. Its members comprise the Bank of England, 13 banks, and one building society.[33]

A significant number of payments are nowadays cleared by these three companies through their various settlement systems. In the year ending June 2009, the total number of items cleared through the various clearing systems exceeded 6.8 billion. Out of these, approximately 1.02 billion were cheques and giro credits, approximately 5.6 billion items were cleared by BACS, approximately 32.7 million items were cleared by CHAPS Sterling, and over 207 million items were cleared through the 'Faster Payments Service', launched in May 2008.[34] The importance of the clearing banks' role in achieving these figures cannot be overstated. In 2004, it was estimated that 95 per cent of the adult population in the United Kingdom had some form of bank or building society account that could be used to effect payment,[35] and, as considered further below, this is likely to increase further as a result of the 'universal banking services' initiative following the Cruickshank Report. Furthermore, the ease with which funds in an account can be accessed, and payments can thereby be effected, has increased significantly in recent years. Traditionally, customers gained access to their accounts through the bank's network of branches throughout the country. Although the branch network remains extensive, its size has reduced in recent years.[36] Indeed, many customers seldom visit a branch at all, nowadays preferring to access their accounts remotely via the bank's telephone banking service, a personal computer connected to the internet, WAP-enabled mobile telephone,[37] or digital television. Most clearing banks now offer their customers telephone and internet banking services, and some newly established banks have no branches at all, operating only via the internet.[38]

The integrity of the clearing system is protected by additional membership criteria. A bank or other financial institution that applies for membership of the Cheque and

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[32] For a list of founding members, see APACS' Press Release, *Phased Roll Out for New Faster Payments Service* (28 April 2008).

[33] As at October 2010 (www.bacs.co.uk).

[34] UK Payments Administration, *Clearing Statistics—June 2009* (London, 2009), 1. According to these statistics, the amount by value cleared through CHAPS Sterling far exceeds the others: Cheques and Credit Clearing—£1.03 trillion; BACS—£3.91 trillion; CHAPS Sterling—£70.6 trillion; 'Faster Payments Service'—£76.2 billion. For a forecast of payment volumes and values between 2007 and 2017, see Payments Council, *Annual Review 2008—Driving Change in UK Payments* (London, 2008), 10–15.

[35] APACS, *Yearbook of Payment Statistics 2004* (2004), 6.

[36] Ibid., 36, which states that the number of United Kingdom branches for APACS members reduced from 15,709 in 1990 to 11,241 in 2003.

[37] Although the Payments Council investigated the feasibility of an industry-wide payments service allowing spontaneous account-to-account payments by mobile phone (Payments Council, *National Payments Plan—Setting the Strategic Vision for UK Payments* (London, 14 May 2008), 41–42; Payments Council, *Progress Report—Delivering the National Payments Plan* (London, March 2009), 4–5), it has concluded that 'due to the rapid evolution of the mobile market and competitive developments' the initiative would be temporarily shelved (Payments Council, *Progress Report: Delivering the National Payments Plan* (June 2010), 4).

[38] Frequently, the 'internet banks' are subsidiaries of established banks, such as Cahoot (the internet division of Santander UK plc), Smile (a division of the Co-operative Bank), and Egg Banking plc (a division of Citigroup), which transferred its credit card business to Barclays Bank in 2011.

Credit Clearing Co. Ltd and its clearing house has to undertake to maintain its own clearing department,[39] to which all cheques payable to the bank's customers are sent by the branches charged with their collection. Such cheques are largely processed at the bank's own clearing centre and are thereafter delivered to the 'clearing house'—located, since October 2003, in Milton Keynes—where the bank also picks up any cheques drawn on itself.[40] As the processing at the clearing centres involves a costly automated procedure, an institution is most unlikely to establish one unless it is of a certain size and has sufficient business to justify the expenditure involved. Even where an institution is prepared to meet this requirement, however, it still has to demonstrate its ability to meet the remaining criteria laid down for membership, including certain requirements respecting the applicant's financial standing.[41] Unsurprisingly, many banks in England and Wales consider it unprofitable to maintain their own clearing department. As a general rule, the same can be said for the foreign banks,[42] most of which are situated in London, and the merchant or investment banks, although some of these latter banks do have customers who open current accounts with them. This means that cheques drawn by customers of these banks, as well as cheques payable to them, need to be cleared.

From the eighteenth century until the end of the Second World War, banks that were not members of the cheque clearing house presented cheques for payment and received cheques drawn on themselves by an inefficient and time-consuming procedure known as the 'walks',[43] which involved the handling of the cheques by messengers several times each day. Gradually, the 'walks' was entirely replaced by the system of 'agency banks', under which a non-clearing bank uses one of the clearing banks as its agent to present cheques for payment and collect their proceeds. Each cheque payable to a customer of the respective non-clearing bank is sent to the agent's clearing department for collection. Cheques drawn on an account maintained with the non-clearing bank are delivered by the relevant payee's bank to the agent bank at the clearing house. This process is facilitated by a simple device—the non-clearing bank is given a sorting number that identifies the bank and its particular branch,[44] that is printed on any cheques that the bank issues to its customers, and that is also encoded on cheques collected for its customers. Since the agent bank's own branches have a similar identifying number, the non-clearing bank is treated for the purposes of the clearing process as if it were a branch of its agent bank. The resulting network of agency banks is formidable, covering many banks of considerable size.

The clearing banks' role in the payment and collection of cheques and other payment orders is directly related to one of their main activities—the maintenance of current

[39] There is now provision for the outsourcing of cheque processing to other non-bank companies.

[40] In fact, many cheques are exchanged directly between major banks themselves. For procedural innovations, including the exchange of code line information over a secure telecommunication link (IBDE) operated by BACS, and cheque truncation generally, see Ch. 10, Sect. 2 below.

[41] For the membership criteria of the main United Kingdom payment schemes, see D. Cruickshank, *Competition in UK Banking—A Report to the Chancellor of the Exchequer* (London, March 2000) (available at www.bankreview.org.uk), Table 3.2. See further Sect. 2(iii) below. The membership criteria of the Cheque and Credit Clearing Co. Ltd include 'financial strength and stability': www.chequeandcredit.co.uk.

[42] Although no foreign bank is a member of the Cheque and Credit Clearing Co. Ltd, the majority of foreign banks involved with clearing payments in the United Kingdom are members of the CHAPS Clearing Co. Ltd (www.chapsco.co.uk), and Danske Bank has been a member of BACS Payment Schemes Ltd since 2006 (www.bacs.co.uk).

[43] Ch. 10, Sect. 2 below.

[44] A sorting number is either a printed or an imprinted message readable by the 'reader-sorter' computer facility.

