Individual Redress Tools in EU Retail Financial Services

Can a Retail Investor Take On the Giants?

BF BETTER FINANCE

The European Federation of Investors and Financial Services Users
Fédération Européenne des Épargnants et Usagers des Services Financiers

Contents

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About BETTER FINANCE

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

EXECUTIVE SUMMARY

Savers and individual investors are one of the most vulnerable groups of consumers due to the nature of financial markets, the limited financial literacy of households and the growing complexity of investment services and products. When breaches of consumer rights occur in this sector, losses are high and usually difficult to compensate. BETTER FINANCE's research estimated that, in the period 2005-2018, the largest[1] cases of consumer detriment in financial services amounted to damages of at least €73.5 billion for more than 13 million financial consumers.

On the back of the recent financial crises and decreasing consumer trust in capital markets, EU and national financial regulatory frameworks have become more complex, providing a wide array of rights for consumers.

However, seeking injunction or redress and compensation can prove difficult, lengthy, costly, or a combination of those. In response to this, the EU harmonised (or required Member States to adopt) civil procedures for consumer class actions against traders, which also cover financial services. The collective redress Directive[2] constitutes an important tool for consumers to gather their claims against the same provider of services and/or products and enforce their rights. Nevertheless, in BETTER FINANCE's view, statistically, most breaches of consumer rights in financial services are *individual*, thus concerning a single client, and small(er) in value. In these cases, each individual client or prospective client must "take on" the financial services provider by him-/herself.

As of 25 December 2022, consumer groups will be able to launch or participate in class actions against financial services providers in any EU Member State.

The EU Commission will maintain a list of ongoing class actions publicly available on its website.

This prompts the question of which *individual redress tools* consumers dispose of, by virtue of EU or national law, to enforce their rights and obtain compensation from financial services providers, as well as their efficiency. Our research found a series of such redress tools and procedures, but not all functioned as planned.

Individual complaint

The first, and perhaps most important, is the individual complaint to the provider: all finance professionals and firms must establish complaint-handling mechanisms to reply or propose a solution to the affected client. However, there are no provisions on how the procedures should be designed (formats, length, costs), so finance professionals are – in principle – free in their setup. The three European Supervisory Authorities (ESAs) have adopted Guidelines to harmonise practices in this sense. Most EU law instruments simply require manufacturers and services to ensure the necessary procedures for complaint-handling mechanisms, but the PEPP Regulation and the Markets in Crypto-Assets Regulation proposal are the most progressive.

Alternative dispute resolution (ADR) bodies

Another tool for abused consumers is to contact alternative dispute resolution (ADR) bodies. Although financial services providers are obliged to adhere to ADR bodies, so far, the uptake of ADR as out-of-court settlement in financial services has been fairly low. This comes despite the symbolic (or no) costs and short(er) deadlines (compared to judicial redress) for dispute resolution, which should make such procedures attractive for non-professional investors. The downside of the procedure is its non-binding outcome for the trader.

[1] By this, BETTER FINANCE made a selection of the most known or largest (in terms of number of consumers affected, cross-border nature, or size of damages) cases of consumer redress actions against financial services providers, using data available in specialised literature, press, reports, or publications of other consumer NGOs.

[2] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, ELI: http://data.europa.eu/eli/dir/2020/1828/oj.

In many jurisdictions, ADR for financial services is done through the office of the ombudsman or mediators.

Complaints to financial supervisory authorities

Third, "retail" financial services users also have the possibility to submit complaints to financial supervisory authorities, both at national and at EU levels. Although their mandates do not cover individual dispute resolution (e.g., to order compensation), the product intervention, injunction, and financial penalty powers can prove important tools to address certain breaches of consumer rights in their respective fields.

BETTER FINANCE analysed potential areas for improvement to the framework of individual redress tools for retail investors and advises the EU co-legislators and Member States to consider the following policy recommendations.

POLICY RECOMMENDATIONS

1. Limit the response deadline for complaint-handling procedures at provider level to an overall maximum of 35 days: this would ensure swift and efficient replies.
2. Initiate awareness campaigns to inform consumers of the possibility of recourse though out-of-court dispute settlements (ADR).
3. Strengthen the independence of ADR bodies (incl. financial ombudsmen) from the financial industry:
    a. Impose a minimum 5-year cooling off period;
    b. Restrict financing from the financial industry;
4. Reduce the fragmentation of ADR bodies, in particular in the banking industry.
5. Create regional ADR bodies, as is the case in Spain.
6. Make ADR decisions (for cases under a certain threshold) binding for financial services providers.

