Draft Heads of Bill – Amendments to FSPO Act 2017

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Head 1 – Short title and commencement

Provide that:

1. This Act may be cited as the Financial Services and Pensions Ombudsman (Amendment) Act 2023.

2. This Act shall come into operation on such day or days as, by order or orders made by the Minister under this section, may be fixed therefor either generally or with reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions.

Explanatory note

This Head is a standard provision.

Head 2 – Definitions

Provide that:

1. “Act of 2017” means the Financial Services and Pensions Ombudsman Act 2017.

2. An expression used in this Act has the same meaning in this Act as in the Act of 2017.

Explanatory note

This Head is a standard provision.

Head 3 – Section 2 - Interpretation

Provide that in subsection 2(1) of the Act of 2017, the definition of “financial service provider” is amended by the addition of the following after sub-paragraph (h):

“(i) To ensure the Ombudsman has the power to investigate complaints, references to "financial service provider" shall include former financial service providers where any of (a) to (h) of this definition applied at the date of the conduct complained of."

Explanatory Note

The purpose of this amendment is to clarify that the FSPO has the statutory power to investigate complaints against a financial service provider, which was regulated at the time of the conduct complained of, even if said provider has lost its regulated status before the complaint was made to the FSPO, or before the FSPO's investigation of the complaint has been concluded.

Head 4 – Section 3 - Expenses

Section 3 of the Act of 2017 is amended by the substitution of the following for subsection (3):

"The calculation of expenses to be charged to the levy, under subsection (2)(a), and to the Oireachtas, under subsection (2)(b), shall be based on the percentage division of the complaints received by the Ombudsman between—

(a) complaints relating to financial service providers, and

(b) complaints relating to pension providers,

in the previous three financial years".

Explanatory Note

The purpose of this Head is to clarify the methodology for the division between the FSPO's sources of funding.

The Financial Services and Pensions Ombudsman (FSPO) is funded in two ways:

(1) financial services complaints are funded by an annual charge on the financial services industry in respect of the services provided by the FSPO to the industry, and

(2) pensions complaints are funded by the Exchequer, through the Department of Finance Vote.

In September 2018, the FSPO Council agreed a methodology whereby the proportion of funding provided by the Exchequer is based on the ratio of pensions-related complaints to financial services complaints.

While the Act refers to complaints *"dealt with by the Ombudsman in the previous financial year",* it is considered the term 'dealt with' should be replaced by 'received by' as it is easier to identify when a complaint has been received, as opposed to when it has been dealt with and this is the metric which is used in practice.

It is further considered that providing for the calculation of expenses over a three-year period would ensure that any spikes, or the opposite, in relation to certain types of

complaints received in the year, would not dramatically affect the calculation of expenses in a given year.

Head 5 – Section 44 – Making of complaints and Section 50 - Jurisdiction of Ombudsman

Section 44 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the addition of the following under sub-paragraph (2)(c):

"(iv) has been the subject of an application to the Credit Reviewer as defined in S.I. No. 127 of 2010 and the Credit Reviewer has issued an Opinion on the viability and repayment capacity of the credit facility."

Section 50 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the addition of the below text under paragraph (3):

"(e) the conduct complained of has been the subject of an application to the Credit Reviewer as defined in S.I. No. 127 of 2010 and the Credit Reviewer has issued an Opinion on the viability and repayment capacity of the credit facility."

Explanatory Note

The purpose of this Head is to clarify any potential overlap in jurisdiction between the FSPO and the Credit Reviewer.

In theory, it is currently possible for a consumer to appeal a decision by a financial service provider/participating institution to the Credit Reviewer while also lodging a complaint regarding the conduct of the financial service provider/participating institution in relation to the same decision with the FSPO. Both of these processes could run in parallel and this could result in a situation where the Credit Reviewer could decide to uphold a credit decision, while the FSPO could decide to uphold a complaint relating to how that decision was made.

Section 44 intends to clarify that a complainant may not make a complaint to the FSPO where the Credit Reviewer has issued an Opinion to the complainant following an application to the Credit Reviewer.

Section 50 intends to clarify that the Ombudsman shall not investigate or make a decision on a complaint where the Credit Reviewer has issued an Opinion to the complainant following an application to the Credit Reviewer.

Head 6 – Section 47 - Powers of Ombudsman in relation to investigation of complaint

Provide that section 47(3) of the Act of 2017, is amended by the addition of the following text to the end of sub-paragraph (b):

Each party will be entitled to cross-examine the person being examined on oath.

Explanatory Note

Section 47 (3)(b) of the Act provides that the Ombudsman may require any person to attend before him and be examined on oath. This Head aims to amend the Act to include an express provision specifically providing for the cross-examination of witnesses on oath.

Head 7 – Section 50 – Jurisdiction of Ombudsman

Section 50 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection (1):

"Notwithstanding sections 44(2)(a)(i) and 50(3)(b), the Ombudsman may accept a complaint against a financial service provider or a pension provider that has initiated legal proceedings in relation to a matter to which the complaint relates, where the Ombudsman believes, based on reasonable grounds, that the financial service provider or the pension provider, as the case may be, has begun those proceedings in order to prevent the making of the complaint, or to frustrate or delay its investigation."

Explanatory Note

The purpose of this Head is to correct a cross-referencing issue where section 50(1) of the Act refers to section 54(1) instead of section 50(3)(b).