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accounts. In this regard, the clearing banks are fairly liberal in accepting persons, whether individuals or companies, as customers. Not only is this liberal approach mandated by law, given that there is a specific prohibition on racial discrimination in the furnishing of banking services,[45] but further liberalization has also resulted from government initiatives that encourage banks to offer 'basic bank accounts' in order to combat financial exclusion.[46] That said, clearing banks are at least required by legal considerations to request that every new customer furnish proof of identity.[47] One consequence of the clearing banks maintaining current accounts is that those banks have control of substantial amounts of money repayable on demand. Accommodation can be provided to customers on such an account by way of an overdraft that is, conceptually, also repayable on demand.[48] The interest chargeable on an overdraft varies between banks, and it can no longer be said with certainty that interest on an overdraft will be lower than that charged on a loan.[49] New internet-only banks, with lower transaction-processing costs, have tried to attract customers by offering higher interest rates on savings and lower rates on borrowings. In recent years, however, customers have become increasingly aware of their money's earning capacity and, given the extremely modest rates of interest payable on some (but not all) current account balances, they have tended to place their savings in interest-bearing accounts, such as fixed deposits. This has enabled the clearing banks to make even more medium- and long-term loans available to customers at lower rates of interest than would be payable on an overdraft facility.[50]

Apart from their typical branch banking activities, the clearing banks engage in all other types of banking business. Each of the (now) four largest clearing banks have international divisions and offices in foreign countries. Furthermore, many of the clearing banks' major local branches offer international banking facilities, including the financing of exports and imports, dealings in foreign currency and gold, and the furnishing of guarantees, performance bonds, and letters of credit. In addition, most of the clearing banks underwrite new issues of commercial paper and, like the merchant or investment banks, provide lines of credit to commercial customers. From about the end of the Second World War, the clearing banks have also been willing to provide customers with financial advice and portfolio services. These services are quite separate from the furnishing of bankers' references, which has been a traditional activity of the clearing banks.[51] The clearing banks are thus engaged in a wide range of banking business.

Before concluding this discussion of the clearing banks, it is necessary to say something about each of the three institutions that operated as 'functional clearers' prior to the clearing system's restructuring in 1985. First, the Co-operative Bank plc maintains branches in all parts of the United Kingdom. Originally, these were located in the department stores of its owner, the Co-operative Wholesale Society, with the result that most of its customers came from among the regular clients of these stores. The bank has grown substantially in recent years, however, and it had already established a Corporate Business Department as early as 1985. Currently, it offers most of the services provided by the older clearing banks. Since 2002, the Co-operative Bank plc has been controlled by a new holding company, the Co-operative Financial Services Ltd, which absorbed the Britannia Building Society in August 2009.

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[45] Race Relations Act 1976, s.20. [46] Sect. 2(iii) below.

[47] For the 'customer due diligence' requirements of the Money Laundering Regulations 2007, S.I. 2007/2157, (as amended by S.I. 2007/3299 & S.I. 2009/209), see Ch. 4, Sect. 3(iv) below. For the statutory defence available to a collecting bank that has converted a cheque, see Ch. 15, Sect. 4(iv) below).

[48] For the nature of overdrafts, see Ch. 17, Sects. 1–2 below.

[49] Ch. 17, Sect. 1 below. [50] Id. [51] Ch. 16, Sect. 2 below.

Secondly, Girobank was originally founded as a body offering certain banking services on behalf of the Post Office. Girobank's establishment was sanctioned by legislation[52] that authorized the Post Office to provide such banking services as it saw fit and that deemed it 'for all practical purposes to be a banker and carrying on the business of banking'.[53] In 1978, the Girobank was renamed the National Girobank and subsequently became an authorized institution under the Banking Act 1987. When the Alliance and Leicester Building Society acquired Girobank in 1990, the close connection with the Post Office was not entirely severed and Girobank continued to use the Post Office as a branch network. Pursuant to the Alliance and Leicester (Girobank) Act 1993, the personal accounts of Girobank were transferred to Alliance and Leicester plc, and, in July 2003, Girobank was renamed Alliance & Leicester Commercial Bank, which subsequently became authorized and regulated by the FSA under the Financial Services and Markets Act 2000 (FSMA 2000).[54] In October 2008, the Alliance & Leicester Commercial Bank became part of Grupo Santander and, in May 2010, the bank transferred its business to Santander UK and has been rebranded accordingly. In terms of activities, Girobank (in its various subsequent incarnations) has specialized since 1994 in the provision of cash-handling facilities for, *inter alia*, major retailers—cash that it uses to supply the needs of the Post Office and other banking customers, such as filling ATMs. Girobank (in its various subsequent incarnations) also provides bill payment services through its relationship with the Post Office,[55] has become a merchant acquirer,[56] and engages in some lending activity to businesses.

Thirdly, the TSB Bank originated with the establishment of the trustee savings banks, which were initially sanctioned by the Trustee Savings Banks Act 1817.[57] At that time, their object was to provide a savings facility for the 'working classes', who had no access to the trading banks. Until 1985, trustee savings banks were established on a local basis and were constituted as friendly societies, supervised by the Trustee Savings Banks Central Board. Accordingly, they were outside the regime of the Banking Act 1979, being listed in its Schedule 1. Their traditional business was the acceptance of money on deposit, but they were empowered to engage in banking business generally in 1981.[58] Within a short period, the trustee savings banks were offering their customers a variety of banking services, including overdrafts, current accounts, and money-transfer facilities, and this encouraged small businesses to shift their accounts to these banks. By 1985, the trustee savings banks' business had diversified and increased to such an extent that a reorganization under a corporate structure was considered timely. Sections 3(1)–(3) of the Trustee Savings Banks Act 1985 accordingly made provision for the transfer of all the individual trustee savings banks' assets and liabilities (whether transferable or not)[59] to a new company, the Trustee Savings Bank of England plc (or 'TSB Bank'), on 21 July 1986.[60]

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[52] Post Office Act 1969, s.7(1)(b) (replaced by the British Telecommunications Act 1981, s.58(1), which has in turn since been repealed by the Postal Services Act 2000, s.127(6) & Sched. 9). Pursuant to the Postal Services Act 2000, s.62, all the property, rights, and liabilities of the Post Office were transferred to Consignia plc (now Royal Mail Holdings plc) on 26 March 2001. See also the Post Office Company (Nomination and Appointed Day) Order 2001, S.I. 2001/8.

[53] Ibid., s.40 (as amended by the Banking Act 1979, Sched. 4, para. 7). As a consequence, Girobank acquired the protection conferred on collecting banks by the Cheques Act 1957, s.4: Ch. 15, Sect. 4 below.

[54] Ch. 2, Sect. 4 below.

[55] Other banks have developed a relationship with the Post Office through their 'basic bank accounts' that can be accessed through the Post Office: British Bankers' Association, '7.3 Million Basic Bank Accounts at the End of the First Quarter' (18 July 2008). See further Sect. 2(iii) below.

[56] See generally Ch. 14 below.

[57] E.P. Ellinger, *Modern Banking Law* (Oxford, 1987), 11–13.

[58] Trustee Savings Banks Act 1981, s.18(1).

[59] Trustee Savings Banks Act 1985, s.3(6).

[60] Ibid., s.3(3). See also Trustee Savings Banks Act 1985 (Appointed Day) (No. 3) Order 1986, S.I. 1986/1222, art. 2. See generally *Ross* v. *Lord Advocate* [1986] 1 WLR 1077 (HL).

