



COMPARATIVE LAW REVIEW



VOLUME 17 · N. 3 · 2026

*Special Issue — Harmonizing and Enhancing the Enforcement of Consumer Law: A
Comparative Analysis of Germany and Italy*



COMPARATIVE LAW REVIEW

The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

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FROM FAILURE TO REDESIGN: THE EUROPEAN ODR SYSTEM AND THE NEXT GENERATION OF DIGITAL CONSUMER REDRESS

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*The discontinuation of the European Union's Online Dispute Resolution (ODR) platform, formalized by Regulation (EU) 2024/3228, marks the end of a governance model premised on a centralized technological gateway dependent upon voluntary trader cooperation. Despite attracting millions of annual visitors, the platform suffered from a structural traffic-to-referral gap, where only 2% of complaints received the trader consent necessary to proceed to an ADR entity. Comparative analysis reveals that the EU model functioned primarily as a referral gateway to ADR bodies. In the UNCITRAL typology, this corresponds to "stage 2" (facilitated mediation). By contrast, more successful systems – such as Brazil's *consumidor.gov.br* – rely on "stage 1" direct negotiation, combined with reputational discipline and public transparency mechanisms; furthermore, different models demonstrate the necessity of binding authority and enforceable outcomes. The transition to Directive (EU) 2025/2647 shifts the EU strategy toward a guided pathway infrastructure and introduces structured response obligations to mitigate trader inertia. Ultimately, the demise of the platform confirms that digital redress cannot succeed through technology alone; it requires a regulatory design that creates meaningful participation incentives and aligns institutional oversight with access-to-justice standards.*

Keywords: Online Dispute Resolution – Alternative Dispute Resolution – EU Consumer Law – Access to Justice – Platform Governance – Digital Market

I. INTRODUCTION

The European Union's Online Dispute Resolution platform (EU ODR) was conceived as a flagship instrument of digital justice for consumer disputes arising from e-commerce.¹ Launched in 2016, it promised a multilingual, low-cost and accessible pathway for resolving low-value claims – especially cross-border claims – towards certified ADR entities, rather than resolving disputes directly.² Yet, less than a decade later, the Union legislator has formally discontinued the platform,

¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

² See: L. Caplin, *Online Cross-Border Consumer Dispute Resolution: an assessment of its potential and analysis of the ECODIR Project*, London, 2004 (1st ed.): "The ECODIR pilot project has shown that a real need exists for a low-cost mechanism for the resolution of low-value cross-border disputes."; F. Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, in *Journal of Law, Technology & Policy*, 1-4 (2009): "the rule of law must transcend old realities in order to face the challenges of adjudicating low-cost online transactions between buyers and sellers from different states, and even countries."; M. E. Hiscock, *Cross-Border Online Consumer Dispute Resolution*, in *Contemporary Asia Arbitration Journal*, 4-1 (2011): "This is a global problem – large numbers of disputes with a low value. The average value is between US\$100 – US\$150. Because of the nature of consumer disputes, and also because of the structure of the international legal infrastructure, it is not possible to have a simple cosmetic change in the machinery for the resolution of international commercial disputes to include cross-border online dispute resolution of consumer transactions."

repealing Regulation (EU) No 524/2013 via Regulation (EU) 2024/3228, marking the shift away from a centralized technological gateway, in a legislative move that is as symbolically relevant as it is legally consequential.³ The formal act of repeal is not merely the end of a website: it signals the limits of a particular governance model for digital consumer redress – one premised on an EU-level technological gateway embedded within, and dependent upon, fragmented national ADR infrastructures and the voluntary cooperation of traders. The discontinuation schedule itself is revealing: Regulation (EU) 2024/3228 distinguishes between the cessation of new complaint submissions (20 March 2025) and the repeal of Regulation (EU) No 524/2013 (20 July 2025), thereby framing the end of EU ODR as a managed shutdown rather than an immediate termination.⁴

The underlying policy justification is stated with unusual candour in the recitals of the repealing Regulation: the platform attracted millions of visitors annually, yet only a minimal fraction of interactions translated into procedures before ADR entities and, ultimately, into redress outcomes.⁵ This structural mismatch – between high demand and negligible throughput – constitutes the core analytical puzzle of this paper: why did a sophisticated match-making interface fail to generate actual cross-border complaints into ADR procedures capable of delivering effective consumer redress?⁶ From this angle, the label “ODR” was arguably misleading from the outset: the platform was designed chiefly to route and coordinate complaints, not to decide disputes in its own right.

At stake is a broader question of institutional design: whether the Union can credibly pursue a model of digital consumer justice that relies on voluntarism and indirect incentives, rather than on mandatory participation rules or binding authority. This question must be made explicit from the outset, because the EU ODR platform was structurally reliant on national ADR systems operating under a minimum-harmonisation directive; it therefore raises a prior institutional dilemma: to what extent can an EU-level digital gateway be effective when it must build on highly heterogeneous national – and often sector-specific – regulatory landscapes? The comparative contrast with domestic platforms operating within harmonised national frameworks suggests that the EU’s problem is not merely technological, but constitutional and regulatory: absent deeper convergence (potentially through fuller harmonisation of the ADR Directive’s key access and participation variables), a digital interface may amplify expectations while remaining unable to guarantee outcomes across borders. The architecture of Regulation (EU) No 524/2013 – which created information obligations without imposing a general duty on traders to participate in ADR –

³ Regulation (EU) 2024/3228, recital (5): “The evidence strongly suggests that, given that no more than 200 cases are transferred per year to an ADR entity, further maintenance of the ODR platform does not correspond to the principles of efficiency and effectiveness as provided for in Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council.”

⁴ Regulation (EU) 2024/3228, art. 2.

⁵ Regulation (EU) 2024/3228, recitals (3)–(4).

⁶ G. F. Colombo, *What We Talk About When We Talk About Consumer ODR: The EU ODR Regulation and its Preliminary Lessons*, in *International Journal of Procedural Law*, 2 (2021), p. 266: “The Report, which is probably slightly overly optimistic, is laudatory from a qualitative point of view, but less so from a quantitative one. This is clearly seen in the contrast between the number of accesses to the platform (“Since its launch, the platform has attracted more than 8.5 million visitors and 120 000 consumer-to-business disputes”) and the number of disputes effectively handled through the platform itself: 2% of the total.”

foreshadowed this tension.⁷ Early scholarship warned that such a model risked disappointing consumers: a hyperlink can create expectations of redress, but the platform cannot assist a consumer if the trader declines to engage.⁸

Compliance with Article 14 information obligations was also reportedly weak, with a large share of traders failing to display the required link and many of those who displayed it placing it in locations unlikely to be noticed by consumers;⁹ at the same time, trader engagement with complaints was extremely low.¹⁰ The platform, in this sense, appears to have suffered from a combination of (i) legal under-inclusiveness (limited binding participation), (ii) practical under-compliance (limited visibility of the tool), and (iii) institutional dependency (variable quality and capacity of national ADR bodies and contact points).¹¹

II. THE EU CONSUMER ADR/ODR ARCHITECTURE (2013 – 2025)

The EU Online Dispute Resolution (ODR) platform was not conceived as an isolated technological artefact. Rather, it constituted the operational gateway of a two-instrument legislative strategy adopted in 2013, aimed at enhancing consumer confidence in the internal market through accessible redress mechanisms. The regulatory move responded to a structural diagnosis: cross-border consumer disputes, especially those arising from e-commerce, were frequently left unresolved because the expected costs (time, language barriers, legal uncertainty) outweighed the individual value of the claim, thereby discouraging rational enforcement and, ultimately, depressing trust in the digital single market. This diagnosis is already explicit in the early recitals of Regulation (EU) No 524/2013, which connect consumer protection, the functioning of the internal market, and the need for effective redress as a precondition for market participation, especially in cross-border settings. The same recitals frame the small-value and cross-border character of disputes as an institutional design constraint: where litigation is structurally irrational, regulatory policy tends to seek alternative channels that reduce transaction costs while maintaining adequate guarantees of fairness.¹² The ODR initiative was, in this sense, a market-making project, but one articulated through the language of consumer rights and procedural accessibility.¹³

⁷ S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, pp. 93-100 available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

⁸ "Surveys undertaken in the Netherlands and Belgium show that most consumers indeed do not reach the ODR sites via traders, but by self-searching on the Internet." E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), p. 224, referring to A. Biard, K. Hanemaaijer, E. van Gelder, *Ervaringen en verwachtingen van consumenten over de Consumentenombudsdienst -Onderzoek naar onvolledige dossiers / Expériences et attentes des consommateurs vis-à-vis du Service de Médiation pour le Consommateur- enquête sur les dossiers incomplets*, available at <https://www.law.kuleuven.be/pub/nl/bestanden/nl-onderzoek-juli-2019-final.pdf> (last visited Jan. 07, 2026).

⁹ M. Poblet, G. Ross, *ODR in Europe*, in D. Rainey, E. Katsh, M. S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice*, Den Haag, 2021 (2nd ed.).

¹⁰ See statistics: European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes*, COM(2019) 425 final, p. 16.

¹¹ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 220-222.

¹² P. Cortés, *Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers*, in *International Journal of Law and Information Technology*, 19-1 (2010), pp. 1-5.

¹³ Regulation (EU) No 524/2013, recitals (9)-(10).

The binding package also marked an evolution from earlier, non-binding EU efforts to stimulate out-of-court consumer redress: the pre-2013 framework – mainly composed of Commission recommendations and policy documents – failed to generate uniform effects in Member States because of its voluntary character and its inability to ensure consistent sectoral and territorial coverage of ADR bodies.¹⁴ The EU legislator identified three main deficits in the pre-2013 framework: uneven availability of ADR schemes across Member States, inconsistent quality standards, and low consumer awareness. The 2013 package was explicitly designed to address these shortcomings. In that sense, the ODR platform should be understood as the digital interface of a deeper institutional choice: rather than building a single European consumer tribunal, the EU opted for a networked model, in which a central platform would route disputes toward a plurality of nationally certified ADR entities, coordinated through EU-level visibility and minimum procedural standards.¹⁵

Regulation (EU) No 524/2013 articulates its purpose in a characteristically EU manner: it links consumer protection to the internal market and treats trust as a functional variable of market integration. The recitals insist that a “high level of consumer protection” is necessary to ensure confidence in the internal market and to encourage cross-border activity, including online commerce. They identify the specific friction points of online transactions – distance, linguistic obstacles, and the asymmetry of bargaining power – and present ODR as a mechanism capable of neutralising those frictions through accessibility and procedural simplification.

At the same time, the EU’s approach cannot be reduced to a purely economic conception of trust. The legal discourse surrounding the platform, including the conceptual and legal framework provided by the Regulation, explicitly situates consumer ODR within a fundamental-rights matrix: access to justice, enshrined in Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union, is invoked as a normative anchor for ensuring that consumers – particularly in low-value cross-border disputes – can effectively enforce their rights.¹⁶ This dual anchoring (market-integration logic and rights-based discourse) is important for any diagnosis of failure. If the platform is read solely as a policy experiment to increase consumer trust, low usage might be interpreted as mere inefficiency; if, however, the platform is also read as a component of access-to-justice infrastructure, low conversion from complaints to outcomes raises rule-of-law concerns: the system may generate expectations of enforceability without delivering actual remedies, thereby producing not only inefficiency but also frustration and legitimacy loss.

A further design choice that structurally shaped the platform’s trajectory was the narrowing of scope: Regulation (EU) No 524/2013 limits its application to disputes arising from online sales or service contracts, thereby excluding disputes rooted in offline contractual relations, even when cross-border. The rationale, according to the recitals, was to target the e-commerce sector as the primary site of cross-border growth and, simultaneously, of consumer vulnerability.¹⁷ This choice had a consequential institutional implication: the EU did not intend the ODR platform to become a general online civil justice portal; instead, it was built as a specialised consumer redress entry-

¹⁴ J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, 2009 (1st ed.).

¹⁵ Regulation (EU) No 524/2013, recitals (10)–(18).

¹⁶ Regulation (EU) No 524/2013, recitals (1)–(4).

