

Observations of the Office of the Financial Services and Pensions Ombudsman (Ireland) in respect of the Consultation on the amendment of the Alternative Dispute Resolution (ADR) Directive and Repeal of the Online Dispute Resolution (ODR) Regulation, being co-ordinated by the Department of Enterprise, Trade and Employment (DETE)

The Financial Services and Pensions Ombudsman (FSPO) was established on 1 January 2018 by the Financial Services and Pensions Ombudsman Act 2017 (“the FSPO Act”). The statutory function of the FSPO is to resolve complaints made by consumers, including small businesses with an annual turnover not exceeding €3M, about the conduct of regulated financial service providers and pension providers. The functions of the Ombudsman are set out in Section 12 of the FSPO Act.

The FSPO provides an independent, fair, impartial and confidential service, free of charge, to resolve complaints either through mediation, leading to a potential mediated settlement agreed between the parties, or by formal investigation and adjudication, leading to a legally binding decision.

The Ombudsman has wide-ranging powers to deal with complaints made against financial service providers. The Ombudsman can direct a financial service provider to rectify the conduct that is the subject of the complaint, without limit to the value of the rectification directed. The Ombudsman can also direct a financial service provider to pay compensation to a complainant, of up to a maximum of €500,000. The Ombudsman publishes legally binding decisions issued in complaints about the conduct of financial service providers. These decisions are anonymised prior to publication. The Ombudsman also publishes the name of every financial service provider that has had three or more complaints against it upheld, substantially upheld, or partially upheld in decisions issued during a calendar year.

As the independent adjudicator of complaints concerning the conduct of financial service providers and pension providers, the FSPO is pleased to contribute to this important discussion on the proposals for amending *Directive 20-13/11/EU*, to extend the geographical scope of the Directive to better adapt dispute resolution procedures for the cross-border nature of digital markets.

A “financial service provider” which comes within the statutory jurisdiction of the FSPO, is defined in the FSPO Act, by reference to the Central Bank Act 1942, and the provider’s regulatory status. In that way, the FSPO has jurisdiction to investigate complaints about the conduct of providers which are regulated in Ireland or alternatively regulated in another member state and are authorised by the Central Bank on a freedom of service basis, and are therefore subject to conduct of business rules. However, the FSPO must also consider the governing laws pertaining to the contract between the consumer and the provider, which gives rise to the complaint.

Where the contract between the parties is governed by laws, other than the laws of Ireland, the fair investigation of the complaint in question would require the FSPO to interpret and apply the laws of a foreign jurisdiction. Because the FSPO cannot interpret and apply the laws of a foreign jurisdiction, it cannot investigate such a complaint.

In those circumstances, with a view to providing a potential solution to the parties, it is the practice of the FSPO, in suitable situations, to seek the consent of the parties to the investigation and adjudication of the complaint, pursuant to the laws of Ireland, whilst noting that such a limited agreement by the parties, to facilitate the provision of the ADR service, will not otherwise alter the underlying contractual arrangements.

If both parties do not furnish such consent, the FSPO cannot investigate the complaint pursuant to the laws of Ireland and therefore, instead, the FSPO will refer the complainant to the appropriate ADR entity in another state within the EEA, as the competent authority to adjudicate the complaint in relation to the contractual issue arising.

It is arguable that no issue arises for consumers, in respect of this referral of cross-border complaints between the respective ADR entities of states within the EEA, because these ADR entities across the states within the EEA are equipped to receive complaints from consumers involving such cross-border activity. A consumer in Ireland may however have a preference to bring their complaint to the FSPO, because ADR entities across the states within the EEA apply a variety of time limits and, in addition, may not be equivalently equipped to deliver redress for the consumer in question.

An updated list of such referrals is set out in Appendix 1 to this document which continues to show a marked upward trend in recent years. There was a significant increase in referrals from 2020 to 2021, and this trend continued in to 2023.

The FSPO notes that one potential solution to this issue arising from the governing law of the contract, is the imposition of an EU regulatory requirement, for financial service providers to offer consumers the alternative option of resolving their complaints in what the consumer may consider to be a suitable location, viz, their country of residence, and to do so by enabling the consumer to elect for the alternative governing law of their country of residence, for the purpose of the complaint investigation. The FSPO believes that offering choice in that manner, would support the integrity of the consumer protection framework, by bolstering the protections offered to consumers of financial products, across the EEA.