Similarly named banks were also established in Scotland and Northern Ireland. The TSB Bank offered a full range of banking services to its customers and was authorized under the Banking Act 1987. In 1995, the TSB Bank merged with Lloyds Bank to form Lloyds TSB Bank plc, one of the United Kingdom's main clearers. In January 2009, Lloyds TSB Bank plc acquired HBOS plc to avert the latter's failure as a result of the global credit crisis that began in 2007, and the resulting combined entity became the Lloyds Banking Group plc, in which the Treasury holds a significant minority shareholding.

(ii) The clearing banks of Scotland and Northern Ireland

The business of the Scottish and Northern Irish clearers is comparable to that of the London clearers, and some of the former group similarly have overseas offices. The clearing procedure used by the clearing banks in London, Scotland, and Northern Ireland is also the same. The four members of the Committee of Scottish Clearing Banks—the Bank of Scotland,[61] the Clydesdale Bank,[62] the Royal Bank of Scotland, and Lloyds TSB Scotland[63]—maintain a clearing centre in Edinburgh.[64] The Northern Irish clearing banks—the Bank of Ireland,[65] the First Trust Bank,[66] Northern Bank Ltd (owned by Danske Bank since March 2005), and Ulster Bank Ltd (part of the Royal Bank of Scotland Group since 2000)—have their own clearing house in Belfast, which is managed by the Belfast Bankers' Clearing Committee. All the Scottish banks are settlement members of BACS and CHAPS, whereas the Northern Irish banks only have indirect access through agency arrangements with members.

(iii) The Cruickshank Report

In recent years, the provision of banking and financial services to personal and business customers has become increasingly competitive. Traditional United Kingdom clearing banks must now compete for business with a range of other financial institutions. First, there are the building societies that have converted from mutual associations to public limited companies and have become banks. Examples include the Abbey National plc (part of Grupo Santander since July 2004 and rebranded 'Santander' on 11 January 2010),[67] Alliance and Leicester plc (part of Grupo Santander since October 2008),[68] Halifax plc (initially part of HBOS plc, and subsequently part of Lloyds Banking Group plc since January 2009), Northern Rock plc (now split into two parts),[69] and Woolwich plc (part of the Barclays Bank Group since 2000, and now the Barclays mortgage brand in the United Kingdom). Secondly, there is an increasing number of foreign banks operating in the United Kingdom. For example, Deutsche Bank, National Australia Bank, Wachovia Corporation,[70] DnB NOR ASA, and

[61] In 2001, the Bank of Scotland and Halifax merged to form HBOS plc, which was subsequently reorganized by the HBOS Group Reorganization Act 2006. In January 2009, Lloyds TSB Bank plc acquired HBOS plc to form the Lloyds Banking Group plc. The 'Bank of Scotland' brand is used for the Scottish branches of the merged entity.

[62] In 2001, Clydesdale Bank acquired the Yorkshire Bank.

[63] In January 2009, Lloyds TSB Scotland became part of the Lloyds Banking Group plc. The 'Bank of Scotland' brand is used for the Scottish branches of the merged entity.

[64] Since 1996, this has been operated by the Cheque and Credit Clearing Co. Ltd under the APACS (now UKPA) umbrella.

[65] The bank was the object of a substantial 'rescue package' by the Irish Government in February 2009.

[66] The bank is part of the AIB Group, which was the object of a significant 'rescue package' by the Irish Government in February 2009 and was effectively nationalized by the Irish Government in September 2010.

[67] N.9 above.

[68] N.10 above.

[69] N.11 above.

[70] In December 2008, Wachovia Corporation was acquired by Wells Fargo.

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Bank of Tokyo-Mitsubishi UFJ Ltd are members of some of the companies operating under the UKPA umbrella with responsibility for payment clearing in the United Kingdom. In other cases, some foreign banks have acquired ownership of United Kingdom banks. For example, in October 2008, Grupo Santander acquired Abbey National plc and Alliance and Leicester Commercial Bank. Thirdly, a range of supermarkets and retail chains now provide banking and other financial services, such as Tesco, Sainsbury's, Marks and Spencer, and Virgin. Often this was done through a joint venture with an established clearer or other financial institution. For example, Sainsbury's Bank (now Sainsbury's Finance) is the result of a joint venture between Sainsbury's supermarket and the Bank of Scotland (now part of the Lloyds Banking Group), Tesco was initially partnered with the Royal Bank of Scotland (although Tesco acquired the Royal Bank of Scotland's share in the joint venture company in 2008, and Tesco Personal Finance became Tesco bank in October 2009), and Virgin Money was originally formed as a joint venture between Virgin and the Norwich Union, although the Virgin Group has since acquired its entire shareholding. Fourthly, there are the internet banks, which usually operate as a subsidiary of an established bank.[71] Despite this competitive environment, however, the British Government commissioned in November 1998 a review of the level of competition within the United Kingdom banking industry, excluding investment banking. Following the publication of an interim report in 1999, the review committee, chaired by Don Cruickshank, published its final report in March 2000.[72] The review committee concentrated on levels of competition in three key areas: money transmission (namely, the flow of money through payment systems), the provision of banking services to personal customers, and the provision of banking services to small and medium-sized enterprises (SMEs).[73] It found competition problems in all three areas and made 55 recommendations to the British Government, which accepted the majority of those recommendations.[74]

Two particular issues, however, merit closer examination. The first issue relates to money transmission services supplied in the United Kingdom. The Cruickshank Committee found that these were run through a series of unregulated networks, mostly controlled by the same few large banks—the (now) four major clearers and the two largest Scottish banks—which in turn dominated the market for services to individuals and

[71] N.38 above. [72] D. Cruickshank, n.41 above.

[73] Following the Cruickshank recommendations concerning the supply of banking services to SMEs, the Competition Commission published its own report: *The Supply of Banking Services by Clearing Banks to Small and Medium-sized Enterprises* (London, Cm. 5319, March 2002). This report found that the main clearing groups were charging excessive prices and making excessive profits, and identified other adverse effects on choice and the level of information available to SME customers. The Competition Commission's recommendations were implemented by means of undertakings agreed between the Office of Fair Trading (OFT) and the banks. The OFT conducted a review of compliance with these undertakings during 2006 and reported its conclusions to the Competition Commission in January 2007, having found that banks had complied with their undertakings and recommending that the four main banks be released from their undertakings to pay interest on business accounts and to offer free core money transmission services. According to the OFT, there was sufficient competition to ensure these practices would continue without the need for formal undertakings, but the undertakings in other areas should continue as the SME banking services market was still not functioning properly: www.oft.gov.uk/news/press/2007/122-07. In August 2007, the Competition Commission provisionally decided to lift price controls on the four main business banks, but retained 11 of their other undertakings relating to SME banking services. After wide consultation, the Competition Commission confirmed its provisional decision in December 2007: www.competition-commission.org.uk.

[74] HM Treasury, *Competition in UK Banking: The Cruickshank Report—Government Response* (London, August 2000) (www.hm-treasury.gov.uk). The Government declined to follow the review committee's recommendation that all mergers between financial institutions should be referred to the Competition Commission for investigation if the merging entities have material shares of the relevant market: ibid., Response to Recommendation 12.

