

C11/2015



**Command Paper on
a draft Act to establish the Financial Services
Ombudsman, to provide for the alternative resolution of
consumer disputes in respect of financial services and
for connected purposes.**

**Presented to Parliament by
the Minister for Financial Services**

**by Command of Her Majesty
5 August 2015**

1. Draft Bill

2. Draft Explanatory Memorandum

Comments on this Command Paper should be sent by email to

command.papers@gibraltar.gov.gi or delivered to

Command Papers Consultation c/o Kevin Warwick, Ministry of Education,
Justice and International Exchange of Information, Suite 771, Europort,
Gibraltar, no later than the 4 September 2015.

Any comments received later than the 4 September 2015 may not be taken into account for the purposes of the relevant consultation.

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,000 of XXth XXXX, 2015

FINANCIAL SERVICES OMBUDSMAN ACT 2015

ARRANGEMENT OF CLAUSES.

Clause

1. Title and commencement.
2. Interpretation.
3. Financial Services Ombudsman.
4. Ombudsman's functions.
5. Excluded disputes.
6. Appointment, etc. of Ombudsman.
7. Ombudsman's Staff.
8. Delegation of functions.
9. Financial service providers.
10. Information to consumers.
11. Ombudsman's procedure.
12. Determinations.
13. Power to require information.
14. Confidentiality.
15. Obstruction and contempt.
16. Annual reports.
17. Liability of Ombudsman.
18. Consequential amendments.

B. XX/15

BILL

FOR

AN ACT to establish the Financial Services Ombudsman, to provide for the alternative resolution of consumer disputes in respect of financial services and for connected purposes.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1.(1) This Act may be cited as the Financial Services Ombudsman Act 2015.

(2) This Act comes into operation on the day appointed by the Minister by notice in the Gazette, and different days may be appointed for different purposes and a notice may contain any transitional, incidental and supplementary provisions the Minister thinks necessary or expedient.

Interpretation.

2.(1) In this Act—

“authorisation” under a relevant Act includes registration, approval, a licence or other permission and “authorised” is to be construed accordingly;

“consumer” means—

- (a) an individual who is acting outside of the individual’s trade, business, craft or profession;

- (b) a charity which, on the date that it submits a financial service dispute, has an annual income of less than £1 million; or
- (c) a trustee of a trust which, on the date that it submits a financial service dispute, has a net asset value of less than £1 million;

“EEA State” means—

- (a) a Member State of the European Union; or
- (b) any other state which is a party to the European Economic Area Agreement;

“financial service dispute” mean a dispute submitted by or on behalf of a consumer to the Ombudsman and arising from a contract in respect of a financial service between the consumer and a financial service provider;

“financial service provider” means a person who—

- (a) is authorised under a relevant Act to provide a financial service and does so—
 - (i) in Gibraltar; or
 - (ii) in an EEA state from a place of business in Gibraltar;
- (b) is a relevant EEA provider; or
- (c) provides a financial service of a kind prescribed under subsection (2)(b);

“Minister” means the Minister with responsibility for financial services;

“the Ombudsman” means the Financial Services Ombudsman;

“relevant Act” means a Supervisory Act other than the Financial Services (Auditors) Act 2009;

“relevant EEA provider” means a person who—

- (a) is established in an EEA State and authorised under the law of that State to conduct an activity which, if conducted by a person established in Gibraltar, would require authorisation under a relevant Act; and
- (b) carries on that activity from a place of business in Gibraltar;

“Supervisory Act” has the same meaning as in the Financial Services Commission Act 2007.

(2) In this Act a “financial service” is a business or activity—

- (a) for which authorisation is required under a relevant Act; or
- (b) of a kind prescribed in Regulations made by the Minister.

Financial Services Ombudsman.

3.(1) There is to be a Financial Services Ombudsman.

(2) The Ombudsman is to be appointed by the Minister under section 6.

Ombudsman’s functions.

4.(1) The Ombudsman has the function of investigating, and facilitating, mediating, proposing or determining solutions to, financial service disputes.

(2) The Ombudsman may do anything which is intended to facilitate, or is conducive or incidental to, the exercise of the functions of the Ombudsman.

(3) The Ombudsman may only consider a financial service dispute if—

- (a) the act or omission which is the subject of the dispute occurred—
 - (i) not more than six years before the date when the dispute is received by the Ombudsman; or
 - (ii) at an earlier date but with reasonable diligence the consumer could not have known of it until after that date and it is received by the Ombudsman not more than three years after the date when, in the opinion of

the Ombudsman, the consumer first knew or ought reasonably to have known of the act or omission; and

- (b) it is received by the Ombudsman within one year of the date on which the consumer first complained to the financial service provider concerned about that act or omission.