INTRODUCTION

Individual and non-professional financial services users, in their various capacities such as investors, shareholders, pension savers, (life) insurance policyholders, etc., are the most vulnerable category of consumers and suffer the most breaches of their rights by professionals. This is because of the unique nature of financial services and products which makes it difficult to compare and ascertain their quality or value even after purchase, rendering clients almost entirely reliant on trust. In other words, financial services and products are *credence* services or goods[3] from the consumer point of view, mandating in return a vast legal framework regulating the conduct of business, design, and distribution of these services and products to non-professional clients. Moreover, when breaches of consumer rights occur in this sector, the losses for non-professional financial services users are usually very high and difficult to compensate, such as life savings losses, unrealised gains, or significant erosion of investments.

The cornerstone obligation for finance professionals towards their clients is the *fiduciary duty* or *general duty of care*, by which the former must take all necessary steps to deliver the best result, or at least attempt to, for the latter. It comes as a natural response to the fact that clients place their trust in the services provider or product manufacturer. In some jurisdictions, this obligation takes the form of *stewardship*, while in others it's an obligation to employ all means suitable and necessary to obtain a certain result. For example, under EU law financial services providers are bound by the duty to *act in the best interests of clients* (Art. 25(1) MiFID II, Art. 17(1) IDD, Art. 7(1) MCD, Art. 59 MiCAR).

Generally, a fiduciary duty is abstract, allowing providers the flexibility to adapt their conduct as they see fit to ensure that clients' best interests are catered for. However, in financial services policy makers and stakeholders observed that prescriptiveness is needed to ensure that certain detriment to consumers is prevented in a harmonised way. For example, execution (including reception and transmission) of client transaction orders under the execution-only regime is subject to the obligation of *best execution* (Art. 27(1) MiFID II), which is in fact an application of the duty to act in the best interest of clients.[4]

Due to the growing number of cases of consumer detriment in financial services, especially after the 2008 global financial crisis, retail financial services have increasingly come under scrutiny as part of a large consumer protection movement from public authorities and consumer representatives (non-governmental organisations). BETTER FINANCE attempted to research and quantify the total value of damages and number of consumers affected in the largest[5] cases of consumer detriment in financial markets between 2005 and 2018. Our estimates point to more than €73.5 billion in damages for more than 13 million financial services users.[6]

This has resulted in continuous attempt to impose specific obligations and sanctions on financial services providers in order to create an optimal investing environment for non-professional clients, restore the trust lost in financial institutions, and finally ensure a high professional standard. Coupled with the need to preserve financial stability and the integrity of capital markets, EU financial regulation has become a very heavy and complex legal framework, divided in at least two layers: the EU dimension, attempting to harmonise certain provisions across the EU; and the national dimension, either implementing EU law (in many instances differently) or distinctly regulating conduct in financial markets.

In this context, the European Commission highlighted that "*rights which cannot be enforced in practice are worthless*"[7] as part of its impact assessment to harmonise consumer class actions across the EU.

[3] David Merenda, 'Protection of Retail Investors' (6 December 2018) Prague Law Working Papers Series 2018/III/1, p. 2.
[4] BETTER FINANCE report *Simple Products for Retail Investors*
[5] By this, BETTER FINANCE made a selection of the most known or largest (in terms of number of consumers affected, cross-border nature, or size of damages) cases of consumer redress actions against financial services providers, using data available in specialised literature, press, reports, or publications of other consumer NGOs.
[6] However, these figures are estimated as both the sources and figures published are not, in all cases, clear or definitive – the research was conducted in 2019, so many may have changed in the meantime.
[7] European Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress, SEC(2011) 173 final, para 1.1.

Indeed, consumers need to be able to effectively enforce their rights in order to benefit from this retail investor protection framework. Therefore, the question this report seeks to answer is whether individual, non-professional financial services users (consumers) dispose of adequate redress tools to enforce their rights or obtain compensation when their rights are breached.