¹⁷ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 668–669.

point, tied to contractual obligations arising from distance and digital contracting practices. The Regulation also defines its negative scope: it does not apply to disputes between traders, and it does not apply to “consumer complaint-handling systems operated by the trader,” which underscores the conceptual distinction between private customer-service mechanisms and independent ADR procedures.¹⁸

Even within that limited domain, the Regulation introduces additional exclusions. In particular, it clarifies that it does not apply to disputes arising from online contracts in the health and education sectors, and that it does not cover disputes where the trader is not established in the Union.¹⁹ These boundaries highlight an implicit EU strategy: to focus regulatory resources on sectors where the EU could plausibly ensure systemic coordination through the internal market competence, and where the ADR supply (nationally certified bodies) could realistically exist across Member States. Yet, as comparative analysis later shows, jurisdictions that have built high-uptake ODR systems often succeed precisely by integrating consumer complaint-handling, negotiation, and escalation pathways within a single environment, rather than drawing sharp lines between trader-operated systems and certified ADR. The EU’s conceptual boundary thus already foreshadows a structural challenge: the platform’s value proposition depends on consumer migration away from private complaint-handling channels and toward an EU-level gateway, without the EU gateway itself offering decisive procedural leverage over traders.

In functional terms, the platform provides: (i) the electronic complaint form; (ii) information regarding ADR entities; (iii) an electronic case management tool; (iv) translation of information; (v) feedback mechanisms; and (vi) public-facing information on the functioning of ODR and consumer rights.²⁰ It also contains a register of certified ADR entities, as established in accordance with the ADR Directive, and it is explicitly required to operate free of charge. This is, therefore, a classic gateway model: a centralised intake and routing infrastructure coupled with decentralised dispute resolution procedures.

The platform’s workflow, as legally structured, is crucial for understanding both its promise and its vulnerability. The Regulation provides that the complainant submits the complaint through an electronic form, and the complaint must include information enabling identification of the competent ADR entity;²¹ once a complaint is submitted, the platform notifies the respondent party; the decisive step follows: the parties must, through the platform, agree on the ADR entity that will handle the dispute.

The Regulation establishes a default procedural stopping point if agreement fails: if the parties do not agree on an ADR entity within 30 calendar days from the submission of the complaint, or if the complaint cannot be transmitted because no competent ADR entity exists (or the identified entity refuses competence), the platform informs the complainant that the complaint cannot be processed further.²² In other words, the platform is structurally dependent on a party-consent mechanism at the most critical point of the workflow. This design choice may be interpreted as a

¹⁸ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp-221-222.

¹⁹ Regulation (EU) No 524/2013, art. 4(e)-(f); Directive 2013/11/EU, art. 2(2)(b), (h).

²⁰ Regulation (EU) No 524/2013, recital (18); art. 9.

²¹ Regulation (EU) No 524/2013, art. 8(1).

²² Regulation (EU) No 524/2013, art. 9(6)-(7).

compromise between consumer protection and trader autonomy; yet, from an institutional perspective, it creates a consent requirement capable of neutralising the platform's effectiveness. The importance of this bottleneck becomes clearer when placed against the Directive's aspiration to create effective, quick, and low-cost procedures. In the architecture imagined by EU policymakers, the ADR entity would then resolve the dispute within the Directive's envisaged timeframe (the ninety-day horizon), delivering a speedy outcome where litigation would be irrational.²³ Yet the procedural chain is only as strong as its weakest link: if the trader refuses to cooperate, or simply remains passive, the consumer's experience becomes one of bureaucratic intake without remedy. The platform can therefore generate a paradoxical effect: by making dispute initiation easy, it may multiply consumer expectations, while the consent bottleneck dissipates those expectations into non-processing.

III. PRACTICAL CHALLENGES AND REASONS FOR FAILURE

The trajectory of the EU ODR platform, viewed through a synthetic yet source-based reconstruction, reveals its demise as a structural – rather than merely operational – failure. The most immediate empirical marker is the traffic-to-resolution gap: notwithstanding the legal obligation for online traders and marketplaces to display a readily accessible link to the EU ODR platform, awareness efforts produced between two and three million visitors per year, yet only a minority of those visitors filed a complaint and, crucially, only about 2% of submitted complaints received a positive reply from traders that would allow transmission to an ADR entity, with the overall output amounting to roughly 200 cases per year across the Union.²⁴ This disproportion between a high-demand front-end and an almost negligible back-end throughput is legally significant because it reveals a mismatch between the platform's regulatory ambition – enhancing consumer trust in cross-border e-commerce through accessible redress – and the design choice to rely on voluntary trader cooperation within a fragmented and uneven ADR landscape across Member States, an institutional ecology that the platform neither governed nor could effectively compel. The subsequent political and legislative conclusion aligns with this diagnosis: in the 2022 call for evidence on adapting out-of-court dispute resolution to digital markets, the Commission reported that only 5% of responding consumers had used the platform and that the prevailing view was that it either required substantial reform or should be discontinued as not cost-effective, a premise later crystallised in the repeal.²⁵ At the doctrinal core lies a specific juridical architecture: the platform did not resolve disputes in its own right, but functioned mainly as a referral gateway enabling consumers to request that traders agree to use an ADR entity listed on the platform; accordingly, effectiveness depended less on the consumer's willingness to complain (which was demonstrably present) than on the trader's willingness to engage and on the parties' capacity to converge on a competent ADR body.²⁶ The Regulation establishes a procedural architecture whereby, if the parties do not agree on an ADR entity within 30 calendar days from the submission

²³ Directive 2013/11/EU, art. 8(e).

²⁴ Regulation (EU) 2024/3228, recitals (3)-(4).

²⁵ Regulation (EU) 2024/3228, recital (5).

²⁶ Regulation (EU) 2024/3228, recital (2).

of the complaint,²⁷ or if the complaint cannot be transmitted because no competent ADR entity exists or the identified entity refuses competence,²⁸ the platform informs the complainant that the complaint cannot be processed further. This consent-dependent design creates what may be termed a “consent bottleneck”, in which rational non-cooperation by traders – when legally low-cost and reputationally neutral – became systemic attrition rather than an exception, a dynamic explicitly captured in the trader engagement patterns. The fragility of this model had been anticipated in the literature: authors warned that information duties could generate an illusion of access, because traders not committed to ADR were neither required to identify a concrete ADR entity nor required to disclose non-adherence, so consumers could be directed to an ODR gateway structurally unable to deliver redress where the trader refused participation.²⁹ Empirical accounts reinforce that this structural impediment was not hypothetical: where parties failed to agree on an ADR entity, complaints were automatically closed after thirty days, with Commission data cited in the literature suggesting that a very large share of complaints ended in closure on that ground.³⁰ The platform’s regulatory strategy – relying on information obligations rather than mandatory participation – suffered analogous weaknesses in practice: although the ODR framework mandated a clear and accessible link, the statistics report widespread non-display and, when displayed, frequent concealment within legal pages such as terms and conditions, neutralising the behavioural function of pre-dispute information duties. Empirical analysis complements this picture by suggesting that consumers often reached the ODR platform through their own online searches rather than through traders’ disclosures, thus exposing, in classic consumer-law fashion, how formally elegant information obligations may fail under conditions of weak enforcement and minimal downside for non-compliance.³¹

The platform’s difficulties were further amplified by its dependence on divergent national infrastructures: conceived as an EU gateway resting on Member State ADR ecosystems, it necessarily inherited wide variations in the availability, quality, and sectoral coverage of ADR bodies, and it relied on national contact points whose performance was uneven, thereby failing to deliver a uniform European experience of redress and instead channeling users into heterogeneous national systems. This structural heterogeneity also intersects with legitimacy concerns: without mechanisms for the publication of outcomes and systematic quality controls, the ODR architecture risks fragmenting into a domain of dispersed micro-justice; such a lack of transparency limits the platform’s ability to foster the consistent development of EU consumer law or to generate trust in voluntary enforcement channels. A final nuance concerns user practice: the platform’s direct talk function was often used as a communication tool between consumer and trader, while only a marginal proportion of users proceeded to an ADR body, suggesting that formal transmission to

²⁷ Regulation (EU) No 524/2013, art. 9(8).

²⁸ Regulation (EU) No 524/2013, art. 9(6)-(7).

²⁹ M. B. M. Loos, *Enforcing European consumer rights at the detriment of European consumer law*, in *European Review of Private Law*, 24-1, (2016), pp. 61-79.

³⁰ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), p. 670.

³¹ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 223-224.

ADR may have been an imperfect proxy for user-perceived resolution.³² Nevertheless, this interpretive rescue remains circumscribed: a communication tool without incentives risks becoming a digital dead-end, and where settlement occurs off-platform the Union lacks reliable visibility into the fairness, transparency, and effectiveness of outcomes, which undermines the claim that the platform secured meaningful access to justice as a regulatory deliverable; the EU's decision to discontinue the platform while pursuing a different digital interactive tool focused on guidance and signposting is consistent with that reassessment.³³ Ultimately, the repeal is not merely a policy recalibration but a formal legal admission: Regulation (EU) 2024/3228 explicitly frames discontinuation in terms of public-law principles of efficiency and effectiveness, fixes a concrete closure timetable and data-management duties, and thereby confirms that a soft model – information duties combined with a voluntary referral gateway – could not justify the administrative and technological costs of maintenance; the repeal thus compels a renewed comparative inquiry into what forms of incentive alignment, market integration, or calibrated compulsion are necessary for ODR to function at scale in consumer disputes characterised by low claim values and high enforcement costs.³⁴

IV. COMPARATIVE LESSONS FOR THE RE-DESIGN OF EU DIGITAL CONSUMER REDRESS

The discontinuation of the EU ODR Platform on 20 July 2025, after a period in which new complaints were no longer accepted (after 20 March 2025), does not merely mark the end of an institutional artefact: it clarifies, by negative evidence, that the effectiveness of digital redress depends less on the existence of a sophisticated portal than on the legal, economic, and institutional forces that make participation rational for traders and credible for consumers.³⁵ The EU experiment treated ODR primarily as an access point – a multilingual single entry interface – while leaving the core of dispute settlement to a fragmented constellation of national ADR bodies and voluntary trader behaviour. Comparative experience suggests that such a model is structurally weak whenever the platform is not embedded in a broader ecosystem that produces settlement incentives and absorbs enforcement costs.

A first comparative cluster consists of private, marketplace-embedded schemes. The classic example is the rise of eBay/SquareTrade dispute resolution, which illustrates that ODR can succeed when it is tightly integrated into the life-cycle of the underlying transaction, and when compliance is driven by reputational and economic mechanisms rather than by a formal legal duty to cooperate.³⁶ Early models of private ODR were able to combine the promise of informality with

³² S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

³³ Directive (EU) 2025/2647, art. 20.

³⁴ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 679-682.

³⁵ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 659-660.

³⁶ On the eBay/SquareTrade model as paradigm of marketplace-embedded ODR, see P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2010 (1st ed.), p. 67; on the broader European context of online mediation development, see G. László Szöke, *The Possibility of Online Mediation under the Hungarian Mediation Act in Comparison with a Number of International, Including European, Documents on Mediation*, in *Information and Communications Technology Law*, 15-2 (2006).

the hard levers of platform governance (feedback systems, payment flows, and continuing access to the marketplace). The crucial comparative point is not that private ordering is normatively superior, but that a platform which can internalise the costs of non-compliance – by penalising the uncooperative party within the marketplace – does not need to rely on exogenous enforcement.³⁷ The EU ODR Platform, by contrast, never acquired an equivalent capacity: it could notify traders and host a directory, but it could not make engagement the most convenient option.

A second comparative cluster is represented by public negotiation platforms that make cooperation attractive through transparency and reputational discipline. Brazil's *consumidor.gov.br* is routinely invoked as a counter-example precisely because it demonstrates that a public platform can produce high settlement rates without transforming every consumer dispute into a judicialised procedure. The scheme's effectiveness is explained, in large part, by the architecture of direct communication between consumers and participating companies, coupled with publicly visible performance indicators. The platform is described as an online service "allow[ing] consumers and businesses to engage in direct communication", where the business is expected to respond within a short time window and performance is measured in terms of resolution rate, response time, and satisfaction.³⁸ These figures, drawn from data collected between 2016 and 2018, have been subsequently confirmed by more recent platform statistics, with resolution rates remaining consistently above 80%.³⁹ The resulting dynamics are quasi-regulatory: traders voluntarily participate, but the publication of rankings turns participation into a reputational investment and non-performance into a market disadvantage. These comparisons must, however, be handled with care: both Brazil's *consumidor.gov.br* and Canada's Civil Resolution Tribunal operate within a single national jurisdiction with comparatively coherent procedural baselines and enforcement expectations, whereas EU ODR was necessarily layered over diverging Member State ADR designs, sectoral coverage and language regimes. The comparative value is therefore heuristic – identifying incentive levers and user-interface choices – rather than a claim of institutional equivalence.