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SMEs.[75] The Committee also examined the entry restrictions on membership of these schemes, including those restrictions on membership of APACS (now UKPA) clearings, and concluded that the membership criteria of the main United Kingdom payment schemes distorted competition by restricting full access to banks and other deposit-taking institutions.[76] The Committee's response recommended the establishment of a licensing regime for payment systems.[77] Under the new regime, all payment system participants would be subject to a class licence that would require non-discriminatory access to the payment system.[78] Most importantly, the Committee recommended the establishment of an independent payment systems commission ('PayCom') to supervise the new licensing regime.[79] The British Government was attracted by the Cruickshank Report's recommendations, although it reserved its final decision until completion of a widespread consultation exercise.[80] Initially, responsibility for regulating and reforming United Kingdom payment systems was conferred upon the Office of Fair Trading (OFT),[81] which set up the Payment Systems Task Force in 2004. This was itself wound-up in November 2006 and, after producing its final report,[82] was replaced in 2007 by the Payments Council, a self-regulated body supported by the Treasury and the OFT.[83] In May 2008, the Payments Council published the *National Payments Plan*, its strategic framework for innovation and change in the area of payment services over the following decade,[84] and highlighted a number of priority areas for longer-term reform. Of more immediate significance in this context, however, is the advent of the Payment Services Directive,[85] which will significantly increase competition by allowing any entity to seek authorization[86] as a 'payment

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[75] D. Cruickshank, n.41 above, Executive Summary, [11]. [76] Ibid., [3.94].

[77] Ibid., [3.186]. [78] Ibid., [3.197].

[79] Ibid., [3.204]. [80] HM Treasury, n.74 above, Response to Recommendations 21, 22, & 23.

[81] HM Treasury Consultation Document (London, December 2000); HM Treasury Press Release, 21 December 2000. In May 2003, the OFT published a report containing a market study covering the United Kingdom's money transmission clearing systems and a review of its work on debit, credit, and ATM card networks since 2000: *UK Payment Systems* (London, 2003).

[82] Payment Systems Task Force, *Final Report of the Payment Systems Task Force* (February 2007), Sect. 3, which makes clear that the Task Force has had a significant impact, contributing *inter alia* to the development of the 'Faster Payments Service' (Ch. 13, Sects. 1(iv) & 3(iv)(b) below), to streamlining the governance structure of the LINK scheme, and to the introduction of the uniform '2-4-6' time-limits for cheque clearance (Ch. 10, Sect. 2 below).

[83] The Payments Council board consists of four independent directors and 11 directors representing the main banks involved in processing payments. The Payments Council has produced its first annual report (*Annual Review 2008—Driving Change in UK Payments* (2008)) and progress reports (Payments Council, *Progress Report—Delivering the National Payments Plan* (London, March 2009); Payments Council, *Progress Report: Delivering the National Payments Plan* (London, June 2010)). The OFT has conducted a review of the Payments Council's first two years and, whilst concluding that the Payments Council had been 'largely successful' in meeting two of its objectives, considered that the Payments Council's work on the 'cross-scheme integrity of payment systems has been disappointing' and that it should make more effort to follow up initiatives, to be proactive, and to address the impression that it is 'dominated by banking interests': OFT, *Review of the Operations of the Payments Council* (London, March 2009). The Payments Council's response in August 2009 highlighted a number of areas in which it would seek to improve performance. Recently, the Payments Council has launched a consultation on updating the National Payments Plan: Payments Council, *Updating the National Payments Plan—A Consultation for the 2011 Review of the NPP* (April 2011).

[84] Payments Council, *National Payments Plan—Setting the Strategic Vision for UK Payments* (14 May 2008).

[85] Directive 2007/64/EC on Payment Services in the Internal Market, [2007] OJ L 319.

[86] Ibid., art. 10(1).

institution'[87] so that it can provide 'payment services'[88] within the European Union, provided that such an entity complies with requirements relating to initial capital and own funds.[89] This effectively brings into force something similar to the licensing regime originally proposed in the Cruickshank Report. The 'Payment Services Directive' was implemented in the United Kingdom by the Payment Services Regulations 2009 (PSR 2009),[90] and the prudential supervision of 'payment institutions' was conferred upon the FSA.[91]

The second issue relates to consumer access to banking services, since between 2.5 and 3.5 million of the adult population in the United Kingdom are estimated to be without any form of bank account. Many of these will be on low incomes and may have been refused a current account because of the risk that the account could become overdrawn.[92] This is a real problem, given that a current account is usually required to gain access to a number of money transmission systems, whether these involve the use of cheques, debit cards, or electronic funds tranfers. The Cruickshank Committee considered that it should be made easier for those without a current account to get access to basic banking services.[93] The Government has echoed the Committee's concern and expressed support for the idea of a universal bank to be run through the Post Office network.[94] Part of the Government's response was to establish the Financial Inclusion Taskforce, which works with the Payments Council[95] and advises the Treasury about increasing participation in the banking system. Alongside these initiatives, the major clearing banks and other retail banks have introduced 'universal banking services', which include 'basic bank accounts' that can usually be accessed either at the Post Office or through branches and ATMs, but that do not allow for overdrafts.[96] According to the BBA, the 'universal banking' initiative and the emphasis on 'basic bank accounts' has markedly reduced financial exclusion.[97]

87 Ibid., arts. 1(1)(d), 4(4), 10(1). This does not include 'credit institutions' and 'electronic money institutions' as these are already subject to home state authorization pursuant to Directive 2006/48/EC, [2006] OJ L 177/1: Ch. 2, Sect. 7(i) & (iii) below.

88 Ibid., arts. 4(3) & Annex. These include cash deposits, cash withdrawals and execution of payment instructions on a 'payment account' (defined: ibid, art. 4(14)), the 'execution of payment transactions where the funds are covered by a credit line', issuing and acquiring payment instruments, money remittance, and execution of orders given by electronic means.

89 Ibid., arts. 6–8.

90 S.I. 2009/209.

91 Ibid, reg. 4. For the PSR 2009, see Ch. 2, Sect. 6(iii) & Ch. 13, Sects. 5(iv)–(vi) below.

92 D. Cruickshank, n.41 above, [7.5], which noted that OFT research indicates that up to a quarter of applications for a current account may be refused. Nevertheless, the issue remains controversial with the BBA pointing to an independent report by Kempson and Whyley (University of Bristol) suggesting that the main reason for the lack of bank accounts in the adult population was the absence of any need or desire to use an account, rather than banks' refusal of accounts. In recent years, the BBA has heralded the increase in basic bank accounts amongst the adult population in the United Kingdom: British Bankers' Association, n.55 above. This figure had risen to 7.8 million basic bank accounts by 26 June 2009.