Non-EU traders

The FSPO has noted the proposal to extend the geographical scope of *Directive 2013/11/EU* to include non-EU traders.

In the event of a non-EU trader without an establishment in the EU, offering digital services in the EU, it is noted that a procedure is proposed under the Directive (and set out in the paper entitled *DIRECTIVE on Alternative Dispute Resolution – Additional information from the European Commission WK4188/2025 INIT*) which would require a preliminary agreement between the consumer and the trader “to ensure that the trader is voluntary”, as follows:

“...- The consumer contacts the trader to obtain its agreement to use an ADR entity in the country where the consumer resides;

- *The consumer gives the trader the contact details of the relevant ADR entity so that the trader can check key information such as the type of procedure, the applicable fees, whether the outcome will be binding;*
- *After reviewing this information, the trader should confirm its agreement to the consumer (i.e. by email) and confirm the contact details that the ADR entity should use;*
- *The consumer transmits the agreement and the contact details to the ADR entity which can then start the procedure...”*

Having reviewed the explanatory table (WK 4188/2024 INIT) which provides clarification on the application of the extended geographical scope, the possible scenarios and the corresponding procedures, the following observations are made by the FSPO:

- The Irish statutory framework currently in place for the resolution of financial service complaints by the FSPO, is based upon the trader meeting the definition of a “*financial service provider*” which captures those providers which are regulated in Ireland or alternatively regulated in another member state and are authorised by the Central Bank of Ireland, on a freedom of service basis and are therefore subject to conduct of business rules. That existing legislative framework for the FSPO, does not capture financial service providers that are regulated outside of the EEA or that operate without regulated status. Consequently, in such circumstances, the FSPO does not currently have jurisdiction over such entities, under its governing legislation. The FSPO recognises that this position would be altered by the implementation of the proposed amendments to the Directive. It is unclear as to whether such proposals are intended to include non-EU traders which are not regulated in a manner equivalent to the regulation of traders across the EEA, by designated competent authorities.
- Although mediation services offered by the FSPO are embarked on by a complainant and their provider, on a voluntary basis, the FSPO mediation service is currently offered only in complaints which concern the conduct of regulated financial service providers, as defined, because other providers do not fall within the FSPO’s statutory jurisdiction. A successful mediation leads to a legally binding mediated agreement. If, arising from the proposed amendments to the ADR Directive, the FSPO will be required to offer those voluntary mediation services to providers which do not otherwise fall within the legislative remit of the FSPO, and their customers, then:
 - (i) where the non-EU trader elects not to engage, the complaint will be closed by the FSPO, and
 - (ii) where the non-EU trader engages, but the complaint is not resolved by mediation, the complaint will also then be closed, without the FSPO’s formal investigation process being available to the parties to facilitate a full adjudication and a legally binding decision.

Such a proposal, whereby complaints must be accepted initially to explore mediation, may create an understandable expectation by the consumer that the FSPO can fully investigate their complaint, whereas the FSPO could then, in fact, only

offer a limited service, involving mediation by agreement of both parties. Whilst consumers could be made clearly aware that, if a non-EU trader were to agree to mediation by the FSPO, and if that mediation was not successful to resolve the complaint, the FSPO would then have no further role to play, nevertheless, it is the experience of the FSPO that when a complaint is initially accepted, and then declined for reasons of jurisdiction, this leads to very significant levels of dissatisfaction. Consumers do not readily differentiate between the different elements of the FSPO services.