The comparison matters for EU policy because it highlights a structural asymmetry between merely informational obligations and incentive-producing transparency. Under the ODR Regulation, the EU emphasised the duty to display a link to the platform; empirical non-compliance and the invisibility of the link undermined the expected awareness channel. Yet even perfect compliance with a hyperlink duty would not have solved the deeper problem: if traders can ignore complaints without tangible consequences, the platform becomes, for consumers, a bureaucratic detour rather than a pathway to redress.⁴⁰ Brazil's model instead treats transparency not as an ancillary value but as a functional mechanism for inducing cooperation. In doctrinal terms, it translates the diffuse duty of good faith in consumer relations into measurable public signals, thereby reducing information asymmetry and disciplining opportunistic behaviour.⁴¹

³⁷ P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2010 (1st ed.), p. 67.

³⁸ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 664-667.

³⁹ For current statistics, see <https://www.consumidor.gov.br/pages/indicador/geral/abrir> (last visited Jan. 03, 2026).

⁴⁰ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 223-224.

⁴¹ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 667-668.

A third comparative cluster points towards a different solution: not reputational discipline, but public authority. Canada's Civil Resolution Tribunal (CRT) illustrates the logic of "ODR with teeth": a digital forum is effective when it is part of the public justice system, equipped with binding decision-making power and enforceability. The CRT is presented as an administrative tribunal within British Columbia's justice system, whose resolution process is designed to be primarily online and to culminate, where settlement fails, in an enforceable decision. Its structure includes negotiation and facilitated settlement phases before adjudication, reflecting a layered model in which the system first attempts consensual outcomes but does not remain hostage to refusal or inertia. Moreover, tribunal decisions are described as enforceable "as a court order", with limited avenues of review – features that transform digital access into effective legal protection.⁴²

The CRT experience offers particularly instructive data for EU policymakers. The tribunal's design philosophy centres on avoiding adjudication. According to published statistics, only 15% of disputes have been resolved through formal adjudication; the remaining 85% were resolved by consent, default, or withdrawal.⁴³ This ratio stands in stark contrast to traditional courts, where a very high percentage of matters may be abandoned due to cost and delay rather than reaching consensual resolution.⁴⁴ The CRT achieves these outcomes through a layered architecture: prospective claimants must first complete a sophisticated online "Solution Explorer" that triages disputes, collects information, and prompts consideration of alternative resolution methods; only thereafter does the proceeding enter a facilitation phase – essentially online mediation – with adjudication reserved as a last resort.⁴⁵

Crucially, the CRT's trajectory illustrates the governance evolution that may be necessary for ODR to function at scale. Originally designed as a voluntary tribunal, the CRT was transformed into a mandatory forum following stakeholder feedback: condominium property representatives argued that a voluntary scheme would allow one party to veto the other's access to an efficient digital forum, effectively forcing claimants back to the Supreme Court of British Columbia.⁴⁶ This transition – from opt-in voluntarism to exclusive jurisdiction – represents a structural solution to the participation deficit analysed above. The CRT now exercises exclusive or quasi-exclusive jurisdiction for strata disputes and small claims up to CAD \$5,000, with plans to expand this threshold progressively.⁴⁷

⁴² P. Daly et al, *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, available at http://www.internationallegalaiddgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026), pp. 78-82.

⁴³ P. Daly et al., *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, p. 83, available at http://www.internationallegalaiddgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026); see also S. Salter, D. Thompson, *Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, in McGill Journal of Dispute Resolution, 3, p. 117 (2016-2017).

⁴⁴ In British Columbia, only 3% of civil cases are disposed of at trial: BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), p. 2.

⁴⁵ Civil Resolution Tribunal Act, SBC 2012, c 25, as amended; see S. Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, in Windsor Yearbook of Access to Justice, 34 (2017).

⁴⁶ British Columbia, Hansard, 39th Parl, 4th Sess, 8 May 2012 at 11686 (Hon S Bond): "For many matters, the choice to use the tribunal or the Provincial Court will be up to the parties in the dispute. [...] This is a voluntary tribunal." The shift to mandatory jurisdiction followed the Civil Resolution Tribunal Amendment Act, 2015, SBC 2015, c 16.

⁴⁷ S. Salter (2017), cit., p. 122: the monetary jurisdiction for small claims was subsequently increased to \$5,000 and is expected to reach \$25,000.

User satisfaction data further validates the model. The CRT conducts voluntary participant surveys, with cumulative results indicating that 75% of respondents would recommend the tribunal to others, 77% agreed that the system prepared them adequately for dispute resolution, and 71% found the online interface easy to use.⁴⁸ While these figures should be interpreted cautiously – representing self-selecting respondents – they nonetheless demonstrate that a public ODR system can achieve reasonable acceptance when supported by enforceable authority and integrated guidance mechanisms.

Sectoral ombudsman schemes offer a complementary variant of authority through regulation: the UK Financial Ombudsman Service (FOS) is not a generic consumer ODR platform; however, it illustrates how mandatory trader participation and binding outcomes can be achieved through sector-specific regulation rather than through a universal platform. The UK financial regulatory framework requires firms to handle complaints fairly and recognises the ombudsman mechanism as a final stage of redress; where the ombudsman decides in favour of the consumer and the consumer accepts the outcome, the firm must comply, up to specified monetary limits that have been progressively increased over time.⁴⁹ This design again resolves the EU's fundamental weakness: it eliminates the silent trader problem by converting cooperation into a regulatory obligation, and it gives consumers a credible end-point beyond information and negotiation.

Comparatively, these models show that digitalisation is not a substitute for governance. Whereas the EU placed technology at the centre while leaving governance dispersed, successful public models tend to do the opposite: they place governance at the centre and use technology as an enabling infrastructure. The policy implication is not that the EU should judicialise consumer disputes, but that any EU-level digital redress strategy must either embed incentives (market governance), embed transparency (reputational discipline), or embed authority (binding outcomes). Without at least one of these anchors, ODR remains a portal rather than a remedy.

V. THE DIRECTIVE (EU) 2025/2647 AND THE NEW ODR SYSTEM

The EU's response to the collapse of its first-generation platform is not a retreat from digital redress, but a conceptual shift. At the level of public communication, the Commission frames the discontinuation as a transition rather than an abandonment: consumers are redirected towards a broader ecosystem of redress options, including the new mechanisms developed under the Digital Services Act for specific platform-related disputes.⁵⁰ At the legislative level, the key move is the adoption of Directive (EU) 2025/2647, adopted on 16 December 2025 and published in the Official Journal on 30 December 2025, which must be transposed by Member States by 20 March 2028 and applied from 20 September 2028. This amending directive reflects an explicit acknowledgement that the prior model – central platform plus voluntarism – requires re-engineering.

⁴⁸ Participant Satisfaction Survey – April to December 2018 (Civil Resolution Tribunal, 15 January 2019), available at <https://civilresolutionbc.ca/participant-satisfaction-survey-april-december-2018/> (last visited Jan. 05, 2026).

⁴⁹ Financial Ombudsman Service, *Annual Reports and Accounts for the year ended 31 March 2025*, available at <https://www.financial-ombudsman.org.uk/files/324642/Financial-Ombudsman-Service-Annual-Report-and-Accounts-2024-25.pdf> (last visited Jan. 09, 2026); Financial Conduct Authority, *DISP 3.6 (Handbook)*, available at <https://handbook.fca.org.uk/handbook/disp3/disp3s6?timeline=true> (last visited Jan. 02, 2026).

⁵⁰ M. Dąbrowski, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), pp. 171-174.

Two elements are especially relevant for a re-design of EU digital redress.

First, the amended framework introduces a structured response obligation on traders. The amended Article 5 of Directive 2013/11/EU, as introduced by Directive (EU) 2025/2647, establishes a structured timeline: traders must reply within a maximum of 20 working days to any question addressed by an ADR entity regarding their participation in a proposed ADR proceeding; this period may be extended to 30 working days in the case of complex disputes or exceptional circumstances such as periods of increased activity or external crises.⁵¹ The significance of this provision lies not in its coercive force – traders remain free to decline participation – but in its informational function: consumers will receive a clear answer within a defined timeframe rather than encountering the opacity that characterised the previous system. If a trader fails to respond, the ADR entity may treat such silence as a refusal and close the case accordingly, thereby providing closure to the consumer rather than indefinite procedural limbo.⁵² This is not full mandatory participation, but it introduces a legally significant innovation: silence becomes legally qualified as refusal, rather than functioning as a *de facto* veto through inertia.

The directive also specifies a concrete implementation calendar that structures the transition period. The digital interactive tool mandated by the amended Article 20 of Directive 2013/11/EU must be operational no later than 20 April 2026.⁵³ This tool is conceived as a user-friendly, multilingual interface that guides consumers through the identification of appropriate redress options, provides direct links to ADR entity complaint forms, and includes a free machine-translation function available to ADR entities and contact points dealing with cross-border disputes.⁵⁴ Member States must transpose the directive by 20 March 2028 and apply its provisions from 20 September 2028.

The temporal gap between the availability of the new digital tool (April 2026) and the full application of the amended ADR framework (September 2028) creates an intermediate period during which the guidance infrastructure will operate without the supporting regulatory obligations on traders. This sequencing reflects a pragmatic recognition that consumer awareness and institutional capacity must be developed before the substantive reforms take effect. The Commission is also tasked with creating a network of ADR contact points and Member States must notify the Commission of their designated contact points by 20 March 2028, ensuring that the informational infrastructure is in place when the new obligations become applicable.

In the EU ODR Platform, silence was practically indistinguishable from a technical failure, leaving consumers without clarity and without a next step. The new duty to reply, although limited, is

⁵¹ Directive (EU) 2025/2647, art. 1, point (4)(d), adding paragraph 9 to article 5 of Directive 2013/11/EU. The Committee on Internal Market and Consumer Protection had proposed reducing this period to 15 working days, with optional extension to 20 days only for complex disputes: see European Parliament, Amendments to Proposal for a Directive 2013/11/EU, A-9-2024-0060-AM-001-057.

⁵² The legal effect of non-response as qualified refusal represents a departure from the previous system where silence had no procedural consequence: see M. Dąbrowski, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), pp. 181-182.

⁵³ Directive (EU) 2025/2647, art. 1(10)(c), adding paragraph 8 to article 20 of Directive 2013/11/EU.

⁵⁴ *Ibidem*. The tool must include links to ADR entities listed pursuant to Article 20(4) of Directive 2013/11/EU and to ADR contact points notified under Article 24(4).

therefore best understood as a minimal anti-inertia rule designed to make voluntary ADR operationally meaningful.

Second, the guided pathway infrastructure described above represents a conceptual shift from the prior model. It resembles the CRT's logic, though without necessarily creating an EU-level adjudicative body. It also offers a partial answer to the EU ODR Platform's failure to match high user traffic with effective outcomes: guidance, if designed well, can reduce the friction of choosing the correct ADR scheme, mitigate linguistic barriers, and reframe consumer redress as a set of navigable routes rather than as a single portal.

As the Union turns to a post-platform model, the successor digital tool should be designed not as a merely informational portal, but as a governance interface capable of aligning incentives and managing expectations. It should, first, communicate in a legally accurate manner that its function is triage and signposting – rather than online adjudication – so as to avoid the expectation gap that undermined EU ODR. Second, it should embed a structured, technology-enabled negotiation space between consumer and trader, supported by time-bound response duties and by the “silence-as-refusal” logic, so that the entry stage of the procedure does not collapse into inertia. Third, the tool should be interoperable with the Union’s wider enforcement and redress ecosystem: where individual complaints reveal systemic infringements, they should be capable of being flagged, in an appropriate and privacy-compliant manner, for competent authorities and for collective redress actors, in a context where parallel tools – such as EC-REACT for representative actions – are already developing. Finally, the tool should publish aggregate, privacy-respecting performance metrics by sector and trader category, enabling reputational incentives to complement legal design, while keeping the user journey coherent across a proliferating landscape of EU and national consumer-protection platforms.⁵⁵

VI. OPEN QUESTIONS

Before drawing final conclusions, it is appropriate to acknowledge the limitations of this analysis and identify questions that remain open for future research.