93 Ibid., [7.20]–[7.28].

94 HM Treasury, n.74 above, Response to Recommendation 54.

95 Payments Council, *Progress Report: Delivering the National Payments Plan* (June 2010), 3.

96 The usual features of basic bank accounts are that wages, benefits, pensions, and tax credits can be paid in directly; sterling cheques can be paid in for free; cash can be withdrawn from ATMs and at Post Office counters; bills can be paid by direct debit; most accounts also permit over-the-counter bank transactions; and some accounts include a debit card or the ability to make payments by standing order: FSA, *Moneymadeclear: Just the Facts about Basic Bank Accounts* (November 2009), 2. For a similar, earlier definition, see *Banking Code* (March 2008), 30, which also highlights that overdrafts are usually unavailable on such accounts. See also *Office of Fair Trading* v. *Abbey National plc* [2008] EWHC 875 (Comm.), [37]; [2008] EWHC 2325 (Comm.), [66]–[76]. , rev'd on a different point: [2010] 2 All ER (Comm.) 945 (UKSC). See further *Lending Code* (March 2011), *Glossary*.

97 British Bankers' Association, n.55 above, which indicates that, since April 2003, '3.2 million post-office accessible accounts have been opened, half for customers with no previous banking relationship'. See also Financial Inclusion Taskforce, *Fourth Annual Report* (London, October 2009).

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3 The merchant or investment banks[98]

During the 1970s and early 1980s, the merchant (now investment) banks were divided into two groups: the acceptance houses and the issuing houses. To appreciate the nature of these two types of bank and their differences, it is necessary to consider their background. The acceptance houses originated in the late eighteenth and early nineteenth centuries,[99] and comprised the seven members of the Accepting Houses Committee. Although most of them became incorporated in the twentieth century, they usually commenced their operations either as individual merchants or partnerships. In their early days, the acceptance houses were 'merchants' in the true sense of the word, as they traded on their own capital, primarily in the import and export of goods. Some even had their own fleets of ships. Later on, their ships were also used by other merchants engaged in current transactions; and, in due course, the acceptance houses began to finance such smaller traders. The facility used by the acceptance houses in the nineteenth century to finance other traders was the acceptance credit,[100] which provided for bills of exchange to be drawn by the trader on the house. The house's acceptance of the bills facilitated their discount, usually with another acceptance house, and reimbursement for any amounts paid upon the maturity of any acceptance was usually made out of the proceeds of the mercantile transaction in question. The acceptance house usually charged an acceptance fee, which constituted its direct profit from the transaction. As a result of their activity in the export trade, the acceptance houses played an important role in the development of such commercial facilities as the cif and fob contract and the documentary letter of credit.[101] Over time, the acceptance houses broadened their activities to include foreign-exchange dealings, money-management dealings (including portfolio investments for customers), the financing of current and capital transactions by means of short-term, medium-term, and even long-term loans, and eventually even capital ventures. In modern times, they became involved also in capital issues and in underwriting their clients' issues of shares and bonds.[102]

The issuing houses constituted a very different group. First, the issuing houses' origin differed from that of the acceptance houses, since many of the former were new faces in the City. Secondly, as indicated by their name, the issuing houses' main business was in the field of capital issues. Some of the issuing houses were not involved with current transactions and those that engaged in this type of business regarded it as incidental or secondary to their main underwriting and capital-issues business. Thus, the issuing houses specialized in one specific type of merchant-banking business. Thirdly, a bank could qualify for membership of the issuing houses' organization—the Issuing Houses Association—even if it was not under British control, whereas this was not the case as regards the acceptance houses' organization.

The structure of merchant (now investment) banking changed radically following the general increase in global financial activity during the 1980s, which made specialization unattractive. Many banking institutions, including some issuing houses and some

[98] J.J. Clay & B.S. Wheble, *Modern Merchant Banking* (3rd edn., London, 1990).

[99] V. Cowles, *The Rothschilds: A Family of Fortune* (revd. edn., London, 1979); J. Ellis, *Heir to Adventure: The Story of Brown & Co.* (London, 1960).

[100] Ch. 10, Sects. 1 & 10 below.

[101] E.P. Ellinger, *Documentary Letters of Credit: A Comparative Study* (Singapore, 1970), ch. 2; E.P. Ellinger & D. Neo, *The Law and Practice of Documentary Letters of Credit* (Oxford, 2010), ch. 1.

[102] Additionally, most of the acceptance houses engaged in bullion transactions, but not generally the factoring of accounts: see generally N. Ruddy, S. Mills, & N. Davidson, *Salinger on Factoring* (4th edn., London, 2006).

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acceptance houses, started to work in close association with firms engaged in investment services, such as substantial stockbrokers and bond dealers. The formation of these links led to the replacement in 1988 of the two older organizations with the British Merchant Banking and Securities Houses Association. This subsequently became the London Investment Banking Association (LIBA), which is now the principal United Kingdom trade association for firms that are active in the investment banking and securities industry. Not all of its members are banks, but most of them operate under an authorization granted pursuant to the FSMA 2000.[103] This means that the members of LIBA engage in a diverse range of business activities from the traditional activities of the acceptance houses in international trade, on the one hand, to all types of capital issues and financial and investment services business, such as fund management and the arrangement of transactions respecting equities and bonds, on the other. This diversity is evident in Jacobson J's description of modern investment banking business in *Australian Securities and Investments Commission* v. *Citigroup Global Markets Australia Pty Ltd (No. 4)*:[104]

> ...the term 'investment bank' is not capable of precise definition but the influence and importance of investment banks in the financial system is vast; they are integral to the efficient operation of the system...[m]ajor investment banks are listed public companies which operate internationally. They describe themselves, and are referred to, as global financial services firms and financial services conglomerates. They provide a diverse range of services including financial advisory services to corporations on mergers and acquisitions, issuing, buying and selling securities, investment research and transactions financing. This is not an exhaustive list...

As this statement also makes clear, what unites the members of LIBA is not so much the business activities they have in common, but rather the type of business in which they do not engage, namely the provision of those personal banking services that are most closely associated with retail banking. A consequence of this is that, unlike the clearing banks, the merchant (now investment) banks do not maintain chains of branches and are not generally members of the clearing companies that fall under the UKPA umbrella. Instead, many of the LIBA members operate from a single office in the City, although some have up to three or four branches or offices in the City or in major industrial towns. Furthermore, the merchant (now investment) banks cater mainly to the needs of corporations and large unincorporated enterprises, and do not seek out individual customers. Thus, although nowadays more commonly referred to as 'investment banks', LIBA members have remained true to their original description as 'merchant banks', engaged in mercantile transactions.[105]

4 Discount houses and the wholesale money markets

Until the late 1990s, discount houses formed a specialist group of banks that operated in London's short-term money markets. Originally, they were discounters of bills of exchange drawn under acceptance credits issued by banks,[106] but they subsequently expanded their

[103] Ch. 2, Sect. 4 below. For LIBA members, see www.liba.org.uk.

[104] (2007) 241 ALR 705, [255]–[256] (FCA). For a statutory definition of the term, 'investment bank', see Banking Act 2009, s.232.