(4) Subject to subsection (5), this Act only applies to a financial service dispute relating to an event which—

- (a) occurs after the date when this section comes in operation; or
- (b) with reasonable diligence the consumer could not have known about until after that date.

(5) The Ombudsman, with the consent of the financial service provider concerned, may deal with a financial service dispute relating to an event which occurred (or which with reasonable diligence the consumer first knew of) within the 12 months before the date when this section comes into operation.

Excluded disputes.

5.(1) The Ombudsman may refuse to deal with a financial service dispute where—

- (a) the consumer has not attempted to contact the financial service provider concerned in order to seek to resolve the dispute directly with the financial service provider;
- (b) the financial service provider has offered compensation (or some other payment) to the consumer in respect of the dispute which—
 - (i) in the opinion of the Ombudsman is fair and reasonable; and
 - (ii) remains available for acceptance by the consumer;
- (c) in the opinion of the Ombudsman—

- (i) the consumer has not suffered (or is unlikely to suffer) financial loss, material distress or material inconvenience;
 - (ii) the consumer does not have a reasonable prospect of success; or
 - (iii) the dispute is frivolous or vexatious;
- (d) the dispute relates solely to the performance of investments;
- (e) the dispute relates to the legitimate exercise of a financial service provider's commercial judgment;
- (f) the dispute relates to the financial service provider's—
- (i) exercise of a discretion under a will or private trust; or
 - (ii) failure to consult a beneficiary, in circumstances where there was no obligation to do so, before exercising such a discretion;
- (g) the dispute relates (or may relate) to more than one consumer and—
- (i) it has been referred to the Ombudsman without the consent of all of those consumers; and
 - (ii) the Ombudsman considers that it would be inappropriate to pursue it without that consent;
- (h) the dispute is being or has previously been considered by an alternative dispute resolution provider or by a court;
- (i) the value of the claim is less than £250 or such other monetary threshold as may be specified in regulations made under subsection (3) (which must not be set at a level which significantly impairs consumers' access to dispute resolution by the Ombudsman);
- (j) the dispute is of a particular type specified by the Ombudsman, dealing with which would seriously impair the effective operation of the Ombudsman.

(2) Where, in accordance with subsection (1), the Ombudsman refuses to deal with a financial service dispute, the Ombudsman must provide the parties with a reasoned explanation of the grounds for not doing so.

(3) The Minister may by regulations amend subsection (1).

Appointment, etc. of Ombudsman.

6.(1) The Ombudsman is to be appointed by the Minister on terms specified by the Minister and may be re-appointed.

(2) The Ombudsman may resign at any time by giving written notice to the Minister.

(3) The Minister may remove the Ombudsman from office if the Minister is satisfied that the Ombudsman—

- (a) is guilty of misconduct;
- (b) is bankrupt;
- (c) is incapacitated by physical or mental illness;
- (d) is in material breach of the terms of appointment; or
- (e) is otherwise unable or unfit to discharge the functions of the Ombudsman.

(4) The salary, expenses and allowances of the Ombudsman are to be—

- (a) approved by resolution of Parliament; and
- (b) a charge on the Consolidated Fund without the need for appropriation.

Ombudsman's Staff.

7.(1) The Ombudsman may appoint such staff as the Ombudsman thinks necessary or convenient for the purpose of performing the Ombudsman's functions, powers and duties under this Act.

(2) Appointments under subsection (1) may only be made with the written approval of the Minister and within the limits of allowances and expenses approved by Parliament under section 6(4).

Delegation of functions.

8.(1) The Ombudsman may arrange for any person to exercise any function of the Ombudsman other than a function under this subsection or sections 7(1), 15(1) or 16(1).

(2) A person exercising a function of the Ombudsman delegated under this section may, in doing so, deal with any property or rights vested in the Ombudsman as if they were vested in that person.

(3) Any act done or omitted to be done by a person exercising a function delegated under this section is taken to have been done or omitted to have been done by the Ombudsman.

Financial service providers.

9. A financial service provider who is a party to a financial service dispute must—

- (a) cooperate with any investigation by the Ombudsman; and
- (b) participate in any resolution procedure which the Ombudsman conducts in respect of that dispute.

Information to consumers.

10.(1) If a dispute arises from a contract in respect of a financial service between a consumer and a financial service provider which the parties are unable to resolve, the financial service provider must—

- (a) inform the consumer that the consumer may submit the dispute to the Ombudsman;
- (b) provide the consumer with the address and other contact details of the Ombudsman; and
- (c) inform the consumer that, if the consumer does submit the dispute to the Ombudsman, the financial service provider—

- (i) must cooperate with any investigation conducted by the Ombudsman;
- (ii) must participate in any resolution procedure conducted by the Ombudsman; and
- (iii) may be required by the Ombudsman to accept the outcome of a resolution procedure if the consumer has agreed to accept the outcome.