First, the relationship between public ADR infrastructure and private platform-based dispute resolution (PODR) warrants further investigation. While this paper has noted the success of marketplace-embedded schemes such as eBay's Resolution Center, a systematic analysis of the regulatory implications of PODR dominance – including questions of procedural fairness, algorithmic accountability, and platform neutrality – exceeds the scope of the present study. The available data suggests that in 2020, 12% of consumers who experienced a problem with a trader used these private platforms, compared with only 5% who resorted to ADR procedures.⁵⁶ The eBay Resolution Center alone reportedly handles over 60 million disputes annually – a figure that

⁵⁵ Council of the European Union, Council calls for the closure of the ODR platform and its replacement with a better tool, 19 November 2024, available at: <https://www.consilium.europa.eu/en/press/press-releases/2024/11/19/council-calls-for-the-closure-of-the-odr-platform-and-its-replacement-with-a-better-tool/> (last visited Feb. 17, 2026); European Commission, Welcome to EC-REACT: the Representative Actions Collaboration Tool, available at: <https://representative-actions-collaboration.ec.europa.eu/> (last visited Feb. 17, 2026); European Commission, Representative Actions Directive – “EC-REACT”, available at: https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en (last visited Feb. 17, 2026).

⁵⁶ M. Dąbrowski, M. Rokosz, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), p. 174, citing Commission Staff Working Document SWD/2023/337 final.

dwarfs the entire EU ADR caseload.⁵⁷ These private systems are not subject to the quality standards and transparency requirements imposed by Directive 2013/11/EU, raising questions about procedural fairness, algorithmic bias, and the potential for structural favouritism toward traders who are also the platforms' commercial partners. The relationship between public and private ODR – whether complementary, competitive, or substitutive – requires sustained scholarly attention.

Second, the geographical scope of the EU framework remains contested. Directive (EU) 2025/2647 extends ADR coverage to disputes involving traders not established in the Union but offering goods or services to EU-resident consumers.⁵⁸ This expansion addresses a significant gap: e-commerce increasingly involves purchases from non-EU traders, particularly through platforms based in Asia. However, the enforcement mechanisms available against non-EU traders are limited, and the cost implications for ADR entities – which cannot recover fees from traders who refuse to participate – have not been fully assessed.⁵⁹ Whether the new framework will be effective against traders beyond the jurisdictional reach of EU enforcement authorities remains to be seen.

Third, the analysis has not addressed the specific challenges facing vulnerable consumers and those with limited digital skills. While Directive (EU) 2025/2647 requires Member States to ensure that consumers can submit and access documents in non-digital form upon request,⁶⁰ the fundamental premise of the new system remains digital accessibility. From a design and legitimacy perspective, this is not merely a question of access to hardware: empirical work on consumer redress mechanisms suggests that users' expectations, digital literacy and behavioural patterns shape whether they will complete a procedure, trust its neutrality, and persevere beyond the first friction point. Where consumers misunderstand the role of a redress body, or where the interface demands evidentiary and procedural steps that users are not prepared to fulfil, discontinuation and drop-out become structural rather than exceptional; conversely, trader participation is also conditioned by reputational incentives and organisational compliance cultures. A credible EU successor tool should therefore be explicitly user-centred, integrating assistance and expectation management as core functionalities rather than as ancillary communication.⁶¹

Finally, the balance between procedural efficiency and substantive fairness remains a perennial concern. The CRT model demonstrates that mandatory participation and enforceable outcomes

⁵⁷ C. Rule, *Designing a Global Online Dispute Resolution System: Lessons Learned from eBay*, in University of St. Thomas Law Journal, 13 (2017), p. 354; see also A. J. Schmitz, C. Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, Washington, 2017, p. 33.

⁵⁸ Proposal to amend Article 5(1) of Directive 2013/11/EU, as reflected in Commission Staff Working Document, part 2/2, p. 36. See M. Dąbrowski (2024), cit., p. 180.

⁵⁹ The Commission estimates that the cost of resolving one dispute could be EUR 300, and handling potential new 200,000 disputes could amount to EUR 60 million per year: Commission Staff Working Document accompanying the Proposal for a Directive amending Directive 2013/11/EU.

⁶⁰ Proposal to amend Article 5(2)(b) of Directive 2013/11/EU, requiring Member States to ensure that consumers with limited digital skills can submit and access documents in non-digital form upon request.

⁶¹ A. Biard, S. Voet, K. Hanemaaijer, E. van Gelder, *Ervaringen en verwachtingen van consumenten over de Consumentenombudsdienst / Service de Médiation pour le Consommateur. Onderzoek naar onvolledige dossiers*, Brussels, 2019, available at: <https://euciviljustice.eu/sites/default/files/nl-onderzoek-juli-2019-final.pdf> (last visited Feb. 17, 2026), pp. 9-15; Cambridge Pro Bono Project, *A Comparative Analysis of Online Dispute Resolution*, Cambridge, 2019 (Executive Summary and Conclusions); S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, Brussels, 2022, available at: https://euciviljustice.eu/sites/default/files/files/2022-08/adr_report_final.pdf (last visited Feb. 17, 2026).

can generate high throughput, but critics have questioned whether the streamlined procedures adequately protect parties' rights to be heard and whether the absence of traditional legal representation disadvantages less sophisticated disputants.⁶² Similar questions will arise as the EU system evolves: if the new guided pathway successfully increases case volume, will ADR entities maintain procedural quality under increased workload? The trade-off between accessibility and due process safeguards remains a design challenge that no jurisdiction has fully resolved.

VII. FINAL REMARKS

Regulation (EU) No 524/2013 was, in its original architecture, an internal market instrument: it sought to support cross-border e-commerce by giving consumers access to simple, efficient, fast and low-cost dispute resolution pathways, precisely where judicial enforcement was structurally unattractive because of low value, linguistic distance, and the costs of cross-border litigation.⁶³ The legal policy wager was therefore clear: if the Union could reduce transactional friction at the enforcement stage, it could increase trust in online cross-border trade and, indirectly, strengthen the digital dimension of the internal market.

The later decision to repeal that framework functions as an explicit regulatory admission that the platform did not meet the standards of efficiency and effectiveness expected from a Union-level governance tool. The repeal instrument explicitly acknowledges the traffic-to-resolution gap documented above, confirming that the platform's informational success did not translate into dispute resolution outcomes. It also records the results of the Commission's 2022 call for evidence: only a small portion of consumer respondents had used the platform, and most respondents supported substantial reform or discontinuation on cost-effectiveness grounds.⁶⁴

This diagnosis is legally consequential because it clarifies the nature of the platform's failure. The EU ODR initiative did not collapse merely because of a deficit of technological adoption, nor because consumers were unwilling to seek digital pathways. Rather, its demise reflects the classic governance problem of platformisation without leverage: a sophisticated interface cannot compensate for weak incentives, under-enforced duties, and the absence of credible participation mechanisms for the economic actor whose cooperation is indispensable – namely the trader.⁶⁵ The formal termination schedule further crystallises this shift from experimentation to abandonment: new complaint submissions ceased on 20 March 2025, and the repeal took effect on 20 July 2025. The most illuminating contrast is offered by publicly supported systems designed around direct engagement rather than a gateway-to-ADR model: drawing on the UNCITRAL typology of ODR

⁶² See the discussion of CRT limitations in P. Daly et al., *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, pp. 83-84, available at http://www.internationallegalaidgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026), noting inter alia: "Since the CRT is a tribunal rather than a court, the institutional and personal aspects of judicial independence are attenuated"; and observing that in small claims decisions, "any party who is dissatisfied with the decision can file a notice to have it vacated without supplying any grounds."

⁶³ M. Kumar N, J. Banerjee, *The Role of Cross Border ODR in Standardizing E-Commerce Dispute Resolution Globally*, in *International Journal of Human Rights Law Review*, 4-3 (2025); C. Berlian, M.A. Santoso, R. Yuniarti, M.F. Hadi, *Consumer Dispute Resolution in Cross-Border Online Transactions Through Alternative Dispute Resolution from the Perspective of International Law*, in *Tirtayasa Journal of International Law*, 4-1 (2025).

⁶⁴ Regulation (EU) 2024/3228, recital (5).

⁶⁵ European Commission, *Report from the commission to the European parliament and the council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes*, COM(2017) 744 final, 13.12.2017.

procedures (which distinguishes between stage-1 technology-enabled negotiation, stage-2 facilitated mediation, and binding stages like arbitration), it is possible to classify Brazil's *consumidor.gov.br* as a stage-1 system. Conversely, the EU ODR platform is characterised as stage 2, being structured to route cases toward ADR entities rather than to concentrate on the negotiated resolution phase itself.⁶⁶

The empirical asymmetry is stark and has direct implications for legal design. In the EU setting, approximately 85% of complaints were automatically closed after the lapse of a period without trader engagement; exit surveys suggested that many disputes were resolved bilaterally outside the platform, while only a small minority proceeded to the ADR stage that constituted the platform's formal objective.⁶⁷ Conversely, the Brazilian system is characterised by very high trader responsiveness, with replies in almost all cases and within a short time horizon – an element that is not simply a user experience feature but a structural governance lever.⁶⁸

The comparative lesson, for present purposes, is not that the EU should mechanically import a foreign model. The EU environment is multi-jurisdictional, multilingual, and institutionally fragmented in ways that make any single-platform solution intrinsically more complex. However, the comparison does show that, in low-value B2C disputes, the core bottleneck is frequently not the adjudication capacity but the responsiveness capacity: absent a credible duty to reply (or a reputational/public accountability mechanism), the procedural funnel collapses at its entrance. In that sense, the EU platform failed not because it tried to be European, but because it tried to be European through a design that presupposed voluntary cooperation in a context where the rational strategy for many traders was non-engagement.

A second implication of the EU ODR experience concerns the constitutional dimension of consumer redress. The legal framework was never merely an instrument of market integration: it was also framed – at least at the level of policy narratives – as part of a broader commitment to access to justice, linked to Article 47 of the Charter of Fundamental Rights and to Article 6 ECHR. This does not mean that ODR must fully replicate judicial guarantees; however, it does mean that digital redress must be assessed not only through utilitarian metrics (traffic, throughput, cost per case) but also through the lens of effective rights-enforcement for weaker parties.

Here, the literature on internet governance provides a further cautionary note. Broader analysis of the ODR landscape connects this field to the “fragmentation of the internet” debate, stressing that because ODR tools often belong to the private world, they risk imposing conditions (including in subtle or surreptitious ways) that shape access to online services. This dynamic can indirectly influence recourse to public justice, potentially to the detriment of weaker subjects.⁶⁹ Read together

⁶⁶ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 667-668.

⁶⁷ G. F. Colombo, *What We Talk About When We Talk About Consumer ODR: The EU ODR Regulation and its Preliminary Lessons*, in *International Journal of Procedural Law*, 2 (2021), p. 265; S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

⁶⁸ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020).

⁶⁹ I. Sigismondi, *Piattaforme di risoluzione alternativa delle controversie online tra frammentazione di Internet e istanze di giustizia*, in *Rivista Italiana di Informatica e Diritto*, 2 (2023).

with the EU ODR failure, this suggests a dual vulnerability: not only can a public platform fail because it lacks incentives, but even successful private platforms may raise normative concerns if they become de facto gatekeepers of redress without adequate public oversight and without preserving meaningful pathways to public adjudication.

Accordingly, the next generation of EU digital redress must avoid two symmetrical errors: the first-generation error of voluntarism without leverage; and the opposite error of privatised efficiency without rights-based safeguards. The legitimate ambition is to build a redress ecosystem that both increases settlement rates and preserves the normative conditions of accessibility, transparency, and accountability that are implicit in the Union's fundamental rights discourse.⁷⁰

The discontinuation of the EU ODR platform should therefore be understood neither as the end of ODR in Europe nor as the repudiation of digital justice as such. Indeed, the Commission has announced a replacement plan: a new digital interactive tool meant to guide consumers to effective redress options, coupled with the revision of the consumer ADR framework. This is coherent with the broader comparative insight that a single point of entry can be valuable only if it is embedded within enforceable obligations and interoperable institutional infrastructures.