Since December 2020, with the adoption of the *Directive on representative actions for the protection of the collective interests of consumers*[8], enforcement of consumer rights in EU financial services (among other sectors) acquired a new dimension. Through this Directive, EU Member States must adopt the necessary provisions in national law to ensure that groups of consumers and certain entities[9] can seek injunction and/or redress[10] measures before national courts for breaches of consumer rights by traders,[11] including financial services providers and product manufacturers.

Thus, enforcement of consumer rights (effective as of 25 December 2022) will henceforth be possible on a large scale by grouping the claims of an indefinite number of consumers in one or more EU Member States against the same provider. While this procedure will represent a key tool for consumers of financial services to enforce their rights, the question of whether consumers are sufficiently well-equipped to obtain redress *individually* still stands.

Unfortunately, we believe that the majority of breaches of the retail investor protection framework are individual, meaning that a certain conduct (action, inaction, omission) of financial services providers is not generalised so as to give rise to a collective redress procedure. In fact, the collective redress Directive is relevant for a few, but very large and sensitive, cases, whereas the more frequent, but small and less sensitive, instances of consumer right breaches are left for each non-professional client to deal with alone, individually.

Disposing of an effective class action procedure in financial services is, beyond doubt, pivotal in both acting as a deterrent for mass detriment and ensuring that adequate compensation is obtained. Nevertheless, restoring trust and creating attractive EU capital markets requires the assurance of simple, efficient, and cheap individual redress tools for non-professional clients. This topic is now all the more important in the context of the European Commission's announced *EU Strategy for Retail Investors*,[12] a large policy initiative aimed at reviewing almost all investor protection aspects in EU law in order to boost the trust and participation of EU households in the EU single market for capital and investments.

In light of the above, this report seeks to better understand:

- what types of individual redress tools consumers of financial services currently dispose of,
- what flaws (if any) or good practices are there (in the existing framework) and
- if there is a need for reform at the EU level.

What types of claims are enforceable?

Financial instruments and products are more and more diverse and have become exponentially complex. Capital markets constantly innovate and offer new types of investments, with just a fraction being currently available to non-professional clients. Thus, the features and clauses that instruments and products embed are equally varied. The purpose of this section is to present a generic overview of frequent instances – abstracted – that generally cannot be considered a breach of investor rights. Most often such claims are related to financial performance, manager (in)competence, or costs, although many exceptions exist.

[8] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, ELI: http://data.europa.eu/eli/dir/2020/1828/oj, hereinafter "collective redress Directive".
[9] See Article 4 of the collective redress Directive.
[10] See Arts. 7, 8, and 9 of the collective redress Directive.
[11] See Art. 3(2) of the collective redress Directive.
[12] See the European Commission's website: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12755-Retail-Investment-Strategy.

This section is purely educational and informational, it is not an exhaustive legal assessment, it does not provide legal advice, and nor should it be understood as such. There may be instances or particular legal provisions that contradict the information mentioned below. Any and all legal advice must be obtained from authorised professionals.

Financial performance. The performance of financial instruments and products, particularly poor- or underperformance, cannot *per se* be grounds for redress and compensation. This is because the evolution of investments and capital markets cannot be predicted and finance professionals cannot promise a certain return, nor can anybody control such evolution so as to be in a legitimate position to "sell it". In other words, investors themselves bear the risk of financial performance, meaning low(er) or poor(er) returns on capital markets.

Projections or estimations on the possible performance of an instrument or product are frequently made, but these are not indicative of what the actual performance will be, nor should they be understood as such or as a promise or guarantee.

For instance, MiFID II and PRIIPs oblige manufacturers to include a warning with any performance estimations that "*it is not a reliable indicator of future performance*" (Art. 44(6)(6) MiFID II Delegated Act[13]) or "*The scenarios presented are an estimate of future performance based on evidence from the past on how the value of this investment varies and are not an exact indicator. What you get will vary depending on how the market performs and how long you keep the investment/product*" (Annex V, Part 2, of the PRIIPs Delegated Regulation[14]).

At the same time, past performance is often included in disclosure documents for consumers (marketing communication, regulatory reporting), but far too often non-professional investors expect the same evolution to continue or apply a hyperbolic discounting when reading such information. In reality, past performance is an even more unreliable indicator of future performance, and its presentation does not serve such purpose.[15] Equally, the MiFID II framework obliges manufacturers and distributors to warn clients of the fact that past performance "*is not a reliable indicator of future performance*" (Art. 44(4)(d) MiFID II Delegated Act).

