

Draft Bill establishing the Independent Administrative Authority for the Protection of Financial Customers

On 5 April the Spanish Council of Ministers approved the Draft Bill establishing the Independent Administrative Authority for the Defence of Financial Customers. The new regulation will bring important changes that financial institutions should be aware of. A team of specialists in the field from Uría Menéndez has prepared a document with the key issues.

- **The Draft Bill complies with the mandate in the first additional provision of Law 7/2017 of 2 November** (which in turn transposes Directive 2013/11/EU) to create a single entity, the ACDF, with powers to resolve financial services customer complaints and obliges financial institutions to participate in alternative dispute resolution procedures conducted by this entity.
- It provides that the ACDF will now handle all **out-of-court dispute resolution proceedings** arising from financial services customers' complaints, which were previously shared out between the complaints services of the National Securities Market Commission ("**CNMV**"), the Bank of Spain ("**BdE**") and the Directorate General of Insurance and Pension Funds ("**DGSFP**"). The ADCF's resolutions will be binding when the user claims less than EUR 20,000 and will resolve complaints not only from customers of currently supervised entities, but also from customers of fintech companies and crypto-asset service providers to the extent that they are registered or supervised.
- The **principle of personalised service provision and attention** is introduced to take into account the personal circumstances of citizens, such as their age and digital skills, as well as the characteristics of the geographical area in which they live, and to guarantee that financial services customers can both avail themselves of services and make complaints to the ACDF through face-to-face, telephone and online channels that are adapted and accessible to vulnerable groups.

The Draft Bill was published on 6 April and is open to public consultation until 12 May 2022. You can consult the Draft Bill at this [link](#).

1. THE ADCF

Powers: The ADCF will resolve complaints, exclusively of an economic nature, formulated by financial customers¹ acting individually or through associations or organisations that collectively represent their

¹ Financial customers: All natural or legal persons and entities without legal personality, whether Spanish or foreign, who are duly identified and who are users of financial services provided by financial institutions and, consequently, to whom the regulations governing these are applicable. Potential customers are also considered financial customers, understood as those

interests, against financial entities (including branches in Spain of foreign entities)² so that they restore or repair their interests or rights when these have been infringed in the provision of a financial service³ or in the pre-contractual phase, as a consequence of breaches of the rules of conduct,⁴ best practices,⁵ “financial uses” (a concept not defined in the Draft Bill) and unfair clauses⁶.

As a new feature, the future law will allow customers of entities and operators in the fintech sector and of crypto-asset services to file complaints with the ADCF in accordance with the future Regulation of the European Parliament and of the Council on Markets in Crypto-assets, provided that their activities are subject to authorisation or registration. Also of note is the extension of the application of the out-of-court dispute resolution system to potential customer claims in the pre-contractual phase.

Unwaivable rights: The Draft Bill expressly declares null agreements between a customer and a financial institution that limit or condition, in whatever form, the customers’ rights under this regulation.

Inclusion of the ADCF in the out-of-court dispute resolution system: The ADCF will, together with the customer care services and customer ombudsmen of financial institutions, make up the system for out-of-court settlement of disputes between customers and financial institutions, centralising in a single entity the functions performed by the current complaints services of the CNMV, the BdE and the DGSFP (which will no longer perform these functions). It will also be able to handle complaints from financial customers jointly in line with Law 7/2017 of 2 November, which transposes Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in consumer matters into Spanish law.

Nature of the body: The ADCF will be a public body attached to the Ministry of Economic Affairs and Digital Transformation, through the State Secretariat for Economic Affairs and Business Support (*Secretaría de Estado de Economía y Apoyo a la Empresa*).

who have had direct pre-contractual contact with the institution regarding a financial service at the initiative of either party. Institutional investors may also file complaints when acting in defence of their clients’ interests.

² Financial institutions: All natural or legal persons subject to (i) the supervision of the BdE, the CNMV, the DGSFP or similar entities, including those from other EU Member States and third countries, operating in Spain exercising freedom of establishment; (ii) Law 22/2007; (iii) Law 2/2009; (iv) Law 16/2011; (v) Law 5/2019; and (vi), following its approval, the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937.

³ Financial service: Any legal relationship established between a financial institution and its customer, the content of which falls within its corporate object and is included among the activities subject to authorisation or registration.

⁴ Rules of conduct: Transparency and customer protection regulations, as well as any other regulatory provisions that impose obligations on financial institutions in the provision of financial services to their customers, whether prior to the conclusion of the contract, during its performance or after its effects.