[105] The global credit crisis has radically changed the investment banking landscape in the United States, with the largest investment banks either being taken over by, or converting to, commercial banks, which are now precluded from engaging in proprietary trading and related activities: Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (US), s.619. See further Ch. 2, Sect. 1 below.

[106] Gillett Bros., *The Bill on London* (London, 1976). See further Ch. 10, Sect. 10 below.

business by discounting other obligations, such as Treasury bills, and further specialized in the placing of money on the short-term markets. To this end, the discount houses accepted deposits from banks and other financial institutions and invested these in marketable securities and bonds issued by government departments, local authorities, and commercial firms. Discount houses have now disappeared, however, together with the association representing those houses that operated in the City—the London Discount Market Association. This resulted from the Bank of England's decision to sanction the use of gilt repos as an approved instrument for 'Open Market Operations', and to widen its list of approved counterparties, which meant that the discount houses no longer occupied a unique position in money market operations. Since 1997, the London Money Market Association has represented the interests of those banks and other financial institutions that operate in the sterling money market.[107] The Bank of England, through daily money market operations, supplies the settlement banks operating in the wholesale clearing systems with funds that enable them to settle accounts *inter se*. By setting the interest rate for these operations, the Bank of England influences the general level of interest rates throughout the financial system. In these operations, the Bank of England buys high quality assets in exchange for cash, either outright or through a repo transaction. Eligible collateral for 'Open Market Operations' include Treasury bills, gilt-edged stock, eligible bank bills, and securities issued by European Union governments and supranational institutions.

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5 Foreign banks

(i) Overview

London is a major centre of international banking, and unsurprisingly most major banks in the Western world have a presence in the City. There are three organizations for such foreign banks: the Association of Foreign Banks, the American Financial Services Association, and the Japanese Bankers Association.[108] A number of foreign banks have now changed form or disappeared entirely following the global credit crisis, which affected banks in the United States[109] and Iceland[110] particularly severely.

(ii) The Association of Foreign Banks

The Association of Foreign Banks (AFB)[111] has one of the largest memberships of financial institutions in the City—currently around 160 members,[112] which are all foreign banks or securities houses that have their ultimate ownership in countries outside the United Kingdom. The AFB is organized along the lines of a typical international banking operation. Business committees cover business continuity, corporate and institutional

[107] There are other money markets, such as the foreign exchange and bullion markets. For the LMMA members, see www.lmma.org.uk.

[108] There are also Europe-wide banking associations and bodies, such as the Euro Banking Association, the European Payments Council, and the European System of Central Banks.

[109] N.105 above.

[110] See generally *R* v. *HM Treasury, ex parte Kaupthing Bank hf* [2009] EWHC 2542 (Admin.). See also *Rawlinson & Hunter Trustees SA* v. *Kaupthing Bank hf* [2011] EWHC 566 (Comm.), [10]–[34].

[111] Formerly, the Foreign Banks & Securities Houses Association, which was established in 1947 and which absorbed the British Overseas and Commonwealth Banks Association in 1996: A. Gleeson, *London Enriched* (London, 1997).

[112] For current members, see www.foreignbanks.org.uk.

banking, markets, and trade finance. Technical committees cover, *inter alia*, human resources, operations, legal and regulatory issues, taxation, and risk management. The AFB also supervises the needs of foreign banks' representative offices with a special purpose committee. The AFB is governed by a board of directors, but also maintains an advisory council comprising members' representatives from general management as well as the chairmen of some of the business and operational committees. The business activities of the banks organized under the AFB umbrella vary a great deal. It is natural that each bank in the group has a special interest in customers from its home country, and in the promotion of the business links of firms in its country with correspondents in the United Kingdom. Nevertheless, member banks are involved in a wide range of international banking transactions. Their business is concerned mainly with wholesale rather than retail activities, although some member banks do provide current accounts for their customers.

(iii) **The American and Japanese banks**

The American and Japanese banks have established a presence of such significance in the City that it was reasonable for them to found their own respective organizations in London. Each of the two organizations is concerned solely with the respective interests of its members.

6 The British Bankers' Association

The existence in the banking world of so many groups of banks and banking associations resulted in the need for an additional organization to act as co-ordinator. This led to the establishment of the British Bankers' Association (BBA), which is a trade association made up of over 200 member banks and other financial services firms operating in the United Kingdom, as well as 45 'professional associate' member firms.[113] Eighty-five per cent of its members provide wholesale banking services and three-quarters of its members are of non-United Kingdom origin, representing 60 different countries. BBA Membership is open to two types of institution. The first type is an institution authorized by the FSA under the FSMA 2000 with permission to carry on one or more of the following regulated activities:[114] (a) accepting deposits; (b) dealing in investments as principal; (c) dealing in investments as agent; (d) managing investments; and (e) arranging deals in investments. The second type is an institution that is not so authorized by the FSA, but is authorized by another European Union regulator to carry on the same regulated activities as just mentioned and that also has an establishment in the United Kingdom. Subject to the approval of the BBA Council, membership is also open to other organizations that do not fulfil the normal BBA membership criteria, but that nevertheless serve the financial services industry.

The BBA's main objects are to promote the interests of the United Kingdom banking industry and to represent the views of, and where necessary negotiate on behalf of, members in dealings with official bodies in the United Kingdom, the European Union, and elsewhere. In addition, the BBA provides members with a forum for agreeing policy on matters of common interest and providing information and other services to members. Other

[113] Figures as at October 2010: see www.bba.org.uk.

[114] On the term 'regulated activity' (including its extension to cover retail mortgage business and payment services), see Ch. 2, Sect. 4 below.

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important objectives of the BBA include upholding London's position as an international financial centre and (until the advent of the FSA's new 'Banking and Payment Services Regime' in November 2009 covering the regulation of both deposit-taking and the provision of payment services)[115] sponsoring the *Banking Code* and *Business Banking Code*. The BBA has continued to perform the latter function, at least in the areas of bank lending and credit card finance to consumers, micro-enterprises, and smaller charities, by promulgating the *Lending Code* and *A Statement of Principles: Banks and Micro-enterprises—Working Together* in November 2009. These two publications were replaced by a new edition of the *Lending Code* and the *Guide to the Lending Code for Micro-Enterprises* in March 2011.

7 Comparison with building societies[116]

Building societies originated in the early nineteenth century as friendly societies and have been the subject of statutory regulation since the Building Societies Act 1836. At present, they are governed by the Building Societies Act 1986,[117] which has brought under its regime all the pre-existing societies regardless of their type.[118] Building societies' traditional business was the acceptance of deposits from members and mortgage lending to members. Over the years, however, building societies have been empowered to widen their activities. In particular, during the last two decades, the gap has narrowed between the activities of building societies and those of the clearing banks. Indeed, even under the previous regime in the Building Societies Act 1962, there was already an overlap between these two types of institution in respect of their acceptance of deposits and their mortgage lending. Although it is true that building societies dealt primarily with members, whilst clearing banks borrowed from and lent to the public at large, in practice, virtually any individual could become a member of a building society. The distinction was, therefore, largely illusory. Another similarity between the clearing banks and building societies was that both traditionally operated through branches, although the branch networks of the larger clearers were (and still are) more extensive than those of the building societies.