In this sense, confusion should be avoided with capital protection guarantees, minimum returns, profit participation clauses or other such features that are embedded into the product: these are concrete, quantifiable payment obligations for the provider, which are separately priced, and are indeed enforceable. For example, an insurance-based investment product that guarantees the policyholder that, at maturity, it will return at least the ***net***[16] value of the total sum of premiums paid (total net investment) is a rightly enforceable claim. Other examples include:

- pension products that are required by law to deliver a minimum net profit per year; in such cases, the pension saver is entitled to that particular net performance, even if the product records losses;
- profit-participation life insurance products specifying that the policyholder is entitled to a fraction of the return the insurance company earns from making investments using premiums

[13] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive http://data.europa.eu/eli/reg_del/2017/565/oj.

[14] Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents, http://data.europa.eu/eli/reg_del/2017/653/oj.

[15] In fact, BETTER FINANCE highlighted on numerous occasions, both in writing and through public engagements, that the purpose of past performance is only to evaluate whether the manager has reached its objectives in the past and whether the product did generate any profits for clients – see, for instance, BETTER FINANCE's response to the Joint Committee of the European Supervisory Authorities' Public Consultation Concerning Amendments to the PRIIPs KID (16 October 2019) JC 2019 63, available at: https://betterfinance.eu/wp-content/uploads/BETTER-FINANCE-Response-ESAs-PRIIPs-Amendments-L2-FINAL.pdf.

[16] This generally refers to the value after costs and charges are deducted, but before inflation and applicable taxes.

paid; although a clear amount or percentage is not stipulated, the client will earn a profit when the insurer earns a profit as well;

Confusion should be avoided with investment objectives stated in relation to benchmarks or financial indicators. Many financial products stipulate that the aim is to overperform a certain reference indicator (e.g., an equity index), but this is not a return guarantee or promise, just an objective for the investment manager that may or may not be achieved. Examples include:

- index-tracking products, i.e., products that aim to replicate the performance of an index; or
- funds managed in relation to a market index benchmark, e.g., funds that aim to deliver a higher return for investors than what the market would have.

The last example is particularly important since, even if the benchmark or indicator delivers negative returns (records losses), the product manager will still be considered to have reached its objectives when losses are recorded, if the losses are less than those of its reference benchmark or indicator. Certain exceptions observed in the second sub-sections.

Incompetence. In addition, added value propositions complementing investment management or sophisticated varieties on the topic ("insightful" research, selection expertise, "optimal" asset allocation, strategic orientation, etc.) are not legal requirements and, as such, consumers cannot claim damages on these grounds. A frequent example is that of a product that severely underperforms its market: analysed in isolation, underperformance in relation to a stated investment objective or benchmark is generally not a legitimate cause for redress and compensation. Other examples include products that deliver low net returns, further deepened by the effect of inflation and tax.

An exception from this spectrum is – in many cases – related to **gross** incompetence. The manner in which gross incompetence is described in applicable laws can vary from one jurisdiction to another:

- some laws expressly regulate cases of gross incompetence;
- others resort to *tort*, i.e., a set of principles that frame what is accepted as gross incompetence.

Generally, gross incompetence is sanctioned by imposing minimum standards of professionalism, knowledge, training, or conduct of business to providers or manufacturers, reason for which investors can be compensated for losses in such cases. For instance, EU law obliges finance professionals and investment firms to ensure that a firm's staff disposes of sufficient knowledge and training and that the firm puts in place the necessary organisational arrangements to ensure certain key functions, such as risk, liquidity management or conflicts of interest policies.[17] An example includes failure to acknowledge receipt of a redemption request for a product, following which the performance drops and the investor loses value that otherwise would not have been lost.

The issue of costs. In most cases, costs are an integral part of the commercial added value that finance professionals propose to clients and also constitute a fundamental commercial freedom. As in all other sectors, firms and product manufacturers are generally free to establish costs as they see fit and public interventionism through cost regulation only occurs exceptionally.[18] While costs are among the most prominent factors leading to short- and long-term poor or underperformance of investment products – as exemplified by BETTER FINANCE annually[19] – consumers cannot legally challenge providers on the basis that costs are too high. For these reasons, costs very exceptionally form sufficient ground to argue for a breach of consumer rights, but certain instances are foreseen.

