

## **Consultation on the implementation of the EU Directive on Consumer Alternative Dispute Resolution and the EU Regulation on Consumer Online Dispute Resolution**

### **Submission to Department of Jobs, Enterprise and Innovation**

#### **SPECIFIC CONSULTATION RESPONSE OF THE FINANCIAL SERVICES OMBUDSMAN'S BUREAU**

##### **General:**

The Financial Services Ombudsman's Bureau ("FSOB"), participated in and co-authored the Consultative Submission Response submitted on behalf of the Irish Ombudsman Forum and accordingly supports and endorses that Response ("the Ombudsman's Forum Response"). For convenience, a copy of that Response is attached.

The within Response addresses issues specific to the office of the FSO and does not seek to replicate the responses provided in the Ombudsman's Association Response, rather it seeks to set out the views of the FSOB on matters specific to this office and its jurisdiction. In so far as additional responses are provided herein such responses may be taken as supplemental to those provided in the Ombudsman's Association Response.

- A. By way of initial general comment it should be noted that the FSO Scheme, as it currently exists, substantially and materially conforms with the requirements of the Directive insofar as the FSO scheme as an ADR Scheme is established on a full Statutory basis for the resolution of disputes between consumers and regulated financial service providers. Clearly, as the establishment of the FSO scheme on a statutory basis pre-dates the implementation of the Directive in Ireland, a number of aspects concerning the operation of the FSO scheme, in particular the application of certain time limits, are already well established in practice and in law. Further comment in relation to these aspects is made below.
- B. Since the inception of the FSO scheme in 2005, the FSO has amassed very considerable experience in operating an ADR scheme as envisaged by the Directive regarding the provision of financial services. Additionally, having regard to the right of the parties to a dispute before the FSO to appeal a Finding of the FSO to the High Court, there is also a considerable body of jurisprudence now in existence-and currently developing-involving the operation and jurisdiction of the FSO.
- C. Legislation implementing the Directive should, for the avoidance of doubt, confirm the continued provision of ADR services by the FSOB in the specialised area of financial services(subject to the similar remit exercised by the Pensions Ombudsman).
- D. Whilst the FSOB supports the view that the introduction of a proliferation of ADR entities would not be in the best interests of consumers or traders and in the case of general consumer contracts for goods and services that a streamlining/concentration of ADR facilities would be the preferred model, the FSOB is firmly of the view that specialised and complex consumer contracts

and services-such as a financial services-require the continued provision of a stand-alone ADR scheme such as that currently provided by the FSOB. The FSOB is of the view that the introduction of legislation implementing the Directive should not expand the current remit of the FSO to include general consumer contracts or consumer contracts which do not involve the provision of financial services.

- E. Legislation implementing the Directive should include provisions clearly delineating the existing remit of the FSO as being separate and distinct from general consumer contracts and/or consumer contracts not involving the provision of financial services. Any ambiguity whereby ADR redress in respect of general consumer contracts might, in the minds of consumers, be sought before the FSOB should be avoided as this may lead to confusion amongst consumers.
- F. It is recognised that the Pensions Ombudsman's current ADR scheme also provides necessary ADR services in a highly specialised area and the within Submission assumes that should be the current proposed merger of the FSOB and Pensions Ombudsman schemes proceed to finalisation, that the suggested delineation of remit (s) would also apply to any resultant single merged entity.
- G. The FSO endorses and supports the concept of a Residual ADR Entity (as envisaged by paragraph (24) of the Preamble to the Directive. The establishment of a Residual ADR Entity should avoid potential difficulties whereby certain consumers may be left with no avenue of ADR redress or where confusion may arise as to which particular ADR entity is the appropriate one to provide ADR services.

**Specific:**

With the specific exceptions of the responses to questions 14, 16 and 18 is set out below; the FSOB endorses the responses provided in the Ombudsman Forum Response to all other questions and has no further response to make in relation to those other questions.

**Q.14 Is the period beginning on the day on which the relevant dispute is referred to an all ADR procedure and ending on the day which is 30 days after the ADR procedure has concluded sufficient time to extend the limitation period for taking judicial proceedings? If not, why?**

**FSO Response:** It should be noted that the legislation establishing the FSOB scheme (the Central Bank and Financial Services Authority of Ireland Act, 2004) specifies that Findings of the FSO are binding upon the parties, subject only to an appeal to the High Court. That legislation also provides a specific statutory time limit within which complaints regarding the provision of financial services may be brought (six years from the time the conduct complained of occurred).

As the proposed extension under Article 12 of the Directive, relates to an ADR procedure the outcome of which is not binding, it is not envisaged that the implementation of the proposal will affect the operation of the FSOB scheme. However, the experience of the FSOB in respect of the time period within which the parties dissatisfied with a finding of the FSO may appeal to the High Court-21 calendar days from the issue of the Finding-is that parties considering an appeal,

particularly consumers who may not have the benefit of legal representation, find the time period of 21 days to be challenging, notwithstanding that the High Court has the discretion to grant an extension to this time period.

**Q.16 Do you have any views, on the designation of competent authorities? Should the State designate one competent authority or more (sectoral regulators responsible for particular areas)?**

**FSO Response:** The FSOB is of the view that a single adequately resourced competent authority with sufficient expertise and understanding of the various sectors covered under its remit (or access to such independent expertise), is the preferred option.

**Q. 18 the Department would welcome any other views on issues relating to the Directive and the Regulation which you may wish to provide.**

**Time Limits** - whilst the FSOB has, as a matter of practice, developed certain time limits within its procedures-which time limits are not legally binding-the Directive envisages some time limits which would materially differ from those currently applied by the FSOB. Although the time limits applied by the FSOB do not have the force of law, the FSOB is nonetheless subject to the constitutional requirements of fair procedures and its conduct is always open to judicial review proceedings in this respect.

**Under Chapter II, Article 3 of the Directive** it is envisaged that where an ADR entity in accordance with its procedure rules, is unable to consider a dispute that has been submitted to it that that ADR entity shall provide both parties with a reasoned explanation of the grounds for not considering the dispute within three weeks of receiving the complaint file. There are many instances where the FSOB cannot provide a reasoned explanation within a limit of three weeks of receiving the complaint file as complex issues of jurisdiction may arise which often-in the interests of constitutional fair procedures-require submissions from both parties on those jurisdictional issues and accordingly it is not possible to meet such a short time limit.

**Under Chapter II, Article 8 (a) of the Directive** it is envisaged that the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file, subject to an exception in the case of highly complex disputes where the ADR entity may at its own discretion extend the 90 calendar days' time period. Under the current practice and procedures of the FSOB, due primarily to the legal requirement for full exchange of documentation between the parties in relation to the matters in dispute and due to the often highly complex nature of the disputes, it is not possible in all cases for the FSOB to make the outcome of the ADR procedure (a Finding of the FSO), within a period of 90 calendar days on which the FSOB has received the complete complaint file.

The FSOB considers that specific exceptions to the requirements of the Directive in this regard should be made in any implementing legislation to take account of these well-established procedures.

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