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

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

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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.