⁵ Best practices: The interpretative criteria, practices, methodologies or procedures necessary for financial institutions to fulfil their legal and contractual obligations in the framework of business relationships with their customers in a responsible, diligent and fair manner.

⁶ Unfair term: Any non-individually negotiated stipulation which, contrary to the requirements of good faith, causes a significant and unjustified imbalance in the contractual obligations to the detriment of the consumer, provided that any of the following circumstances apply: (i) that said clause or another of identical significance has been declared null and void as unfair by the case law of the Supreme Court, (ii) that said character results from a judgment of the Court of Justice of the European Union specifically ruling on the matter; or c) that the unfairness has been declared in a final judgment registered in the Register of General Contractual Conditions.

Governing council: The ADCF will be governed by a governing council composed of (i) a president and a vice-president, (ii) two elected directors, (iii) a director representing the BdE, (iv) a director representing the CNMV, (v) a director representing the DGSFP and (vi) the head of the General Secretariat of the Treasury and International Finance. The persons holding the office of president and vice-president and the elected directors will be appointed by the Council of Ministers for a non-renewable period of six years and must have a good reputation and the required knowledge and experience. The president and vice-president will be considered senior civil servants/officials and must not hold any other posts. Among others, the governing council will have the power to decide which of its members and sections will handle complaints, to apply sanctions and to deliberate and report on the matters submitted for its consideration by the president.

Board members and sections: The board members, who will be civil servants or employees selected from among professionals with sufficient experience and knowledge to carry out their functions, will conduct the complaint procedure (investigate and present conclusions), and the sections (made up of an odd number of three or more members other than the members investigating the complaint) will rule on the complaints as a collegiate body. A special section (made up of the president and four persons, each representing one of the ADCF's areas) will rule on questions posed by the sections and the president (e.g. on unifying criteria).

Publicising the out-of-court dispute resolution system: In the pre-contractual information provided to customers on paper, online or by telephone, financial institutions must inform them that to resolve a dispute they must first contact the financial institution's customer service department and, if their complaint is not resolved satisfactorily, they can then contact the ADCF. This information must also be posted on the notice boards of the financial institutions' branches and on their websites.

2. PROCESSING COMPLAINTS

Prior complaint to the customer service department or the ombudsman: As is currently the case with the complaints services of the three supervisors, before the ADCF will begin processing a complaint, the customers will have to prove that they have already submitted their complaint to the customer service department of their financial institution. If the customer service department rules the complaint is inadmissible, totally or partially rejects it, or if one month⁷ passes since it was submitted without it being resolved, the customer may file a complaint with the ADCF.⁸ The complaint must be submitted to the ADCF within one year of it being filed with the financial institution's customer service department, otherwise it will be rejected.

⁷ Fifteen business days for complaints about payment services.

⁸ A customer does not need to hire a lawyer to file a complaint with the ADCF.

Corrections: If the ADCF detects deficiencies in the complaint or the need for additional documentation, the customer will have ten business days to correct the deficiencies and, if this is not done, it will be understood that the customer has withdrawn the claim.⁹

Allegations by financial institutions: The ADCF will send a copy of the complaint and the documents provided by the customer to the institutions against which the complaint is made, giving them 15 days to electronically submit any allegations and documentation that they deem appropriate.

Joint processing of complaints: The ADCF may, on its own initiative or at the request of the customer, process more than one complaint together when they are substantially similar or closely connected.

Reversal of the burden of proof: A new feature compared to the current complaints system is that in this procedure the burden of proving compliance with the obligations established in the rules of conduct and best practices will fall on the financial institution. Specifically, the financial institution will be responsible for providing the ADCF with the pre-contractual and contractual documentation related to the financial service that is the subject of the complaint.¹⁰

Deadlines: The board member has 60 calendar days (from the moment they receive the complete documentation) to examine the file and forward it to the section together with their proposal for resolving the complaint. Upon receipt, the section has 30 calendar days to notify the parties of its decision. The investigating member or the section may decide to extend these deadlines for particularly complex disputes, although the total of both extensions may not exceed 90 calendar days and they must justify the decision to extend.

Effects of lodging a complaint: The parties concerned may not take any judicial or extrajudicial action against each other in relation to the subject matter of the complaint while it is being processed by the ADCF. The filing of a complaint with the ADCF interrupts the limitation period for the corresponding legal actions until its decision is issued.