[17] See, for example, Art. 16 and Art. 20 MiFID II (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).

[18] A rare example is the fee cap for the basic PEPP (default investment option), where the total costs – excluding the costs for the capital guaranteed option – are limited to 1% of the accumulated capital, see Art. 45(1) PEPP Regulation (Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP)); other cases include the prohibition of price discrimination towards consumers.

[19] BETTER FINANCE Report on Long-Term and Pension Savings, 2021 edition, available at: https://betterfinance.eu/wp-content/uploads/The-Real-Return-Long-Term-Pension-Savings-Report-2021-Edition.pdf.

The following sub-section analyses a few of the exceptions to the abovementioned cases where consumers are entitled to, and should, seek compensation for their damages.

Selected exceptions: closet indexing. We noted earlier that the financial performance of an investment is a risk uniquely borne by investors, and managers or manufacturers generally cannot be held accountable for it. However, in certain cases investors can seek compensation directly in relation to the returns of a product or instrument.

This is the case for *closet indexing*, a practice to which BETTER FINANCE drew the attention of EU and national supervisors.[20] In short, closet indexing has been observed in relation to actively managed funds and refers to the practice of fund managers claiming to manage portfolios actively and attempt to "beat" a reference indicator (e.g. overperform the STOXX 500 equity index) whilst, in fact, passively managing the fund by merely tracking the reference indicator (i.e. replicating the performance of the STOXX 500 equity index in the hypothetical example above).

In this case, financial performance can be said to represent a breach of investor protection rights, but opinions are divided. In some instances, closet indexing has been sanctioned by courts on the grounds of *excessive and disproportionate costs.*[21] Other authors view closet indexing as a false or misleading statement directed at clients and also an "opportunity loss".

The European Securities and Markets Authority – without formally naming the exact type of breach – developed a methodology for national financial supervisory authorities to analyse possible cases of closet indexing and take appropriate enforcement measures against it. Prior to this supervisory guidance, sanctions against closet indexers were taken by Irish and UK regulators.[22]

Selected exceptions: "undue" costs. Finance professionals and product manufacturers are free to waive or charge any costs incurred in providing a service or managing a product for clients. However, there is a specific provision in EU law where the aforementioned are bound to not charge clients with costs that are "undue".[23] The exact meaning of "undue" is not harmonised at EU level and varies from one jurisdiction to another. ESMA attempted to level the concept of "undue costs" for the 27 national securities supervisors,[24] but the BETTER FINANCE team has no evidence so far indicating whether the attempt was successful or not.

In short, ESMA proposed to national supervisors that due costs should be considered those that are charged for what should be in the best interests of the clients (fund unit holders), meaning that these should be "*consistent with the investment objective of the fund and do not prevent the fund to achieve this objective*" and that "*the pricing process adopted by the management company allows a clear identification and quantification of all costs charged to the fund*" in order to be able to assess whether a cost is charged in the best interests of the client. In other words, ESMA did not suggest quantitative limits, or otherwise a mathematical methodology to evaluate whether costs are undue, but in fact it suggests a qualitative, case-by-case assessment of whether the costs hinder the fund in achieving its investment objectives and, thereby, fail to act in the best interests of clients.

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[20] See BETTER FINANCE, *Press Release: BETTER FINANCE Replicates and Discloses ESMA Findings on Closet Indexing* (13 February 2017) available at: https://betterfinance.eu/publication/better-finance-replicates-and-discloses-esma-findings-on-closet-indexing/; see also BETTER FINANCE, *Open Letter to the European Commission on Closet Indexing* (29 March 2017) available at: https://betterfinance.eu/wp-content/uploads/publications/BF_-_Letter_to_EC_on_Closet_Indexing_2017.pdf.

[21] See Advisor's Edge, *Firms File Proposed Class Action Over Alleged 'Closet Index' Funds* (10 April 2019, advisor.ca) accessed 18 March 2022, available at: https://www.advisor.ca/news/industry-news/firms-file-proposed-class-action-over-alleged-closet-index-funds/.; see also Ben Miller, *American Century Accused of 'Closet Indexing' Lawsuit* (Ignites Europe via FT.com, 10 November 2021) accessed 18 March 2022, available at: https://www.ft.com/content/66a16f3a-0f0f-459e-9f26-a4f0e0b09ac1.