Accordingly, the main difference between the clearing banks and building societies prior to the enactment of the Building Societies Act 1986 lay in the narrower range of services provided by the building societies, including the range of transactions financed by them. Whilst the clearing banks have always provided credit facilities for general purposes, the building societies' lending remained predominantly related to transactions involving the acquisition of land. Two additional important distinctions were, first, that

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[115] Ch. 2, Sect. 6 below. One aspect of the BBA's role in representing the interests of banks is to participate in litigation on behalf of its members generally; see, for a recent example, *R (on the application of the British Bankers Association)* v. *Financial Services Authority* [2011] EWHC 999 (Admin.), [2]–[11].

[116] E.A. Wurtzburg & J. Mills, *Building Society Law* (15th edn., by T. Lloyd, M. Water, & E. Ovey, London, 1989).

[117] The Building Societies Act 1986 has been in force *in toto* since 1 January 1988, and it repealed and replaced the Building Societies Act 1962, which in turn had consolidated earlier legislation: E.A. Wurtzburg & J. Mills, n.116 above, [1.04]. For amendments to the Building Societies Act 1986, see in particular the Building Societies Act 1997 and the Banking (Special Provisions) Act 2008, s.11.

[118] Building societies used to be either incorporated or unincorporated. Before the Building Societies Act 1986, the former were regulated by the Building Societies Act 1962, and the latter by the Benefit Building Societies Act 1836. In the twentieth century, the unincorporated building society ceased to exist and the incorporated form became predominant. Although most incorporated building societies were 'permanent', some were 'terminating' and ceased to exist on a given date or event. The Building Societies Act 1986 rendered all these distinctions obsolete and now deems all building societies to be permanent.

building societies were restricted to dealings with individuals and, secondly, that a building society could not provide members with current account facilities involving drawing cheques on the society itself.[119] The building societies regime changed considerably, however, with the Building Societies Act 1986,[120] which had two aims: first, to relax the tight statutory controls on building societies' commercial powers, so as to allow them to compete more effectively with banks in the more deregulated financial and mortgage markets of the 1980s; and, secondly, to introduce a modern system of prudential regulation and supervision and to improve the protection of societies' investing members. Despite these changes, building societies could still only provide those services that were explicitly permitted by the Building Societies Act 1986. Further deregulation took place in 1988,[121] although a number of the restrictions that remained were only removed with the permissive regime of the Building Societies Act 1997, which allowed societies to carry out any type of business activity within their objects, unless it was explicitly prohibited.

This regime has not, however, escaped the sweeping changes to the regulation of the financial services industry introduced by the FSMA 2000. First, under the Building Societies Act 1986, the Building Societies Commission was constituted the supervisory body for all existing and future building societies.[122] The Commission has now ceased to function, as, under section 336(1) of the FSMA 2000, the Treasury was given power to order that its functions be transferred primarily to the FSA, with any remaining functions being exercised by the Treasury itself. This transfer was effected by the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001.[123] Accordingly, deposit-taking by both banks and building societies became regulated by the FSA under the FSMA 2000 regime,[124] and (together with the regulation of payment services) now falls within the FSA's 'Banking and Payment Services' regime that has been effective since 1 November 2009.[125] The second important consequence of the FSMA 2000 was the abolition of the Building Societies Investor Protection Board, which administered the scheme to protect investors in an insolvent building society,[126] as a result of the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001.[127] Investors are now protected by the Financial Services Compensation Scheme established under Part 15 of the FSMA 2000, as recently amended by Part 4 of the Banking Act 2009.[128]

The changes brought about by the Building Societies Act 1986, together with the amendments in 1988 and 1997, allow building societies to provide a whole host of banking and other financial services to their members. For example, building societies nowadays offer their members current accounts that are operable by cheque and

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[119] This problem was exacerbated by building societies not having direct access to the cheque clearing house, although some tried to overcome this obstacle by making arrangements for the payment of their customers' accounts by issuing the society's own cheques. An ingenious scheme, introduced in the 1980s in collaboration with some of the clearers, enabled the building societies' members to draw cheques, bearing the name of the building society, on the bank that supported the scheme. In essence, the building society was the drawer, the bank was the drawee, and the building society member, whose account details were set out in the instrument's magnetic ink line, completed the instrument and signed it. These cheques could be cleared through the respective bank by means of a direct-debit entry in the customer's account. Conceptually, the customer drew the cheque on the bank under the building society's authority.

[120] Building Society Commission, *Annual Report 1999–2000*, ch. 3.

[121] Building Societies (Commercial Assets and Services) Order 1988, S.I. 1988/1141, as amended by S.I. 1989/839 (now lapsed).

[122] Building Societies Act 1986, s.1. For the Building Societies Commission's powers of control, see ibid., ss.36–57, Sched. 3, Pts. III, IV & Scheds. 7A, 8A.

[123] S.I. 2001/2617, art. 4.

[124] Ch. 2, Sect. 4 below.

[125] Ch. 2, Sect. 6 below.

[126] Building Societies Act 1986, ss.24–29A & Scheds. 5–6.

[127] S.I. 2001/2617, art. 11. See also FSMA 2000, s.337.

[128] Ch. 2, Sect. 4(viii) below.

electronic means, as well as offering money-transfer services.[129] To facilitate this, the defences available to banks in respect of the payment and the collection of cheques have also been conferred on building societies.[130] The success of the building societies in this field is evidenced by some of them having taken up membership of APACS,[131] and, since APACS' dissolution, by them continuing to be members of the companies responsible for clearing payments in the United Kingdom that operate under the UKPA umbrella.[132] Accordingly, the Building Societies Act 1986, as amended, has generally narrowed the gap between the clearing banks and building societies. Indeed, a building society can now opt to transfer its entire business to a commercial company,[133] thereby ceasing to be a statutory corporation and becoming an entity regulated by the companies' legislation. Nevertheless, a society that converts to corporate status and becomes a bank continues to be protected from being made the subject of a take-over bid for a period of five years following conversion.[134]

This route from mutual society to bank has proved attractive to a number of former building societies, for example, Abbey National plc (part of Grupo Santander since July 2004 and rebranded 'Santander' on 11 January 2010),[135] Alliance and Leicester plc (part of Grupo Santander since October 2008),[136] Halifax plc (initially part of HBOS plc, and subsequently part of Lloyds Banking Group plc since January 2009), and Woolwich plc (part of the Barclays Bank Group since 2000, and now the Barclays United Kingdom mortgage brand). The number of authorized societies has fallen from 137 in 1986 to 68 in 2000,[137] and eight of the ten largest societies have become banks, halving the sector's market share.[138] Despite the significant deregulation that subsequently took place in 1988 and 1997, the Building Societies Act 1986 was still mentioned by a number of building societies as one of the factors motivating their decision to convert.[139] The global credit crisis that began in 2007 has further impacted on the number of United Kingdom building societies that remain in existence: since 1 December 2008, the Derbyshire Building Society and the Cheshire Building Society have been trading divisions of the Nationwide Building Society, which also acquired the assets of the Dunfermline Building Society on 30 March 2009; since 31 December 2008, the Barnsley Building Society has been a trading name of the Yorkshire Building Society following its acquisition; since 31 December 2008, the Skipton Building Society and the Scarborough Building Society have merged to form an enlarged society; and, during 2008, the Bradford & Bingley plc, was partly nationalized[140] and partly acquired by the Abbey National plc, which is itself now owned by Grupo Santander. Accordingly, whilst in 2008 there were 59 members of the Building Societies

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[129] From 1 November 2009, the provision of 'payment services' has been regulated by the PSR 2009, implementing Directive 2007/64/EC on Payment Services in the Internal Market, [2007] OJ L 319: Ch. 2, Sect. 6(iii) & Ch. 13, Sects. 5(iv)–(vi) below.