(2) The information in subsection (1) must be provided in writing, in a clear, comprehensible and easily accessible manner when the financial service provider concludes that it is unable to resolve the dispute and informs the consumer of that outcome (which the financial service provider must do promptly and in writing).

(3) A person who fails to comply with subsection (1) or (2) is guilty of an offence and is liable on summary conviction to a fine at level 5 on the standard scale.

Ombudsman's procedure.

11.(1) Subject to any regulations made under subsection (2), the Ombudsman may adopt any procedure that the Ombudsman considers appropriate for the purpose of investigating, or facilitating, mediating, proposing or determining a solution to, a financial service dispute.

(2) The Minister may by rules provide for—

- (a) the form and manner in which a financial service dispute is to be submitted to the Ombudsman;
- (b) any fees or costs payable in connection with submitting, investigating, or facilitating, mediating, proposing or determining a solution to, such a dispute;
- (c) the procedure to be adopted by the Ombudsman in connection with investigating, or facilitating, mediating, proposing or determining a solution to, such a dispute; and
- (d) the award of costs to and against the parties to such a dispute.

(3) Any regulations made under subsection (2) must not significantly impair consumers' access to alternative dispute resolution procedures, including in respect of cross-border disputes.

Determinations

12.(1) Subject to subsections (4) and (6), a determination of the Ombudsman arising from a resolution procedure in respect of a financial service dispute is final and binding if it is—

- (a) accepted by the consumer and the financial service provider;
or
- (b) accepted by the consumer and subject to a direction by the Ombudsman that it is binding upon the financial service provider.

(2) A determination by the Ombudsman may include any of the following—

- (a) a direction requiring the financial service provider to take specified steps within a specified time in order to remedy a specified act or omission;
- (b) an award of compensation, to be paid by the financial service provider, of an amount not exceeding the prescribed sum as the Ombudsman considers just and equitable;
- (c) where rules made under section 11(2)(d) so provide, an award against one party in respect of the costs (or any part of them) incurred by another party in connection with the financial service dispute.

(3) In subsection (2)(b) “the prescribed sum” means such sum as the Minister may by order prescribe.

(4) A determination awarding costs under subsection (2)(c) may be imposed and is final and binding upon a consumer even if the consumer has not accepted a determination proposed by the Ombudsman in respect of the financial service dispute to which the costs relate.

(5) A compensation award under subsection (2)(b) may consist of or include an amount which is payable if the financial service provider fails to comply with a direction made under subsection (2)(a).

(6) A party has a right of appeal to the Supreme Court on a point of law arising from a determination or direction of the Ombudsman.

(7) That right may be exercised only with permission given by the court on an application by the party.

(8) A determination or direction of the Ombudsman is enforceable in the Supreme Court as if it were a judgment or order of that court.

Power to require information.

13.(1) The Ombudsman may require a party to a financial service dispute to provide any information or produce any document which the Ombudsman considers necessary for the determination of that dispute.

(2) A requirement under subsection (1) must be made by notice setting out—

- (a) the information (or a description of the information) to be provided;
- (b) the document (or a description of the document) to be produced;
- (c) the form and manner in which it is to be provided or produced; and
- (d) the date and time by and place at which it must be provided or produced.

(3) Where any information is provided or document is produced in response to a requirement imposed under this section, the Ombudsman may—

- (a) take copies of, or extracts from, any document; and
- (b) require the person providing the information or producing the document to provide an explanation of that information or document.

Confidentiality.

14.(1) The Ombudsman must treat as confidential any information which the Ombudsman acquires in performing any function under this Act and from which an individual or other person can be identified.

(2) The Ombudsman may only disclose information to which subsection (1) applies—

- (a) with the consent of the individual or person who can be identified from that information;
- (b) to the extent that its disclosure appears to the Ombudsman to be necessary—
 - (i) to enable the Ombudsman to perform any function under this Act;
 - (ii) to prevent or detect crime; or
 - (iii) to comply with any order or direction of the Supreme Court; or
- (c) to the extent that its disclosure to the Financial Services Commission established under the Financial Services Commission Act 2007 appears to the Ombudsman to be in the public interest.

Obstruction and contempt.

15.(1) If a person—

- (a) fails to comply with a requirement imposed under section 13; or
- (b) obstructs any investigation by or proceeding of the Ombudsman under this Act;

the Ombudsman may certify the matter to the Supreme Court.