[22] See BETTER FINANCE, *FCA Fines Henderson £1.9m for Closet Indexing* (5 December 2019) available at: https://betterfinance.eu/article/fca-fines-henderson-1-9m-for-closet-indexing/.

[23] Art. 22(4) of the UCITS L2 Directive (Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company, http://data.europa.eu/eli/dir/2010/43/oj.

[24] ESMA, *Supervisory Briefing on the Supervision of Costs in UCITS and AIFs* (4 June 2020, ESMA34-39-1042) available at: https://www.esma.europa.eu/sites/default/files/library/esma34-39-1042_supervisory_briefing_on_the_supervision_of_costs.pdf.

Selected exceptions: disloyal terms. Input from one of the German member organisations of BETTER FINANCE (German Federation of Insured[25]) revealed a certain practice among life insurance companies by which the policyholder's life expectancy at retirement is overstated (or exaggerated) by a wide margin, e.g., 30-40 years. An insurance-based investment product, such as a unit-linked life insurance contract, covers certain beneficiaries designated by the policyholder against the latter's risk of death by a certain age (usually retirement) and, if such event does not occur, the policyholder is entitled to start receiving payments from the investment performance of the contract.

These payments (if the profit is withdrawn periodically, such as annually or monthly) need to be calculated through an estimation of the expected life after retirement, but evidence brought by BdV indicates that the life expectancy at retirement was estimated to reach 130-135 years, which would result in policyholders receiving far less – regularly – than the accumulated capital.

In our view, this is a case of unfair terms in consumer contracts, linked to the performance of the investment component of the life insurance contract, and it forms a valid basis for injunctive or redress measures by the consumer.

Legal advice should be sought only from persons authorised as such according to national law.

TYPES OF INDIVIDUAL REDRESS TOOLS

Given the duality of EU and national laws in the applicable regulatory framework, this analysis will focus on the available individual redress tools deriving from EU law and separately those stemming from national law.

Generally, there is no common body of rules for financial services and products, meaning that applicable legislation is *sectoral* and specific for each of the three segments of financial markets: banking and payments, securities markets and insurances. The recent and rapidly evolving digital innovation in financial services added two new segments to the three abovementioned sectors: crowdfunding and crypto assets. For the benefit of our non-professional readers, the BETTER FINANCE team notes that crowdfunding services and crypto-asset providers are regulated (and supervised) separately from the three other sectors due to their distinct nature and characteristics.

From the outset, it is helpful to recall the main pieces of EU legislation applicable to retail financial services and products, categorised by financial market:

[25] Bund der Versicherten - https://www.bundderversicherten.de/.

Financial market	EU supervisory authority	Legislation (main)	Products covered
Securities markets	European Securities and Markets Authority (ESMA)	MiFID II[26] MiFIR[27] Transparency Directive[28] Prospectus Regulation[29] EMIR[30] UCITS[31] AIFMD,[32] ELTIF,[33] EuVECA,[34] EuSEF,[35] MAR[36] MAD[37] SRDII[38] SFDR[39] NFRD[40] STSR[41] Investor compensation schemes Directive[42]	• Shares (incl. depository receipts) • Debt securities (such as bonds, commercial paper, notes etc) • Commodities • Loans (other than those from credit institutions) • Investment fund units or shares • Derivatives • and other crypto-based assets that are used or function as securities
Banking sector (and payments)	European Banking Authority (EBA); European Central Bank (ECB); European Single Resolution Board (ESRB);	CCD[43] & MCD[44] PSD2[45] NDGS[46]	• currencies • deposits • loans (granted by credit institutions) • payments • digital currencies

[26] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.
[27] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.
[28] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.
[29] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
[30] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
[31] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).
[32] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
[33] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.
[34] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.
[35] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.
[36] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
[37] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).
[38] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
[39] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.
[40] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[41] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.
[42] Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.
[43] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.
[44] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.
[45] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.
[46] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