At the same time, the technological horizon – particularly the use of AI-assisted triage, automated negotiation support, and the potential contribution of tamper-resistant records⁷¹ – adds a new layer of regulatory complexity. The technological innovation in dispute resolution also triggers concerns about data protection, fairness, accountability, and the need for human oversight and appeal mechanisms, including in light of GDPR compliance and the emerging AI governance framework at EU level. The regulatory complexity introduced by AI-assisted dispute resolution mechanisms warrants particular attention in light of the EU AI Act framework. Recent scholarship has proposed a risk-based categorisation of AI-driven ADR/ODR systems (AI-DR) that maps directly onto the architecture of Regulation (EU) 2024/1689.⁷² Under this framework, AI systems intended to assist ADR bodies in researching and interpreting facts and law, and in applying law to specific facts, qualify as high-risk where the outcomes of such proceedings produce legal effects for the parties – a classification explicitly acknowledged in Recital 61 and Annex III, point 8(a) of the AI Act.

This categorisation carries significant implications for the next generation of EU digital redress tools. The new interactive digital tool mandated by Directive (EU) 2025/2647 may incorporate AI functionalities ranging from informational chatbots (minimal risk) to systems that analyse claims and assist in triage or workflow automation (limited risk). However, should future iterations integrate AI systems capable of producing case-specific assessments or predictive outcomes with legal effects, they would fall within the high-risk category, triggering mandatory requirements including conformity assessments, fundamental rights impact assessments, and human oversight obligations.

The distinction articulated in the literature between AI systems that generate automated outputs to assist human experts and fully autonomous systems that render binding decisions without human

⁷⁰ O. Kesten, S. Özyurt, *Strategy-proof Multi-Issue Mediation: An Application to Online Dispute Resolution*, in Management Science, 71-1 (2025).

⁷¹ P. Ortolani, *A research agenda for online dispute resolution for DLT finance*, in J. Lee, A. Darbellay (eds.), *A Research Agenda for Financial Law and Regulation*, Cheltenham, 2025 (1st Ed.).

⁷² A. E. Vilalta Nicuesa, M. Gili Saldaña, *AI-driven alternative and online dispute resolution in the European Union: An analysis of the legal framework and a proposed categorization*, in Computer Law & Security Review, 57 (2025), proposing five categories: zero-risk AI-DR, minimal-risk AI-DR, limited-risk AI-DR, high-risk AI-DR, and unacceptable-risk AI-DR.

oversight is particularly salient.⁷³ The latter category – characterised as presenting unacceptable risk – would be incompatible with the foundational principles of access to justice, including human dignity, accountability, and the right to an effective remedy. Recital 61 of the AI Act underscores that “the use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity.” This principle applies equally to alternative dispute resolution bodies when their outcomes carry legal effects.

The redesign of the EU’s infrastructure necessitates that AI integration preserves human oversight at the decisional stage. Furthermore, transparency regarding AI’s influence is essential to satisfy the accountability requirements of the AI Act.

The post-platform horizon demands more than technological sophistication; it requires a careful calibration between efficiency and procedural fairness. Consequently, this shift should be framed not merely as a technical redesign, but as a governance challenge where architectural legal obligations and institutional oversight are strictly aligned. In the comparative perspective, ODR succeeds where legal design creates participation incentives, collects meaningful performance data, and safeguards fairness; it fails where it is reduced to a procedural corridor without enforceable commitments.

The real lesson of the EU case is therefore institutional: when law turns to platforms as governance tools, it must ensure that normative ambition is matched by enforceable design.

⁷³ A. E. Vilalta Nicuesa, M. Gili Saldaña, *AI-driven alternative and online dispute resolution in the European Union: An analysis of the legal framework and a proposed categorization*, in *Computer Law & Security Review*, 57 (2025), Section 5.5, noting that Recital 61 of the AI Act, while not codified in Article 5, signals the incompatibility of fully autonomous adjudication with rule-of-law values.

PUBLIC AND HYBRID ENFORCEMENT OF FINANCIAL SERVICES CONSUMER LAW IN ITALY AND GERMANY

Maria Cecilia Paglietti & Peter Rott¹

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This article wishes to introduce readers to the rather different ways in which Italy and Germany have organised the enforcement of consumer law in the area of financial services. It starts by providing some EU law background on both substantive consumer law related to financial services and the enforcement system (I). The article then discusses the roles of Italian and German financial services regulators: Banca d'Italia with the Arbitro bancario e finanziario (Banking and Financial Ombud; ABF), National Commission for Companies and the Stock Exchange (Consob) with the Arbitro per le Controversie Finanziarie (Securities and Financial Ombud; ACF), the Institute for the Supervision of Insurance (IVASS) with the Insurance Ombud (Arbitro Assicurativo; AAS), and the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority; BaFin), the instruments they have available for the protection of consumers and their overall importance in the national enforcement landscape of financial services consumer law (II. and III.) before concluding with a summary and perspectives for the future of public enforcement of financial services consumer law (IV.).

Keywords: consumer financial services – public enforcement – alternative dispute resolution – Arbitro bancario e finanziario – BaFin

I. EU BACKGROUND OF PUBLIC ENFORCEMENT OF CONSUMER LAW

EU law is dominating prudential supervision law as well as substantive consumer law in the area of financial services. For example, in banking law, the EU has a long tradition of regulating credit law, currently with the third Consumer Credit Directive (EU) 2023/2225 and the Mortgage Credit Directive 2014/17/EU, and other financial services, with the Payment Services Directive (EU) 2015/2366, the Payment Account Directive 2014/94/EU and the Distance Marketing of Consumer Financial Services Directive 2002/65/EC, among others. In addition to that, general consumer law of the Unfair Contract Terms Directive 93/13/EEC and the Unfair Commercial Practices Directive 2005/29/EC plays an important role in the banking sector.

This strong influence on substantive law is in stark contrast to its enforcement. In the multi-level system of the EU, consumer law is enforced by the Member States. Thereby, as a starting point, Member States enjoy procedural autonomy, which means that they are free to decide on the suitable enforcement mechanisms. Nevertheless, the EU has set limits to that autonomy through the

¹ This Article is the result of joint research. Sections I, II and IV have been written by Peter Rott; sections III and V by Maria Cecilia Paglietti.

principle of effectiveness,² and it has in the meantime adopted minimum standards on enforcement mechanisms in many areas, most recently with the Representative Actions Directive (EU) 2020/1828.³ The latter covers, in its Annex, not only the above-mentioned legislation in the banking area but also EU legislation in the areas of capital market law and insurance law.

The financial sector, together with other areas of particular importance, such as energy and telecommunication, is special in that the EU has obliged Member States to set up regulatory bodies that must be independent and have sufficient powers and discretion. Their main task is the enforcement of public law provisions, for example in the case of banks, relating to capital requirements of banks and the stability of the financial market. Some of the regulators are also explicitly tasked with the protection of consumers but rather in an indirect manner. For example, the electricity regulators have the duty to help to ensure, together with other relevant authorities, that the consumer protection measures are effective and enforced.⁴ Article 16 of the Air Passengers Rights Regulation (EU) No. 261/2004⁵ requires Member States to designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Court of Justice has decided that this provision does not mean that the regulator has to protect the interests of individual consumers.⁶

The only exception is, in principle, the Consumer Protection Cooperation (CPC) Regulation (EU) 2017/2394 dealing with the cross-border cooperation between national authorities responsible for the enforcement of consumer protection laws. This Regulation, as its predecessor, CPC Regulation (EC) No 2006/2004,⁷ requires Member States to designate consumer protection authorities with certain minimum enforcement powers, and it was actually the reason why Germany had to establish a consumer protection authority in the first place, the *Bundesamt für Justiz* (although with only powers for that Regulation).

Overall, however, Member States are free to design their own mix of public and private law enforcement of consumer law, including in the financial sector.

II. ITALY

II.1 Banking, Financial and Insurance Ombud in Italy

In the aftermath of the 2008 financial crisis, to preserve financial stability and increase confidence in the financial system by ensuring adequate implementation of the rules and sufficient protection for the customers, the Italian legislator introduced ADR mechanisms embedded in the supervisory

² ECJ, case 33/76 REWE, ECLI:EU:C:1976:188, and case 45/76 Comet, ECLI:EU:C:1976:191. For detailed discussion see P. Rott, *Effektivität des Verbraucherrechtsschutzes: Rahmenfestlegungen des Gemeinschaftsrechts* (2006), <http://download.ble.de/04HS033.pdf>. See also N. Reich, *Legal Protection of Individual and Collective Consumer Interests*, in N. Reich, H.-W. Micklitz, P. Rott and K. Tonner (eds.), *European Consumer Law*, 2nd ed. Cambridge (UK), 2014, pp. 344 ff.

³ On which see L. Bugatti, C. Meller-Hannich and A.-K. Mayrhofer, *Comparative analysis of collective redress in Italy and Germany. Framework conditions and legal decisions in the implementation of the European Representative Action Directive*, in this issue.

⁴ See Art. 59(1)(r) of the Electricity Market Directive (EU) 2019/944.

⁵ OJ 2004 L 46/1.

⁶ CJEU, joined cases C-145/15 and C-146/15 *Ruijsenaars and Dees-Erf*, ECLI:EU:C:2016:187.

⁷ OJ 2004, L 364/1, as amended.

authorities.⁸ These Ombuds⁹ are out-of-court alternative dispute resolution schemes which fall under the scope of the ADR Directive 2013/11/EC,¹⁰ and thus must possess certain quality requirements and guarantees, such as legality, liberty, speed and impartiality.

There are three financial Ombuds operating in Italy: the Banking and Financial Ombud (*Arbitro bancario e finanziario*, hereinafter: ABF), based at the Bank of Italy, established in 2009;¹¹ the Securities and Financial Ombud (*Arbitro per le Controversie Finanziarie*, hereinafter ACF), based at the National Commission for Companies and the Stock Exchange (Consob) established in 2017,¹² and recently, a new one has been introduced for the insurance market: the Insurance Ombud (*Arbitro Assicurativo*, hereinafter: AAS), based at the Institute for the Supervision of Insurance.¹³

In case of a dispute with an intermediary, clients may file a complaint with the ABF if it concerns banking and financial services, e.g. current accounts, credit or debit cards, personal loans or mortgages and reports to the Central Credit Register; with the ACF if it concerns investment services and activities, e.g. securities trading or placement, investment advice and asset management, and with the AAC if it concerns a range of insurance products. These Ombuds have some features in common, namely a) design and nature; b) functions and competence.

As for design and nature, ABF, ACF and AAS share basically the same model. The dispute system design is very important for the success of these ADR schemes.¹⁴

If one wanted to find a word that features the Italian Ombud model, it would be eclecticism: the system's procedures are deliberately created by drawing upon and mixing elements from various dispute resolution models, rather than adhering to a single, existing cultural reference.

They don't have a judicial nature. They are ADR adjudicative type bodies designed on a mix of adversarial and inquisitorial model; they decide who is right and who is wrong, taking into account only the documents submitted by the parties via the Ombuds' online portals. They provide consumers with expert advice, offering a user-friendly dispute resolution process. They are all based at the supervisory authorities (in relation to which they are autonomous and impartial: see *infra*), which also provide them assistance and support in their work, in particular through the technical secretariats, composed of regulatory authorities' employees. Ombud members are appointed, respectively, by the Bank of Italy, Consob and IVASS; the composition of the panels ensures that

⁸ This is a common trend in Europe: I. Benhor, *Alternative Dispute Resolution for the Consumer in the European Union*, in Christopher Hodges et al (eds.), *Consumer ADR in Europe*, Oxford, 2012, p. 1; M. Hertogh and R. Kirkham (eds.), *Research Handbook on the Ombudsman*, Cheltenham, 2018; N. Creutzfeldt-Banda, *Ombudsmen and ADR: a Comparative Study of Informal Justice in Europe*, London, 2018.

⁹ A note on terminology: we use the term Ombud as singular, Ombuds as plural, also for women working at this post. We use these terms for clarity. Although we are aware of the gender neutrality of the word Ombudman, due to its Scandinavian roots (as the 'man' suffix itself is gender neutral in the Swedish Language), we prefer to use the term Ombud because it allows us to avoid objections regarding its gender and overcome the problem of its plural form, which in Swedish is ombudsmän, but translated in modern English as Ombuds, thus endorsing the masculine ending.

¹⁰ Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution of consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/63.