Resolution: If the customer's complaint is upheld and they have claimed less than EUR 20,000, the resolution will be binding on the financial institution. The financial institution must comply with the binding resolution within 30 business days of being notified of it. This is a significant change to the current complaints procedures of the CNMV, BdE and the DGSFP. When the amount claimed is EUR 20,000 or more, the resolution will not be binding on the parties. If the resolution is unfavourable to the institution, it must indicate, within 30 days of notification, whether or not it accepts the resolution, and provide the ADCF with documentary proof that it has corrected its position with the customer (when it has done so).

Appeal: The ADCF's binding decisions will conclude the complaints procedure and may not be appealed before the administrative authorities. Any party may appeal these binding decisions before the

⁹ In this case, the time limit for a decision may be suspended for the time between the notification of the request and it being met.

¹⁰ In order to comply with this obligation, the Draft Bill obliges financial institutions to keep pre-contractual and contractual documentation relating to financial services for a minimum of six years from the time when the contract ceases to have effect with respect to the financial customer. If the contract has not been concluded, this minimum period will begin from the time it was delivered to the financial customer.

administrative courts (claims in respect of non-binding decisions will be settled, as up until now, in the civil courts). If a financial institution appeals a binding decision and does not obtain a more favourable ruling than that adopted by the ADCF, it will be ordered to pay the costs.

Transitional regime for ongoing legal proceedings: When the new procedure comes into force, customers who have pending legal proceedings on matters that would have fallen under the jurisdiction of the ADCF may unilaterally withdraw from the lawsuit (at no cost) and submit the complaint to the ADCF.

3. PENALTIES AND FEES

Infringements¹¹: Infringements include not complying with (i) the obligation to submit allegations and documentation to the ADCF in the format and within the period provided for in the Draft Bill; (ii) the obligations to prove compliance with the obligations established in the rules of good conduct and best practices, and to keep (pre-)contractual documentation; and (iii) the ADCF's binding resolutions (presumably, when not appealed before the administrative courts). An infringement will be considered serious if it affects a considerable number of parties, the conduct is repeated or it affects customer confidence and the stability of the financial system.

Liability: The Draft Bill establishes that financial institutions, as well as those who hold administrative or directorship or managerial positions in them, may be liable.

Penalties: The ADCF may apply fines of up to 5% (serious) and 1% (minor) of the annual net turnover of the sanctioned financial institution. In the case of serious infringements, the ADCF may also publish the name of the offender, details of the infringement and the sanction applied in the Spanish Official State Gazette. Fines will vary according to factors such as the value of the transactions affected by the infringement, the benefits/profits obtained from the infringement and the intention to infringe. Meanwhile a customer found to have acted recklessly or in bad faith when filing a complaint will be fined up to EUR 1,000.

Fee for resolving complaints: The ADCF will charge EUR 250 per complaint, which must be paid by the financial institution against which the complaint is made. The fee will be used to finance the ADCF and to encourage institutions to resolve complaints amicably with their customers before they go to the ADCF and, finally, to the courts. Customers will not be charged for making a complaint.

4. TRANSITIONAL REGIME FOR FINANCIAL SUPERVISORS' COMPLAINTS SERVICES

The Draft Bill provides that until the ADCF's president and vice-president are appointed, and until the necessary funds are in place to allow the ADCF to operate, the existing complaints services of the financial supervisors will continue to handle complaints under the previous regulations.

¹¹ These infringements are separate to breaches of regulatory and disciplinary rules that may underlie a complaint, and which the ADCF may report to the competent supervisors for subsequent action on their part.

5. IMPROVING FINANCIAL EDUCATION AND INCLUSION

Promoting financial education: The Draft Bill requires supervisors to work together and with the ADCF and the Ministry of Education to improve citizens' financial literacy.

Guaranteeing personalised attention: In providing their services, from now on financial institutions must take into consideration the age of their customers, the characteristics of the geographical area where they live and their digital skills, among other factors. The ADCF will seek to ensure they comply with this principle when deciding on complaints. To this end, financial institutions and the ADCF will have to work to guarantee the availability of face-to-face (whether permanent or intermittent), telephone and online channels for providing their services to customers and the filing of complaints with the ADCF.¹²

Increased information on access to financial services: Credit institutions will be obliged to periodically submit to the BdE a set of data that will enable the public authorities to analyse the problems citizens face when trying to access financial services, taking into account the geographic distribution of the population, age, socio-economic factors and how financial services are provided.

¹² Although the Draft Bill provides for the mandatory use of electronic means to submit complaints in the case of financial customers who are legal persons and the preferential use of these means by all other customers.

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