Insurances	European Insurance and Occupational Pensions Authority (EIOPA)	IDD[47] Solvency II[48] PEPP[49] IORP[50]	• Non-life insurances (such as motor civil liability or travel insurance) • Life insurances (incl. insurance-based investment products) • IORPs (occupational pension plans) • pan-European Personal Pension (PEPP) products
Crowdfunding	European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA)	ECSPR[51]	• crowdfunding services & platforms
Crypto-assets		MiCAR[52]	• crypto-assets not covered by other sectoral legislation

Source: BETTER FINANCE own elaboration, 2022

As shown in the table above, even at the EU level with limited competencies, the regulatory framework is already very complex. It's worth noting that these legislative acts also cover the adjacent services provided in relation to the abovementioned products (conflicts of interests, conduct of business, disclosures, distribution, redemption, complaints, compensation schemes for investors) and are accompanied by further Level 2 and Level 3 acts.

Where financial services users are part of a group of clients (for instance, when subscribing to an investment fund), it is more likely that a breach of rights by the professional will be more efficiently addressed through a collective redress action rather than individually.

Thus, for the purpose of this analysis, the BETTER FINANCE team selected certain financial services for which the relationship with clients is unique (individual) in order to ensure any redress is more likely to be dealt with via an individual redress tool rather than through collective redress.

Complaint-handling procedures

The main sectoral legislation applicable to retail financial products generally prescribes product manufacturers and other services providers to ensure that the firm has organisational procedures in place to handle complaints from clients. As a matter of principle, the most efficient manner to deal with potential breaches of contractual or consumer rights is directly with the provider or manufacturer. More often than not, the latter can either provide a swift solution to a complaint or justify why it considers a certain conduct as legitimate.

Moreover, it is worth recalling that – generally – most non-judicial dispute resolution procedures require consumers to first attempt addressing and solving the complaint with the provider or manufacturer,[53] which is the case as well in financial services (see next section).

This section provides a general overview of the legal requirements stemming from EU law on complaint handling mechanisms.

MiFID II. Generally applicable to securities markets and issuers, the Markets in Financial Instruments Directive (MiFID II) provides for two obligations concerning redress tools for clients of investment firms:

[47] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.
[48] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).
[49] Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP).
[50] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs).
[51] Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.
[52] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final.
[53] The ADR Directive allows EU Member States to allow ADR bodies to set up rules for the refusal of dealing on a dispute on grounds that "the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader" – Art. 5(4)(a) ADR Directive.

one addressed directly to investment firms (as organisational requirements), and one addressed to EU Member States (analysed in the following section).

Article 16(2) requires investment firms to establish "*adequate policies and procedures sufficient to ensure compliance*" of the firm and its staff (incl. tied agents) with the provisions of the Directive. This obligation was detailed at length by the European Commission through a Level 2 Regulation (MiFID II Delegated Act[54]).

MiFID II also requires investment firms to ensure that the compliance function of the firm monitors the complaint-handling procedures, and that it uses such monitoring in its analysis for the risk-based monitoring programme (Art. 22 MiFID II DA). In addition, the MiFID framework provides for specific organisational requirements in relation to complaint-handling procedures (Art. 26 MiFID II DA): investment firms must establish and make information about the complaint-handling mechanism publicly available, which has to be **free of charge**, effective and transparent and lead to a prompt resolution of complaints from clients or prospective clients.

The description must be "*clear, accurate, and up-to-date*" and inform the public on the steps to be followed and the contact details of the complaint management function. All communication with clients in this sense must be made "*clearly, in plain language that is easy to understand*" and must reply to the complaints of clients or prospective clients "*without undue delay*".

In terms of resolution, Art. 26(5) MiFID II DA specifies that the investment firm must communicate their position and available options for the client's or prospective client's request and also inform them of the possibility to challenge the position in alternative dispute resolution (ADR) mechanisms (non-judicial, see section below) or refer to a civil court (see judicial enforcement section below).