¹¹ Credit Committee (CICR) Resolution 275/2008 as amended; Bank of Italy provisions issued on 18 June 2009 as amended; and Legislative Decree 130/2015. On ABF see G. L. Carriero, *Giustizia senza giurisdizione: l'arbitro bancario finanziario*, in Riv. trim. dir. e proc. civ., 2014, 161; E. Lucchini Guastalla, *Arbitro bancario finanziario*, in Enc. Dir., Annali, VIII, Milano, 2014, pp. 35 ff.; D. Dalfino, *L'Abf e i principi del processo civile: contestazione, "contumacia", onere della prova*, in Il Processo 2019, pp. 27 ff.

¹² Legislative Decree 130/2015 (implementing Directive 2013/11/EU), which has been in force since 9 January 2017. See G. Afferni, *Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF)*, in *Private and public enforcement of EU investor protection regulation*, Quaderni di ricerca giuridica della Banca d'Italia, Roma, 2019, p. 97 ff.; A. Dolmetta and U. Malvagna, *Sul nuovo ADR Consob*, in Banca, borsa, tit. cred., 2016, pp. 251 ff.

¹³ Min. Decree n. 215/2024.

¹⁴ P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*, Cambridge (UK) 2017, pp. 247 ff.

the interests of all parties involved are represented. ABF is the biggest and most established Ombud, whose decision-making body has been divided into seven territorial panels (Bari, Bologna, Milan, Naples, Palermo, Rome and Turin, whereby the *forum actoris* rule applies).¹⁵ The other two Ombuds consist of just one body, composed of five members.

Participation in the system is mandatory: this means that any regulated business providing the service covered by the scheme (e.g., banks, insurers, utility companies) is legally required to be a member of, and submit to the jurisdiction of, the relevant Ombud scheme.

Before referring a dispute to the Ombud, the customer must lodge a complaint with the bank, financial intermediary or insurance. Since the Ombuds are meant to resolve disputes which could not be settled directly with the company, procedures require that the company is given the chance to resolve the dispute before the ADR body hears a complaint.

The Ombud services are almost free of charge: Claimants only pay 20 euros, which are refunded if the decision is made in their favour (even if only in part). Only the defending party is charged for the procedure, and only if the complaint is successful.

None of them require any legal or other professional assistance, but, if wanted, customers may also avail themselves of a representative power of attorney).¹⁶

All Ombuds have detailed regulations on their functioning and on the procedure for filing a complaint in order to ensure procedural safeguards, and the average duration of the proceedings is below 180 days. The speed of the proceedings is a crucial element, and the procedural provisions have been updated over the years in order to guarantee timely decisions.¹⁷

They do not deprive intermediaries and customers of the right to go to courts: the protection and dispute resolution of the Ombuds do not limit the protection and dispute resolution of the judiciary.

Their decisions are not binding: the sanction in cases of a compliance failure is that the notice of non-compliance is published on the supervisory authorities' websites for five years. Thus, a black list of non-complying intermediaries is available.

As to the relations with the judiciary, Ombuds and courts coexist. Ombuds add something extra to the protection of individuals and complement the work of the courts by promoting compliance in individual cases and acting as effective guidance for the future. It is important that co-existence does not lead to duplication or collision, thus their relationship is conceived in terms of mutual interaction. For instance, they make cross-references to each other's judgments or decisions and engage in coordination between the formal outcomes of deliberative and decision-making processes.

At the level of fundamental choices, five structural elements should be highlighted: compulsory participation in the system; the right to act is reserved to the customer alone (not exclusively to consumers, but extended to also cover collective entities and/or natural persons, the professional or private scope of the contract being irrelevant)¹⁸; the lack of any obligation of legal assistance¹⁹; the principle of the burden of proof applies; only the defending party is charged for the process, and only if the complaint is upheld.

¹⁵ As consistency in decisions, uniformity of approaches and stability of decisions are key elements in providing effectiveness of protection, a coordinating Panel has been introduced, which decides on the complaints concerning issues of particular significance or that have given or could give rise to inconsistent decisions by the seven territorial Panels.

¹⁶ Respecting the provisions of Art 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

¹⁷ For instance, the ABF process was updated in February 2025.

¹⁸ Art 5, para 1, of the CICR Resolution (n 8), whose aim is to reserve an alternative remedy for settling economic disputes in banking and credit matters and payments to the customer alone.

¹⁹ Respecting the provisions of Art 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

II.2 Specificities

As for the Ombuds' nature, two main issues have been raised since their establishment: their relationship with the regulator and their private/public nature.

One could doubt the Ombuds' independence and impartiality given their close structural connection with the regulatory authority. The question of whether the structural and regulatory proximity to the regulator could undermine the impartiality and independence of Ombuds was answered in the negative by the European Court of Human Rights in its ruling on the UK Financial Ombudsman Services (FOS), which is based at the Financial Conduct Authority (FCA).²⁰ The applicant had complained that the Ombud lacked independence and impartiality "in light of the close link between the FOS and the FSA, with the latter having a supervisory role over the former" (§ 18). One of the grounds of the complaint was the alleged violation of the right to a fair and public hearing ... by an independent and impartial tribunal of Article 6 of the European Convention of Human Rights. The Court stated that the statutory relationship between the regulator and the Ombud was not "such as to compromise or raise doubts regarding the latter's independence and impartiality when deciding individual complaints".

Also, their public or private nature has been discussed at length. Italian Ombuds are bodies placed in a public law framework stemming from the public law imprimatur of the regulatory authorities where they are based, from which they receive support and by whom they are appointed. This is underlined by the mandatory adhesion to the system and by the fact that they exercise decision-making powers provided for them by law. They have, however, private law features as well in that compliance with their decisions is based on consent and private autonomy. Currently, the consensus seems to be that they are private institutions,²¹ which combine elements of hard law (the services providers' obligation to participate to the system) and soft law (no obligation to comply with the Ombuds' decisions) and makes them one unique in the Italian system, impossible to assign to one of the traditional categories. Overall, the Ombuds are private institutions placed in a public law framework with a hybrid nature that combines elements of hard public law and soft law²².

Despite their similarities, certain differences exist among these bodies, and the procedure may vary between the sectors. For instance, the ABF process has been recently improved by the regulator introducing a mediation stage that encourages settlement over adjudication, designing a mixed model where the more costly and acrimonious adjudicative scheme coexists with an amicable resolution of disputes by agreement. These are tiered procedures, where the adjudicative stage takes place where mediation techniques have not succeeded in reaching settlements.²³ The same design has been chosen for the AAC, but not for ACF.

Another significant difference is that, while ABF and ACF decide exclusively according to the law, AAC decides according to the law and, in some typical cases, to equity, considering what is fair and just).

As for the value of the disputes the Ombuds can resolve, they are assigned to solve "small and medium-sized" disputes, with maximum values ranging from 200,000 euros for the ABF to 500,000 euros for the ACF and up to 300,000 euros for the AAC (300,000 euros for life assurance policies

²⁰ European Court of Human Rights: *Heather Moor & Edgcomb Ltd v United Kingdom* App no. 1550/09 (ECtHR 26 June 2012).

²¹ Art. 128-bis Consolidated Banking Law; Art 1, para 1, lett. b) of the CICR Resolution (n 8).

²² S. Lucattini, *Modelli di giustizia per i mercati*, Torino, 2013.

²³ P. Cortés (n 14), 247 ff.

that provide for payment of the benefit solely in the event of death, 150,000 euros for other life assurance policies, 25,000 euros for non-life insurance (e.g., home, health, travel), and 2,500 euros when the claimant is the injured party).

II.3 (Non) Enforceability of Decisions and Mandatory Participation in the System

As previously mentioned, the Ombuds' decisions are not binding and enforceable, but the effectiveness of protection is ensured through a reputational sanction (e.g., naming and shaming non-compliant firms on a regulator's website). These mechanisms appear to be very effective in incentivising compliance -without using judicial authority- due to the fact that the banking and financial market are based on trust and reliability of the operators. The Ombud's decision, therefore, although not legally binding, is binding at the social level.

Mandatory participation ensures that every consumer who has a complaint about a regulated service has a free, independent, and accessible route to redress. Because all firms are mandatory participants, the Ombud can identify and report systemic issues affecting multiple firms to the relevant regulator. This allows the regulator to step in and make changes that benefit the market as a whole, making the scheme a vital part of the overall regulatory framework.

II.4 (Hybrid) Regulatory Purposes

First of all, Ombuds are not conceived as tools of consumer protection, as legal entities are allowed to submit a complaint as well. Still, they provide a response to the need to afford protection and restore balance to asymmetrical positions, also on the procedural level, by removing barriers on the effectiveness of protection and limiting the time and costs of the procedure.

At the same time, due to the convergence between public enforcement and private remedies, the private disputes become instrumental to the public regulation of the market. This implies a significant fallout in terms of the stability of decisions.

Given the lack of the principle of *stare decisis* in the Italian legal system, the uniformity of approach would appear, in the context of banking and financial Ombuds, to be functional 1) to the reliance of operators; 2) to legal certainty; 3) to the deflation of internal disputes; 4) to the measurement of regulatory compliance, through the collection and publication of aggregated data on individual disputes in order to obtain a global overview of the violations and market performance; 5) to the consolidation of regulation; and 6) prospectively, to the study of the review of the regulatory framework.

It is in the guarantee of a significant degree of uniformity that the principle of regulation through the Ombuds decisions may be completed, and the ultimate objective of an effective customer protection may be achieved.

II.5 Ombud in Action

In 2023, 15,816 complaints were received by the ABF, and complainants were awarded €17.3 million in 2023;²⁴ during 2024, the ACF received 961 complaints, bringing the total number of complaints submitted by savers in the first eight years of operation (2017-2024) to 11,735.

The Ombud plays a vital role in addressing the failure of existing written law to keep pace with new market practices or technological developments—through its function of "regulation through litigation".

One of the main contributions of the Ombud, and in particular of the ABF, is that it has been called upon to decide on issues not yet brought to the attention of the ordinary courts, due to its ability to define and enforce standards of conduct where the formal law is silent, vague, or outdated,

²⁴ Data from The Banking and Financial Ombud Annual Report - Abridged Version -2023.

interpreting general principles. ABF consistently rules on new, complex, or unforeseen disputes (particularly, loans secured by a pledge of one-fifth of salary, which alone represent more than half of all cases). By applying general legal principles (like fairness or good faith) to specific, modern scenarios (e.g., new digital products or complex investment schemes), their decisions effectively integrate and clarify the function of supervision and regulation.

One example.

In relation to payment systems, Art. 97(1)(c) of the Payment Services Directive 2366/2015 (PSD2) has introduced the obligation for a payment service provider (PSP) to perform a strong customer authentication check for every electronic payment transaction unless it qualifies for an exemption. Strong customer authentication is a regulatory requirement aiming to increase the security of electronic payments and reduce fraud. It adds an extra layer of security by using a combination of at least two elements: something the user knows (like a password), something he/she possesses (like a phone), and something he/she is (like a fingerprint). This security system had already been required at a sub-primary legislative level and one that is also incorporated by means of the general clauses and references to the ECB Recommendations and EBA Guidelines.²⁵

Strong customer authentication has in practice been found to be mandatory far before the rule came into force on 14 September 2019, in those legal systems with specific ADR systems devoted to solve bank disputes (like the United Kingdom and Italy) which applied, at the same time, national general clauses, national rules on private relationships and EBA Guidelines. In terms of the regulation of damages deriving from hazardous activities (art. 2050 Italian Civil Code) and the general duty of fairness (expressed in art. 1176 Italian Civil Code), as early as 2010 the ABF even stated that the authentication must be based on the use of two or more elements falling under the categories of knowledge, possession and inherence.²⁶ The British FOS (Financial Ombudsman Service, based at the Financial Conduct Authority), by comparison, decided not to uphold the complaint of a payment services client given the presence of SCA in the bank's security system.²⁷ In these legal systems, the initiation and consolidation of the double/multi factor authentication was far quicker than in those countries, like France, which do not have a proper Ombud scheme for handling consumer complaints and strong customer authentication represented a huge change also in evaluating and allocating responsibilities.²⁸

II.6 Conclusions

Italian Ombuds are private entities designed to be instrument of regulation of the contract with conforming effects, so they are instrumental to public regulation (regulation through litigation).