- The FSPO also notes that its service to consumers with complaints about the conduct of regulated financial service providers, is delivered free of charge, as this service is funded by financial levies imposed on financial services providers authorised within the State. These levy amounts are determined and set by the FSPO Council, with the consent of the Minister for Finance and contribute to the operational costs of the FSPO. The views of financial services providers, which contribute to this levy, may be relevant to this proposal to make the services of the FSPO available to non-EU traders.
- The FSPO notes that the purpose of this proposal is to improve the consumer offering but observes that there may be unknown consequences where the consumer chooses to avail of the proposed voluntary procedure, rather than pursuing any existing option to make a complaint directly to the ADR entity in the non-EU trader's state. Consumers may now find themselves in situations where (in accordance with the new proposals, having chosen to avail of the proposed voluntary procedure in their country of residence, but ultimately having not succeeded in resolving the complaint on a voluntary basis) there may be a risk that any pre-existing option to seek redress by bringing the complaint to a non-EU ADR entity, is itself impacted, e.g. if there are time limit issues, or if the fact that initially selecting an alternative ADR entity affects the jurisdiction of the non-EU ADR entity. Neither the consumer nor the local ADR entity is likely to be aware of what options, if any, will remain for a consumer, following an unsuccessful attempt to resolve the complaint by choosing to avail of the proposed procedure in their country of residence.
- If this proposed procedure is implemented, and to ensure that it can operate at a practical level, the FSPO further observes that consideration should be given to including wording in the explanatory table (*WK 4188/2024 INIT*), to provide that the consumer must seek not only the non-EU trader's agreement to use an ADR entity in the country where the consumer resides, but must also specifically seek the non-EU trader's agreement to accept that the complaint be investigated under the laws of the consumer's country of residence.

MaryRose McGovern
Deputy Financial Services and Pensions Ombudsman

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Appendix 1

Complaints referred by FSPO to other ADR bodies 2018 to 21.03.24

Year Received	Total Complaints Referred
2018	5
Commission de Surveillance du Secteur Financier (CSSF)	4
Deutsche Bundesbank	1
2019	3
Financial Ombudsman Service	3
2020	34
Commission de Surveillance du Secteur Financier (CSSF)	13
Financial Ombudsman Service	21
2021	77
British Virgin Islands Financial Services Commission (BVI-FSC)	1
Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin	1
Commission de Surveillance du Secteur Financier (CSSF)	11
Deutsche Bundesbank	7
Financial Ombudsman Service	2
Lietuvos Bankas	54
Versicherungsombudsmann eV	1
2022	148
Australian Financial Complaints Authority (AFCA)	1
Banco de España - Departamento de Conducta de Entidades	1
British Virgin Islands Financial Services Commission (BVI-FSC)	4
Commission de Surveillance du Secteur Financier (CSSF)	11
Deutsche Bundesbank	12
Dirección General de Seguros y Fondos de Pensiones, Spain (DGSFP)	1
Financial Ombudsman of the Republic of Cyprus	1
Financial Ombudsman Service	29

FinCEN - Financial Crime Enforcement Network	1
Gibraltar Financial Services Commission	1
Klachteninstituut Financiële Dienstverlening (Kifid) - NL	1
Le Médiateur de l'ASF (Association)	1
Lietuvos Bankas	78
OFAS - Office of the Arbiter for Financial Services, Malta	3
Ombudsman for Financial Services, Belgium (Ombudsfm)	3
2023	171
Australian Financial Complaints Authority (AFCA)	2
Banco de España - Departamento de Conducta de Entidades	4
Belize Financial Services Commission	1
British Virgin Islands Financial Services Commission (BVIFSC)	4
Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin	9
Commission de Surveillance du Secteur Financier (CSSF)	11
Deutsche Bundesbank	9
Dirección General de Seguros y Fondos de Pensiones, Spain (DGSFP)	1
Financial Consumer Protection Center, Bank of Thailand	1
Financial Ombudsman of the Republic of Cyprus	1
Financial Ombudsman Service	38
FinCEN - Financial Crime Enforcement Network	1
Hellenic Banking Ombudsman	1
Klachteninstituut Financiële Dienstverlening (Kifid) - NL	1
Le Médiateur de l'ASF (Association)	3
Lietuvos Bankas	79
Mediateur d'Assurance - ACA-ULC	1
OFAS - Office of the Arbiter for Financial Services, Malta	1
Ombudsman for Financial Services, Belgium (Ombudsfm)	1
The FAIS Ombudsman	1
Versicherungsbundsmann eV	1
2024	18
Channel Islands Financial Ombudsman (CIFO)	1
Commission de Surveillance du Secteur Financier (CSSF)	6
Financial Ombudsman Service	5
Le Médiateur de l'ASF (Association)	1
Lietuvos Bankas	1
OFAS - Office of the Arbiter for Financial Services, Malta	2
The FAIS Ombudsman	2
Grand Total	456