Amending this reference to section 50(3)(b) clarifies that the Ombudsman may accept a complaint where a financial service provider or pension provider has initiated legal proceedings in relation to a complaint, where the Ombudsman believes, based on reasonable grounds, that the provider has initiated these proceeding in order to frustrate or delay its investigation.

Without this reference to section 50(3)(b), section 50(1) could be interpreted as contradicting section 50(3)(b).

Head 8 – Section 56 – Conduct of investigation

Section 56 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the text below for subsection (4) and addition of subsection (4a):

"(4) Subject to Subsection (4a) the Ombudsman shall, without prejudice to the form of investigation, ensure investigations are conducted otherwise than in public.

(4a) Where the Ombudsman determines that it is appropriate or desirable for a complaint investigation to include an oral hearing, the Ombudsman shall decide whether to conduct any such oral hearing in public or in private, having consulted with the parties and having considered the nature or circumstances of the complaint and whether it is in the interest of justice to do so."

Explanatory Note

The Ombudsman's functions in Section 12 of the Financial Services and Pensions Ombudsman Act 2017 requires the investigation of complaints in an appropriate manner proportionate to the nature of the complaint including informal means, mediation and formal investigation. Formal investigations may include oral hearing. Decisions issued on foot of formal investigations are legally binding.

The amendments above provide that the Ombudsman is required to take a decision whether to hold oral hearings, as provided for in Section 12(1)(c) of the Act and as conducted under Section 47(3), to held in public or private. This decision is to be taken after consultation of the parties concerned and consideration of the nature or circumstances of the complaint or otherwise in the interest of justice.

Head 9 - Section 58 - Mediation

Section 58 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the following subsection for subsection (5):

"(5) The Ombudsman shall conduct mediations in private and evidence of anything said or admitted during a mediation, or an attempted mediation, of a complaint, and any document prepared for the purposes of the mediation, are not admissible—

a) in any subsequent investigation, under this Part, of the complaint (unless the person who made the admission, or to whom the document relates, consents to its admission), or

b) in any proceedings before a court or a tribunal in the State."

Explanatory Note

Mediation as required under Section 12(2) of the Financial Services and Pensions Ombudsman Act 2017 and conducted under Section 58 of the Act does not constitute the administration of the justice. The purpose of this head is to ensure that mediation shall always be conducted in private. This is considered to be of critical comfort to complainants, who otherwise may be disinclined to submit complaints to the Ombudsman.

Head 10 – Section 59 - Obstruction of work of Ombudsman

Provide that section 59 (1) of the Act of 2017, is amended by the addition of the following sub-paragraph (f):

(f) gives false evidence on oath, whether wilfully or corruptly,

Explanatory Note

This addition of sub-paragraph (f) under section 59 provides that a person giving false evidence on oath, whether wilfully or corruptly, will be committing an offence and that they will be subject to a Class A fine or imprisonment of up to 3 months, or both, if convicted.

Head 11 - Section 62 – Decisions of Ombudsman

1. Section 62 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection (1):

"Subject to the outcome of any appeal under Part 7 against a decision of the Ombudsman under section 60 or 61 in respect of a complaint, the decision is binding on any party to the complaint."

2. Section 62 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection 2, the addition of subsection (2a), and the substitution of the below text for subsection (3):

"(2) Subject to subsection (2a) and subsection (3) the Ombudsman shall publish decisions made by him or her after the establishment day in relation to complaints concerning financial service providers and case studies in relation to complaints concerning pension providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identifed by name, address or otherwise,

(ii) a provider shall not be identified by name or address, and

(b) in accordance with the Data Protection Acts 1988 and 2003."

"(2a) Where the Ombudsman has conducted an oral hearing in public pursuant to Section 56(4a), the Ombudsman may, where he or she is satisfied that in doing so a person's reputation would not be unfairly prejudiced, publish a record of any procedural matter relating to the public oral hearing, whether with or without any information which would enable the persons taking part in the proceedings, or any one or more than one of them, to be identified, as he or she thinks appropriate."

"(3) The Ombudsman may, if he or she considers it appropriate to do so in any particular case, publish, in such form and manner as he or she thinks fit, a report in relation to any investigation under this Part and the result of that investigation. Where the Ombudsman has conducted an oral hearing in public pursuant to Section 56(4a), the Ombudsman may, where he or she is satisfied that in doing so a person's reputation would not be unfairly prejudiced, publish a record of any procedural matter relating to the public oral hearing, whether with

or without any information which would enable the persons taking part in the proceedings, or any one or more than one of them, to be identified, as he or she thinks appropriate."

Explanatory Note

1. The purpose of this sub-head is to correct a typographical error at section 62 of the Act which refers to *"a decision of the Ombudsman under section 61 or 62 in respect of a complaint"* rather than to *"a decision of the Ombudsman under section 60 or 61 in respect of a complaint".*

This amendment rectifies the typographical error so that Section 62 – "Decisions of Ombudsman" refers to Section 60 which is related to "Complaints and redress: financial service providers" while Section 61 refers to "Complaints and redress: pension providers."

2. This is a consequential sub-head arising from Head 8 above. Where an oral hearing has been conducted in public under Section 56(4a), it makes sense that the Ombudsman has the discretion to name the parties concerned in relation to any publication arising from that investigation.