To fully achieve a regulatory effect, the decision must be perceived as stable.

From this perspective, in highly regulated markets – such as the banking market – ADR systems constitute a necessary infrastructure element in an *ordo-liberal* configuration of law and society.²⁹

While not formally regulators in the strict sense, these Ombud exercise *de facto* regulatory powers

²⁵ European Central Bank, Recommendations for The Security of Internet Payments, December 2013, § 7; European Banking Authority, Final guidelines on the security of internet payments, EBA/GL/2014/12_Rev1, 19 December 2014.

²⁶ ABF, Panel Milan, Dec. n. 1506/2010; Coordinating Panel, Dec. n. 3498/12.

²⁷ FOS, Ref: DRN7720365.

²⁸ J. Lasserre Capdeville, *Où en sommes-nous de l'entrée en vigueur des dispositions nouvelles relatives à l'authentification forte?*, in *Semaine Juridique* ed. Entreprise et Affaires, 2020, pp. 567 ff.

²⁹ P. Sirena, *The European System of Banking Law. A Tribute to Stefan Grundmann*, in 34 *European Business Law Review*, 2023, pp. 1017 ff.

in the retail financial services realm, as their rules and determinations direct the behaviour of firms.³⁰

III. GERMANY

III.1 Civil law enforcement and its gaps

With regard to consumer law, Germany has a tradition of private law enforcement. Individual enforcement is reasonably accessible as court fees and lawyers' fees are lower in some other Member States, and nearly 50% of consumers have legal insurance, although it should be mentioned that insurance companies tend to exclude certain areas from protection when mass-scale procedures occur. Thus, they normally do not cover capital market law claims anymore after the IPO of Deutsche Telekom triggered mass litigation of around 17,000 investors.³¹

Collective enforcement has always been performed by consumer organisations, whereby the consumer centres of the *Länder* and their umbrella organisation, *Verbraucherzentrale Bundesverband e.V.* (vzbv), are partly funded by the state. Still, gaps in consumer protection remained, even after the implementation of the Representative Actions Directive. Firstly, many individual still cannot afford litigation, and even less pay for a lawyer, in particular when it comes to consumers with credit issues. Consumer organisations cannot fully close that gap for various reasons. First, they do not have the personal and financial resources for the huge number of lawsuits they would have to initiate. Second, the German implementation of the Representative Actions Directive includes certain obstacles to effective enforcement activities. It only allows third-party funders a share of a maximum of 10%, which makes third-party funding virtually impossible in practice, and judgment only have *inter partes* effects so that a multitude of litigation proceedings would be necessary to fight the same type of breach. For example, all saving banks (*Sparkassen*) have miscalculated interest in certain long-term saving products,³² and a good number of them has been convicted to correct their calculations by now but others still refuse to do so and will need to be sued as well.

Of course, ADR bodies are also available in Germany, due to the requirements of the ADR Directive, and in the area of financial services, we find, for example, the Ombud of the Private Banks (*Ombudsmann der privaten Banken*) and the Insurance Ombud (currently *Versicherungsombudsfrau*). These are, however, not Ombuds in the Scandinavian or Italian sense but regular ADR bodies that simply chose the name *Ombudsmann*. In practice, they are still of some significance as they handle numerous cases for consumers. In 2024, the Ombud of the Private Banks received 10,062 applications³³ while the Insurance Ombud received 15,659 valid applications.³⁴ ADR procedures have gained popularity in Germany not only due to the chance of a free of charge and speedy decision but also because they suspend the prescription of a claim under § 204 para. 1 no. 4 *Bürgerliches Gesetzbuch* (Civil Code, BGB). Thus, ADR bodies are often flooded with claims at the end of the year when those claims are about to be prescribed. Otherwise, ADR bodies have one important disadvantage as they normally do not deal with controversial issues of law that have not been clarified yet by the courts.³⁵

³⁰ Institute of Economic Affairs, *Who Regulates the Regulators? The Financial Ombud Service* (31 March 2021). Available at SSRN: <https://ssrn.com/abstract=3850606> or <http://dx.doi.org/10.2139/ssrn.3850606>.

³¹ See A. Halfmeier, P. Rott and E. Feess, *Kollektiver Rechtsschutz im Kapitalmarktrecht – Evaluation des Kapitalanleger-Musterverfahrensgesetzes*, Frankfurt, 2010, pp. 41 f.

³² See *infra*, IV. 3.

³³ See https://bankenombudsmann.de/media/files/T%C3%A4tigkeitsbericht_2024_0PHrNEE.pdf, sub 4.1.

³⁴ See Ombudsfrau für Versicherungen, *Jahresbericht 2024*, https://www.versicherungsombudsmann.de/wp-content/uploads/Jahresbericht_2024.pdf, 107.

³⁵ See Bankenombudsmann, *Tätigkeitsbericht 2024*, sub 3.

Overall, the gap in private enforcement mainly results from insufficient resources of consumer organisations and from the lack of broader effects of civil law litigation. Public enforcement could play a role in filling that gap.

III.2 The competences of BaFin

BaFin, established in 2002 in a merger of three previous sectoral supervisory authorities for banking, insurance and securities, had for a long time only the competence to act in the public interest, as opposed to the interest of consumers. Its powers in the banking area were and are regulated in the *Kreditwesengesetz* (Banking Act; KWG) that was, again, seen as a set of rules serving only the public interest, whereas consumers could not claim damages for violations of the KWG.³⁶ Only in 2015, BaFin has been explicitly conferred the task of the protection of the collective interest of consumers, following an agreement in the coalition agreement between the conservative parties (CDU and CSU) and the social democrats (SPD) of 2013.³⁷ New § 4 para. 1a *Finanzdienstleistungsaufsichtsgesetz* (Act Establishing the Federal Financial Supervisory Authority; FinDAG) was meant to emphasise the relevance of the aim of collective consumer protection and integrate it in the supervisory activity of BaFin.³⁸ It reads:

”Within its area of competence, the Authority is also obliged to the protection of the collective interests of consumers. Notwithstanding other competences under other laws, the Authority can (...) make all orders that are suitable and necessary to prevent or abolish consumer relevant bad states of affairs if the action is in the general interest of consumer protection. A bad state of affairs in this sense is a significant, continued or repeated breach of consumer protection laws that in its type or extent can violate or impairs the interests not only of individual consumers. (...)”

In detail, almost every aspect of this provision is contested. One commentator had even doubted that this provision is a competence norm rather than a mere political statement.³⁹ This view was, however, untenable,⁴⁰ and courts have, in the few cases that reached them, accepted § 4 para. 1a FinDAG as a proper competence norm,⁴¹ next to the more specific ones in special legislation such as the KWG. This is, however, where general agreement ends. Views on the situations in which the BaFin can take action and what kind of action they can take differ greatly. In the background, there is fundamental disagreement to what extent BaFin, as a public authority, should be allowed to deal with civil law conflicts.

³⁶ See the old case law on the obligation to assess the customer’s creditworthiness that was seen as a public law obligation serving financial stability but not protecting the customer: BGH, 16 March 1989 - III ZR 37/88, in *Neue Juristische Wochenschrift* (NJW), 1989, p. 1665; OLG Köln, 23 June 1999 – 13 W 32/99, in *Zeitschrift für Wirtschaftsrecht* (ZIP), 1999, p. 1794; OLG Stuttgart, 21 March 2001 - 9 U 204/00, in *WM*, 2003, p. 343. Even after implementation of the Consumer Credit Directive 2008/48/EC, the German legislator maintained that view; see P. Rott, E. Terry and C. Twigg-Flesner, *Kreditwürdigkeitsprüfung: Verbraucherschutzverbinderung durch Zuweisung zum Öffentlichen Recht?*, in *VuR*, 2011, pp. 163 ff. This was only changed after the clarifying decision of the Court of Justice in *LCL Le Crédit Lyonnais*: CJEU, 27 March 2014, Case C-565/12 *LCL Le Crédit Lyonnais SA v Fesib Kalban*, ECLI:EU:C:2014:190.

³⁷ CDU, CSU and SPD, *Deutschlands Zukunft gestalten*, <https://www.bundestag.de/resource/blob/194886/koalitionsvertrag.pdf>.

³⁸ See the explanation of the government, Bundestags-Drucksache (Printed Matters of the German Parliament; BT-Drs.) 18/3994, p. 29.

³⁹ See R. Laars, *Finanzdienstleistungsaufsichtsgesetz*, 4th ed., Baden-Baden, 2017, § 4 para. 4 (changed in the 5th ed.).

⁴⁰ See also F. Hufeld, „*Verbraucher und Recht*“, in *VuR*, 2015, pp. 401 ff.; D. Schäfers in D. Kaulbach, G. Bähr and P. Pohlmann (eds.), *Versicherungsaufsichtsgesetz*, 6th ed., Baden-Baden, 2019, § 4 FinDAG para. 6.

⁴¹ See VG Frankfurt, 24 June 2021- 7 K 2237/20.F, in *VuR*, 2021, p. 430; VG Frankfurt, 23 October 2024 – 7 K 548/22.F, in *Zeitschrift für Bank- und Kapitalmarktrecht* (BKR), 2024, p. 1068.

III.2a) Scope of application

Obviously, BaFin can only act within its general field of competence, which is financial services. Not all aspects of financial services have been allocated with BaFin though. For example, the general trading offices (*Gewerbeaufsichtsämter*) are entrusted with the supervision of financial intermediaries and with price control, including control of the correct calculation of the annual percentage rate in consumer credit law.

III.2b) Enforcement of civil law?

The main issue behind the discussions around BaFin's competences is the divide, in German law, between public law and private law. Consumer protection, as mentioned in § 4 para. 1a FinDaG, is obviously a cross-cutting topic, and in financial services law, much of it is private law. It is clear from the explanations of the government at the time that § 4 para. 1a FinDaG was meant to cover, the situation where a financial service provider disregards a decision of the *Bundesgerichtshof* (Federal Supreme Court; BGH) concerning a civil law norm regarding the protection of consumers.⁴²

Nevertheless, banks, with the support of parts of academia, have consistently claimed that the enforcement of civil law by a public authority was unconstitutional due to a breach of the principle of division of powers.⁴³ They refer to a statement of the Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) of 1996, according to which decisions should be made by the power that is best suited,⁴⁴ and claim that in matters of civil consumer protection law, these are the civil courts. Of course, it is hard to defend that BaFin, as the German regulator that is preoccupied with nothing but financial services and that represents Germany in relevant EU institutions, such as the European Banking Authority, lacks competence in financial services law. Moreover, while it is true that appeals against decisions of BaFin go to the administrative courts, they are always the same courts that can, therefore, gain expertise in this area; although one could have thought of giving the competence to hear appeals against BaFin decisions on breaches of civil law to the civil courts instead (see also *infra*, 4.). Anyway, the Administrative Court (*Verwaltungsgericht*; VG) Frankfurt flatly rejected the unconstitutionality argument without further discussion.⁴⁵

What is correct though is that the legislator envisaged the primacy of civil law enforcement and saw the competences of BaFin in this area as supplementary.⁴⁶ As mentioned above, the legislator had in mind that the BGH already clarified the law and banks (or other companies) still engage in the incriminated breach. The main example would be standard terms that have already been declared unfair in relation to one bank but that other banks continue to use.⁴⁷ At the same time, BaFin is explicitly not limited to this situation but can also take action if this is necessary for the protection of consumers, in particular where no decision of the BGH is foreseeable in the near future. The latter criterion has led to controversial discussion. Clearly, a BGH decision is foreseeable if the case is already pending before the BGH. Moreover, academics argued that it is

⁴² BT-Drucks. 18/3994, p. 36.

⁴³ P. Buck-Heeb, *Missstandsaufsicht durch die BaFin nach § 4 Abs. 1 a FinDaG*, in BKR, 2021, pp. 141 ff., p. 143. Vgl. auch C. Herresthal, *Keine Informationspflicht des Klauselverwenders bei ergänzender Vertragsauslegung laufender Verträge*, in BKR 2021, pp. 131 ff., p. 140; H. Edelmann, T. Schultheiß and T. Hölldampf, *Grenzen der Eingriffsbefugnisse der BaFin gegenüber Kreditinstituten nach § 4 Abs. 1a FinDaG*, in Betriebs-Berater (BB), 2021, pp. 835, p. 843.