[130] Building Societies Act 1997, s.12(3).

[131] As at July 2009, only the Nationwide Building Society was an APACS member, although a number of demutualized societies continued with their membership as banks. For example, the Halifax Building Society was a full APACS member (even before becoming part of HBOS plc and then the Lloyds Banking Group plc, which were themselves APACS members), and the Woolwich Building Society was an APACS associate member (before becoming part of the Barclays Bank Group, which was itself a full APACS member).

[132] For example, the Nationwide Building Society is a member of the Cheque and Credit Clearing Co. Ltd and BACS Payment Schemes Ltd.

[133] Building Societies Act 1986, ss.97–100.

[134] Ibid., s.101.

[135] N.9 above.

[136] N.10 above.

[137] Building Society Commission, n.120 above, [3.7].

[138] Id.

[139] Ibid., [3.3].

[140] The nationalized part of the bank was merged with Northern Rock (Asset Management) plc under a single holding company, UK Asset Resolution Ltd, on 1 October 2010.

Association—the trade association for all building societies in the United Kingdom—this had dropped further to only 52 members by August 2009.[141]

That said, whatever amount of deregulation may have occurred, building societies remain subject to a number of key restrictions under the Building Societies Act 1986. First, the legislation affirms that a building society's principal purpose is to make loans for the purchase of residential property by its members.[142] Secondly, a building society must ensure that loans fully secured on residential property make up at least 75 per cent of its total assets, or group assets if applicable, less fixed and liquid assets and any long-term insurance fund.[143] Thirdly, a society must raise at least half of its funding from its members in the form of shares.[144] Fourthly, there are restrictions on building societies engaging in transactions, such as trading in commodities or currencies or transactions involving derivatives.[145] Finally, a building society is prohibited from creating a floating charge on the whole or part of its undertaking or property.[146]

8 Other financial institutions

The banks and building societies are the major financial institutions in the United Kingdom. In addition, there are some entities with a specialized type of business that do not fall under either umbrella. Thus, the finance companies, such as Lombard Tricity Finance Ltd (now part of the Royal Bank of Scotland Group), specialize in what used to be hire-purchase business, but which has now become the general provision of consumer finance. These have grown rapidly since the end of the Second World War, and nowadays provide finance not only to consumers, but also to industry and commerce, and also engage in the leasing of equipment to business firms.[147] Nowadays, a number of banks have substantial shareholdings in finance companies.

Additionally, there are some other bodies that carry on borrowing and lending activities but that are not involved in full-scale banking, such as the Crown Agents, the credit unions, and the National Savings Bank.[148] Finally, and of increasing importance in the United Kingdom, are entities that provide specialized banking services to the Islamic community.[149] Whilst some of the major banks have recognized the demand for Sharia'a-compliant banking products and have accordingly positioned themselves to enter this novel and lucrative market,[150] there are also entities that specialize in such products

141 For a list of members, see www.bsa.org.uk.

142 Building Societies Act 1986, s.5(1) (as amended). A building society's rules must provide that no person will be a member of the society unless he is a shareholder, borrower or both: ibid., Sched. 2, para. 5(1) (as substituted by the Building Societies Act 1997, s.2(1)). A 'shareholding member' is a person who holds a share in the society: ibid., Sched. 2, para. 5(2), as substituted. A 'borrowing member' is an individual who is indebted to the society (1) in respect of a loan that is fully secured on land, or (2) if the rules of the society so provide, in respect of a loan that is (within the meaning of the rules) substantially secured on land: ibid., Sched. 2, para. 5(2), as substituted.

143 Ibid., ss.6–6B.

144 Ibid., s.7.

145 Ibid., s.9A.

146 Ibid., s.9B.

147 Before accepting deposits from the public, finance companies must obtain authorization under the FSMA 2000: Ch. 2, Sect. 4 below.

148 Originally established under the Post Office Savings Bank Act 1969, s.94(1) and currently regulated by the National Savings Bank Act 1971. Its business is to accept deposits from the public, which can be as little as £20, but cannot exceed £100,000. This bank is outside the regime of the FSMA 2000: Ch. 2, Sect. 4 below.

149 See generally M. Kabir Hassan & M.K. Lewis, *Islamic Finance* (Cheltenham, 2007).

150 The association for institutions providing Islamic banking products and services is the Institute of Islamic Banking and Insurance: www.islamic-banking.com.

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and that operate alongside the traditional banking sector (for example, hawaladars).[151] The growing importance of such banking products in the United Kingdom is reflected by the extent to which they have featured in recent litigation.[152]

9 Review of the system

The City of London's banking community is split into a number of groups that have frequently developed on historical rather than functional lines. Some organizations are regional in character, such as the American Financial Services Association and the Japanese Bankers Association, whilst others comprise institutions that have similar interests, such as the old discount houses and their umbrella organization. Up to a point, the same is also true for the merchant (now investment) banks. It is clear, however, that there are overlaps between the different groupings. Accordingly, where an organization's rules do not include a restriction, a given entity may belong to two associations. In particular, many banks are members of their own specific organization and the BBA. From a functional point of view, it is probably best to classify both the banks and their organizations into specialist and general providers of banking services. The clearing banks constitute the generalists; all other organizations tend to represent specialized banks. The emergence of multifunctional banking groups, however, means that both generalist and specialist banking services are now provided by associated companies within the same commercial group. In contrast, from the public's viewpoint, the clearing banks tend to be regarded as 'the banks'. This is a realistic approach, as only the clearers from amongst the banks cater for all the needs of the public and are capable of accommodating the individual, the small business, and the multinational corporation.

[151] *Azam* v. *Iqbal* [2007] EWHC 2025 (Admin.), [20]–[22].

[152] *Shamil Bank of Bahrain EC* v. *Beximco Pharmaceuticals Ltd* [2004] 2 Lloyd's Rep 1 (CA); *Azam* v. *Iqbal*, n.151 above; *Musawi* v. *RE International (UK) Ltd* [2008] 1 Lloyd's Rep 326. See also *Latifah Bte Mat Zin* v. *Rosmawati Bte Sharibun* [2006] 4 MLJ 705, [30]–[31] (MCA); *Arab-Malaysian Merchant Bank Bhd* v. *Silver Concept Sdn Bhd* [2010] 3 MLJ 702.

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