

FINANCIAL SERVICES OMBUDSMANS BUREAU

SUBMISSION TO CENTRAL BANK

CONSULTATION PAPER CP91

***Review of the Code of Conduct for Business Lending to Small and Medium Enterprises***

1. The FSOB has reviewed Consultation Paper CP91 and has one comment to make regarding a potential issue arising from the application of the definition of “*micro, small or medium enterprise*” as set out in Article 2 of the Annex to the Commission Recommendation 2003/361/EC. With the exception of this comment, the FSOB does not propose to make any further comment or submission in respect of the Consultation Paper.
2. It is noted that the Consultation Paper proposes to introduce strengthened protections to all SMEs (as defined – see below). This includes extending to the “SME Sector”, protections under the *Consumer Protection Code 2012* afforded to “personal customers” of regulated financial service providers in relation to the provision of credit .
3. It is also noted that the definition of ‘micro, small or medium enterprise’ means a micro, small or medium enterprise within the meaning of Article 2 of the Annex to the Commission Recommendation 2003/361/EC. Article 2 provides:
  - 1) *The category of micro, small and medium-sized (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR50 million and/or an annual balance sheet total not exceeding EUR 43 million*
  - 2) *Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet does not exceed EUR 10 million.*
  - 3) *Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.*
4. One of the proposals in the Consultation Paper (see page 7) and the draft Regulations (see Section 22 3(e) ), is that lenders would be required to provide information to the customer about the complaints process including , where relevant, to the Financial Services Ombudsman [FSO] and that the borrower can refer the matter to the FSO.
5. Under the *Central Bank and Financial Services Authority of Ireland Act 2004* as amended, including S.I. 190 of 2005 and S.I. 164/2014, the definition of an eligible consumer, who may bring a complaint to the FSO refers to a person or group of persons (including limited

companies and unincorporated bodies such as partnerships, charities ,clubs, trusts and sole traders) having an annual turnover of EUR 3 million or less in the financial year prior to the year in which the complaint is made to the FSO, provided that such person or persons shall not be a member of a group of persons having a combined turnover greater than EUR 3 million.

6. A copy of S.I. 164 of 2014 is attached for convenience.
7. It can be seen that the definitions of SMEs (for the purpose of referring a complaint to the FSO under the proposed Regulations) and eligible consumer (for the purposes of establishing the jurisdiction of the FSO) are in conflict.
8. It can also be seen that the criteria for defining eligibility under the FSO legislation refers only to turnover and does not take account of number of employees and/or annual balance sheet total.
9. **Thus in simple terms as current legislation stands, whilst the Regulations proposed under the Consultation Paper might provide for SMEs to refer a complaint to the FSO, it is likely that there will be many SMEs - intended by the proposed Regulations to have extended protections afforded to them - which will not comply with the definition of “eligible consumer” under the legislation setting out the jurisdiction of the FSO. For example SMEs having a turnover greater than EUR 3 million in the financial year prior to the complaint being made to the FSO would be ineligible to the bring a complaint to the FSO. Also an SME that may be a member of a group of companies having a combined turnover greater than EUR 3 million would be ineligible to bring a complaint to the FSO.**

**Clearly in any proposed Regulations and/or legislation introducing the measures proposed, the issue of the conflict between the two applicable definitions will need to be addressed, failing which the FSO will not have jurisdiction to investigate complaints intended by the proposed Regulations to be referable to the FSO.**

13 April 2015.

**FINANCIAL SERVICES OMBUDSMAN'S BUREAU**



**STATUTORY INSTRUMENTS.**

**S.I. No. 164 of 2014**

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**CENTRAL BANK ACT 1942 (FINANCIAL SERVICES OMBUDSMAN  
COUNCIL) (AMENDMENT) REGULATIONS 2014**

**CENTRAL BANK ACT 1942 (FINANCIAL SERVICES OMBUDSMAN COUNCIL) (AMENDMENT) REGULATIONS 2014**

The Financial Services Ombudsman Council, in exercise of the powers conferred on the Council by Section 57BF of the Central Bank Act 1942 (as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 (No. 21 of 2004)) and as authorised by the Council, with the consent of the Minister for Finance, hereby make the following regulations.

*Citation and commencement*

1. (1) These Regulations may be cited as the Central Bank Act 1942 (Financial Services Ombudsman Council) (Amendment) Regulations 2014.

(2) These Regulations and the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 (S.I. No. 190 of 2005) may be cited together as the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 and 2014 and shall be construed together as one.

(3) These Regulations come into effect on 7 April 2014.

*Definitions*

2. In these Regulations—

“the 2005 Regulations” means the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 (S.I. No. 190 of 2005);

“group of persons” includes limited companies and unincorporated bodies such as partnerships, charities, clubs, trusts and sole traders;

“person” includes a natural person acting in the course of or in connection with, carrying on a business;

“turnover”, in respect of a credit institution or other financial service provider, means the sum of the following income items after deduction of value added tax and other taxes indirectly related to those items where appropriate:

- (i) interest income;
- (ii) interest from securities, including
  - (a) interest from shares and other variable yield securities,
  - (b) income from participating interests, and
  - (c) income from shares in affiliated undertakings;

*Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 8th April, 2014.*

- (iii) commissions receivable;
- (iv) net profit on financial operations; and
- (v) other operating income.

*Amendment of 2005 Regulations*

3. The following Regulation is substituted for Regulation 2 of the 2005 Regulations:

"2. (1) The following classes of persons are prescribed by Council as consumers for the purposes of subsection (b) of the definition of "consumer" in Section 57BA of the Central Bank Act 1942 (as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004):

Person or group of persons having an annual turnover of 3 million euro or less in the financial year prior to the year in which the complaint is made to the Ombudsman, provided that such person or persons shall not be a member of a group of persons having a combined turnover greater than 3 million euro.

(2) In these Regulations "turnover" of the person or group of persons referred to in paragraph 1 shall be determined by calculating the income received from the person's or group of persons' sales and services falling within the person's or group of persons' ordinary activities after deduction of sales rebates.

(3) For the purposes of paragraph (1), "turnover" shall be calculated in respect of the financial year prior to the year in which the complaint is made to the Ombudsman and not the year or years in which the conduct complained of occurred."

L.S.

GIVEN under the seal of the Financial Services Ombudsman Council,

4 April 2014.

DERMOTT JEWELL,

Chairperson.

Financial Services Ombudsman Council  
Lincoln House  
Lincoln Place  
Dublin 2

**EXPLANATORY NOTE.**

*(This note is not part of the Regulations and does not purport to be a legal interpretation.)*

The purpose of these Regulations is:

- (a) To amend and clarify the definition of "consumer" to include (i) a natural person when acting in the course of or in connection with the carrying on of a business and (ii) sole traders;
- (b) To apply the limit of €3m annual turnover to all persons, groups of persons and incorporated bodies;
- (c) To provide for a definition of "turnover" in respect of a person/group of persons and in respect of a financial service provider.

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