⁴⁴ BVerfG, 17 July 1996 – 2 BvF 2/93, NJW, 1997, p. 383.

⁴⁵ VG Frankfurt, in BKR, 2024, 1068.

⁴⁶ See also D. Poelzig, *Durchsetzung von Verbraucherrechten durch Zivilgerichte und die BaFin*, in BKR, 2021, pp. 589 ff., p. 592; L. Klöhn and J. Adam, *Grenzen des Verbraucherschutzes durch die BaFin – eine Untersuchung zu § 4 Abs. 1a FinDaG*, in WM, 2022, pp. 1149 ff., p. 1152.

⁴⁷ There is a slight complication when the standard terms are not entirely identical, see Buck-Heeb, BKR, 2021, pp. 141 ff., p. 146. In the context of representative actions in the form of injunctions, an injunctive order also covers terms that are essentially alike; a concept that should also be applied in the context of § 4 para. 1a FinDaG.

sufficient if the case has reached the level of the higher regional courts so that an appeal against their decision would reach the BGH;⁴⁸ an argument that VG Frankfurt showed sympathy for.⁴⁹ This view is hard to defend as it is entirely uncertain whether the defendant would file an appeal in the first place. In addition to that, much time could pass during which consumers would suffer harm from the continued breach. Even more alien is the argument that BaFin action is not necessary when a case is pending at first instance,⁵⁰ as the legislator clearly looked at foreseeability of a BGH decision in the near future.

III.3 Measures in BaFin's portfolio

A further point of controversy is the measures that are available to BaFin. § 4 para. 1a FinDAG simply refers to 'all measures that are suitable and necessary to prevent or abolish consumer relevant bad states of affairs (...)'. Clearly, the provision foresees preventive and repressive measures.⁵¹

Classical instruments of public authorities are of course injunctive orders and fines. One could, however, also think of more advanced measures, such as an order to inform consumers of a breach, as now foreseen for courts in Article 13(3) Representative Actions Directive, the right to accept undertakings and make them binding, or even reimbursement orders that have proven spectacularly successful in the United Kingdom.⁵² These instruments are clearly suitable, and they could also be seen as necessary for the protection of consumers as experience tells that banks do not normally inform their customers of a breach or even pay out of their own motion.⁵³ In that regard, it should be noted that an injunctive order by BaFin does not suspend the prescription of claims of consumers that are affected by the breach in question. Thus, it would be essential for these consumers to learn of the breach.

Needless to say that banks are heavily opposed to these latter instruments but also academic authors reject them, arguing that § 4 para. 1a FinDAG was too vaguely formulated to allow exotic advanced instruments.⁵⁴

III.4 BaFin in action – the saving accounts case

The problems of BaFin with enforcing consumer law can be nicely illustrated with the saving accounts case that is currently pending in the court system. In the 1990s, German saving banks offered saving contracts with variable interest rates that were to rise continuously over (e.g.) 15 or even 25 years. Consumer organisations alleged that the interest calculation terms were unfair as they left too much discretion to the saving banks, and that saving banks systematically miscalculated interests to the disadvantage of consumers. Despite first decision at the level of instance courts, saving banks (that had all used more or less identical standard terms) routinely rejected consumers' claims or offered unfavourable settlements. In June 2021, BaFin that had been criticised in the press of not doing anything to remedy the situation finally addressed that mass phenomenon with a general order (*Allgemeinverfügung*) to all banks to inform all consumers concerned about the

⁴⁸ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147; Poelzig, in BKR, 2021, pp. 589 ff., p. 592; Klöhn and Adam, in WM, 2022, pp. 1149 ff., p. 1152.

⁴⁹ VG Frankfurt, in VuR, 2021, p. 430.

⁵⁰ Against Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147; H. Edelmann, *Anmerkung*, in BKR, 2021, pp. 587 ff., p. 588.

⁵¹ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147.

⁵² See C. Hodges, *Mass Collective Redress: Consumer ADR and Regulatory Techniques*, in European Review of Private Law, 2015, pp. 829 ff., p. 847 ff.; P. Rott, *Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA*, in Schulte-Nölke (ed.), *Neue Wege zur Durchsetzung des Verbraucherrecht*, Dordrecht, 2017, pp. 31, 47 ff.

⁵³ For discussion, see Rott, in WM, 2019, pp. 1189 ff., p. 1191.

⁵⁴ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 145.

unfairness of the standard term and promise them appropriate compensation in accordance with the yet to be expected concretisation by the BGH.⁵⁵ More than 1,000 banks appealed to BaFin against that order, which BaFin rejected in January 2022, upon which all banks filed lawsuits.

In October 2021, the BGH held the standard term used by Stadt- und Kreissparkasse Leipzig to be unfair,⁵⁶ thereby confirming earlier decisions of 2010 on similar standard terms.⁵⁷ By way of complementary interpretation of the contract (*ergänzende Vertragsauslegung*), banks must use the reference interest rate for long-term saving contracts. Only in July 2024, the BGH concretised the applicable calculation method further,⁵⁸ whereupon BaFin amended the general order in October 2024.

The VG Frankfurt handed down its decision on 23 October 2024,⁵⁹ only taking into account, for procedural reasons, the original decision of BaFin of June 2021. Probably impressed by a bombardment with legal statements from the side of the banking industry (and affiliated lawyers and academics), the court, first of all, did not find a ‘bad state of affairs’, arguing that banks had not been under a duty to inform consumers. Moreover, the court questioned whether requirement of complementary interpretation of the contract (as triggered by the unfairness of the standard terms on variable interest) was meant to protect consumers, arguing, among others, that this BGH case law might disregard case law by the European Court of Justice. Thereby, the court ignored that the bad state of affairs already consisted in the use of unfair terms and the following miscalculation of damages.

The court then argued that at the time of the general order (June 2021) and the rejection of the appeal (January 2022), no relevant BGH case law had been available. According to VG Frankfurt, earlier decision of 2010 on variable interest in saving contracts had been on different types of saving contracts and therefore not relevant for § 4 para. 1a FinDAG, whereas the decision of the BGH of October 2021 (that confirmed the application of the 2010 rules) only dated from October 2021 and was still not sufficiently clear. The BGH decision of July 2024 did not count as it came after the BaFin’s decision on the banks’ appeals in January 2022. Interestingly, the BGH itself stated, in its decision of July 2024, in relation to prescription that the legal situation had been clear since 2010.⁶⁰ The case is now pending on appeal.

III.5 Lessons

One obstacle to the enforcement activities of BaFin is legal uncertainty. With vague formulation of both the preconditions of enforcement and the available instruments, enforcement measures are open to attacks of banks and academia. Thus, the legislator should clarify the relationship between enforcement by BaFin and civil litigation. In particular, rather than enforcement by BaFin being ‘necessary’, BaFin should have discretion as to what cases they want to take up while taking account of the primacy of civil litigation. Courts could then only stop BaFin in clear cases of unnecessary action,⁶¹ which are highly unlikely to occur. The legislator should also codify the

⁵⁵ BaFin, *Allgemeinverfügung bezüglich Zinsanpassungsklauseln in Prämiensparverträgen*, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Aufsichtsrecht/Verfuegung/vf_210621_allgvfg_Zinsanpassungsklauseln_Praemiensparvertraege.html.

⁵⁶ BGH, 6 October 2021 – XI ZR 234/20, in NJW, 2022, p. 311.

⁵⁷ BGH, 13 April 2010 – XI ZR 197/09, in VuR, 2010, p. 267.

⁵⁸ BGH, 9 July 2024 – XI ZR 44/23, in NJW, 2024, p. 2751.

⁵⁹ VG Frankfurt, in BKR, 2024, p. 1068.

⁶⁰ BGH, 9 July 2024 – XI ZR 44/23, in NJW, 2024, pp. 2751 ff., p. 2756.

⁶¹ See also R. Podszun, C. Busch and F. Henning-Bodewig, *Die Durchsetzung des Verbraucherrechts: Das BKartA als UWG-Behörde?*, in *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, 2018, pp. 1004 ff., p. 1010, discussing possible competences of the Federal Cartel Authority in collective consumer protection in unfair commercial practices law.

available instruments, and it should do so in a ‘modern’ way that includes consumer information orders, the right to accept undertakings and make them binding, and reimbursement orders. Actually, these instruments have been made available to the Federal Cartel Authority (*Bundeskartellamt*).⁶²

Acceptance of public enforcement of consumer law could be increased if decisions could be appealed in the civil courts rather than the administrative courts.⁶³ This would reduce the risk of diverging decisions on the merit, and it would alleviate the discomfort of civil lawyers with public law enforcement. Admittedly, the first decisions of VG Frankfurt also seem to show that their lack of experience with BaFin lawsuits exposes them to false or exaggerated arguments of the banking industry.⁶⁴ The few cases that have reached the administrative courts until now have all been stopped for procedural grounds or lack of competence rather than on the merits, and it seems that the VG Frankfurt tries to avoid engaging with substantive consumer law as such.

In fact, changing the legal recourse towards the civil courts would not be without precedence. In the specific case of access to basic bank accounts, this is exactly what the law provides for,⁶⁵ and the aim is exactly to avoid diverging decisions between administrative courts and civil courts.⁶⁶

Finally, to increase the practical effects of BaFin’s activities, injunctive orders by BaFin should suspend the prescription of individual claims of consumers in the same way that is foreseen for injunction procedures by consumer organisations, in accordance with Art. 16 Representative Actions Directive, and that German law provides for in competition law.⁶⁷

IV INSIGHTS

In the broader context of the transformation of (public and private) enforcement, it appears that the banking, financial (and insurance) markets need their own system of dispute resolution, to foster market integrity, financial stability and consumer protection —a necessity also driven by the EU regulatory framework.

Despite this common need, Italy and Germany have chosen profoundly different solutions. The fundamental difference lies in the choice between a semi-formal Alternative Dispute Resolution (ADR) model (Italy) and a model based primarily on civil law and supplementary public oversight (Germany).

Italy opted for a hybrid, external to state courts form of consumer protection enforcer, designed considering the underlying regulatory character of the banking, financial and insurance legal framework. The model embraced is that of Ombuds, closely integrated with the supervisory authorities (Banca d'Italia, Consob, IVASS). The Italian Ombuds are a success story as they benefit of great flexibility, offering faster, simpler and informal procedures: accessing the Ombuds is basically free, does not require complex procedural formalities, nor mandatory legal representation. The simplified procedures lead to a much faster resolution than court proceedings, often completed within 180 days, as requested by the ADR Directive 2013/11/EC. Beyond solving the dispute between the parties, they also have a regulatory function by establishing updated and predictable standards of conduct for the industry (regulation through litigation). They are complementary to, and do not replace or supersede, the judiciary. Thus, Italy appears to have created an effective,

⁶² See § 32 paras 2 and 2a and § 32b *Gesetz gegen Wettbewerbsbeschränkungen* (Competition Act; GWB).

⁶³ See also Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 148.

⁶⁴ One commentator even accused the VG Frankfurt of not having understood that unfair contract terms law was not consumer law as it also protects businesses in Germany; see M. Hippeli, *Anmerkung*, in BKR, 2024, p. 1071.

⁶⁵ See § 50 para. 1 *Zahlungskontengesetz* (Payment Accounts Act, ZKG).

⁶⁶ See BT-Drucks. 18/7204, p. 96.

⁶⁷ See § 33h para. 6 GWB.

highly utilized and widely recognized consumer dispute resolution system in the banking, financial and insurance markets, handling tens of thousands of complaints annually.

On the contrary, the German model of public law enforcement is a public authority exercising public powers. Although the Federal Financial Supervisory Authority (BaFin) was explicitly conferred the task of protecting the collective interests of consumers in 2015, in practice, its enforcement action is often compromised due to systemic and legal ambiguities. Efficacy is curtailed by the legal uncertainty arising from the vague statutory formulation of both the preconditions required for regulatory intervention and the instruments available to the authority. Furthermore, BaFin's intervention is typically limited by the primacy of civil law, meaning it can primarily act in cases where the relevant legal norm has already been unequivocally established by the Federal Supreme Court (BGH) and market operators subsequently persist in the breach; which leads to serious delays.

In summary, Germany's effort to integrate collective consumer protection into the mandate of a pre-existing public law regulator clashes fundamentally with the nation's rigid separation between public and private law, resulting in a hindered, less proactive, and often ineffective enforcement mechanism.