(2) The Supreme Court may enquire into a matter certified under subsection (1) and, if after hearing—

- (a) any witness who may be produced against or on behalf of the person; and

- (b) any statement made by or on behalf of the person;

the court is satisfied that the person would have been in contempt if the inquiry or proceeding had been proceedings before the court, it may deal with the matter as if the person had committed a contempt of court in relation to the Supreme Court.

Annual reports.

16.(1) The Ombudsman must provide a report to the Minister at least once each year (on or by a date the Minister may specify) on the discharge of the Ombudsman's functions.

(2) A report under subsection (1) must include, in respect of the year to which it relates—

- (a) the number and type of financial service disputes referred to the Ombudsman;
- (b) the average time taken to resolve the disputes received;
- (c) the number and percentage share of financial service disputes which were discontinued before an outcome was reached;
- (d) if known, the rate of compliance with the outcomes of the Ombudsman's resolution procedures in respect of financial service disputes;
- (e) any systematic or significant problems that frequently lead to disputes between consumers and financial service providers, together with any recommendations as to how they can be avoided or resolved in future;
- (f) any cooperation within networks of alternative dispute resolution entities facilitating the resolution of cross-border disputes, together with an assessment of the effectiveness of that co-operation (if any);
- (g) any training provided or undertaken by the Ombudsman or member of the Ombudsman's staff in respect of conducting resolution procedures;

- (h) an assessment of the effectiveness of the Ombudsman's resolution procedures and how performance could be improved; and
- (i) any other information that the Minister may specify.

(3) The Ombudsman must publish a copy of any report under this section on its website, on a durable medium upon request and by any other means the Ombudsman considers appropriate.

Liability of Ombudsman.

17.(1) The Ombudsman has no liability for any act or thing done or omitted to be done in that capacity.

(2) A person who is the Ombudsman has no personal liability for any act or thing done or omitted to be done by the person in the exercise of the Ombudsman's functions.

(3) A person has no personal liability for any act or thing done or omitted to be done by that person in performing their duties as a member of the Ombudsman's staff.

(4) Subsections (1) to (3) do not apply to any act or thing which is shown to have been done or omitted to be done in bad faith.

Consequential amendments.

18.(1) In the Financial Services (Insurance Companies) Act 1987, for section 87K substitute—

“Dispute resolution.

87K. (1) Any dispute between the insurer and the insured arising out of a legal expenses insurance contract may be referred to—

- (a) arbitration under the Arbitration Act; or
- (b) where the insured is a consumer within the meaning of the Financial Services Ombudsman Act 2015, to the Financial Services Ombudsman for investigation and resolution in accordance with that Act.

(2) The policy shall mention the right of the insured to have recourse to arbitration and, where the insured is a consumer, to the Financial Services Ombudsman.”.

(2) In the Financial Services (Consumer Credit) Act 2011, for section 29 substitute—

“29. A consumer dispute arising from a credit agreement to which this Act applies may be referred to the Financial Services Ombudsman for investigation and resolution in accordance with the Financial Services Ombudsman Act 2015.”.

(3) In the Financial Services (Information Gathering and Co-operation) Act, in Schedule 1, after “The Gambling Commissioner;” insert “The Financial Services Ombudsman;”.

(4) In the Financial Services (EEA)(Payment Services) Regulations 2010, after regulation 83(3), insert—

“(4) Nothing in this regulation is to be taken to prevent a payment service user who is a consumer within the meaning of the Financial Services Ombudsman Act 2015 from referring a dispute between the payment service user and a payment service provider to the Financial Services Ombudsman for investigation and resolution in accordance with that Act.”.

(5) In the Financial Services (Collective Investment Schemes) Regulations 2011, for regulation 115 substitute—

“115.(1) Any dispute arising under these Regulations may—

- (a) be referred to arbitration under the Arbitration Act; or
- (b) where the complainant is a consumer within the meaning of the Financial Services Ombudsman Act 2015, be referred to the Financial Services Ombudsman for investigation and resolution in accordance with that Act.

(2) The Authority shall facilitate the resolution of cross-border disputes in accordance with subregulation (1).”.

(6) In the Financial Services (Electronic Money) Regulations 2011, after regulation 59(2) insert—

“(3) Nothing in this regulation is to be taken to prevent an electronic money holder who is a consumer within the meaning of the Financial Services Ombudsman Act 2015 from referring a dispute between the electronic money holder and an electronic money issuer to the Financial Services Ombudsman for investigation and resolution in accordance with that Act.”.

Explanatory Memorandum

This Act establishes the Financial Services Ombudsman and sets out its powers and functions and the duties. The Act requires financial service providers to participate in dispute resolution procedures conducted by the Ombudsman in respect of consumer disputes and enables the Ombudsman, with the consent of the consumer concerned, to impose binding solutions upon financial service providers. The Act also requires financial service providers to give consumers certain information about the Ombudsman.