Practical example: A client of an investment advice firm (in Belgium) considers that the recommendation received from his advisor was unsuitable. The firm published on its website – under the *legal terms and conditions* section – the procedure to be followed in case of complaints:

- the address to which complaints should be sent – without a pre-determined form; **however**, the MiFID framework does not specify a delay in which the solution (reply) must be given, nor the form for that purpose;
- the address of the Alternative Dispute Resolution (ADR) bodies, in case the client is unhappy with the proposed solution, i.e.
    - for brokerage banking and investment services, the Financial Ombudsman of Belgium (OMBUDSFIN – www.ombudsfin.be – ombudsman@ombudsfin.be)
    - for insurance brokerage services, the Insurance Ombudsman of Belgium (Ombudsman des Assurances – www.ombudsman.as – info@ombudsman.as)

IDD. For insurance services (brokerage for life and non-life insurance, as well as adjacent services), the Insurance Distribution Directive (IDD) obliges insurers and agents or brokers to inform clients or prospective clients about the procedures "*to register complaints about insurance intermediaries and about the out-of-court complaint and redress procedures*", required by virtue of Arts. 14 and 15 IDD (Art. 18 IDD). Further, on the basis of Art. 10(2) IDD, Annex I obliges firms to ensure that the staff or persons working on their behalf have the "*minimum necessary knowledge of complaints handling*". The European Insurance and Occupational Pensions Authority (EIOPA) adopted Guidelines on:

SOLVENCY II. According to the Solvency II Directive,[55] there are two requirements for insurance and reinsurance companies regarding complaint-handling procedures, divided by the type of insurance

[54] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, http://data.europa.eu/eli/reg_del/2017/565/oj.

[55] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

contract (life and non-life insurance). Article 183 Solvency II applies to non-life insurances and only when the client is a natural person and it obliges firms to inform the client "*of the arrangements for handling complaints of policy holders concerning contracts including, where appropriate, the existence of a complaints body, without prejudice to the right of the policy holder to take legal proceedings*". Article 185 Solvency II applies to life insurance contracts and obliges the insurance undertaking to inform the policyholder of "*the arrangements for handling complaints concerning contracts by policy holders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings*".

PRIIPs. The PRIIPs Regulation is an important step in terms of signposting and making consumers aware of complaint-handling mechanisms and out-of-court settlement of disputes. This is because the mandatory pre-contractual document that must be communicated to the client before buying a PRIIP (the key information document, KID) comprises a specific, distinguishable section entitled "*How can I complain?*" (Art. 8(3)(h) PRIIPs Regulation), where the manufacturer or distributor (depending on who is obliged by law to draw up the PRIIPs KID) must inform the consumer about how and to whom a complaint can be lodged both against "*the product or the conduct of the PRIIP manufacturer or a person advising on, or selling, the product*".

UCITS. The UCITS V Directive[56] imposes an obligation for firms establishing and managing this type of mutual investment funds in the EU (UCITS[57]) to establish internal mechanisms ("*appropriate procedures and arrangements*") to handle complaints from customers in an appropriate manner while also ensuring that the rights of the consumer are not restricted even in such cases where the actual investment firm is domiciled in another EU Member State than where the UCITS itself is domiciled (cross-border cases). Complaints can be submitted in one of the official languages of the EU Member States involved and the information on such mechanisms must be made publicly available upon request (Art. 15 UCITS V Directive).

PEPP. EU law regulating the pan-European personal pension (PEPP) product[58] takes a step forward in terms of redress for consumer rights. To begin with, Recital (61) specifies that the purpose is to establish "*efficient and effective dispute resolution procedures"* so that the mechanism organised by the PEPP provider can provide "*short and clearly defined*" deadlines to answer to the consumer. Second, Art. 50 of the PEPP Regulation on **complaints** constitutes a significant improvement since it imposes two maximum deadlines for financial services providers to respond to complaints: at the latest a consumer complaint must be replied to within 15 days and exceptionally – provided that the consumer is properly informed with a justification for the delay – the deadline can be longer, but it cannot exceed a maximum of 35 days.

Non-judicial dispute resolution (ADR)

The second most important individual redress tools for financial services users are non-judicial (out-of-court, as these are referred to in EU law) procedures, namely *alternative dispute resolution* bodies. These non-judicial dispute resolution entities benefit of their own regulatory framework, namely the EU Directive on alternative dispute resolution for consumer disputes,[59] in essence harmonising out-of-court procedures and bodies involving complaints of consumers against professionals and traders: Art. 5(1) of ADR Directive (ADRD) obliges EU Member States to "*facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their*

[56] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), http://data.europa.eu/eli/dir/2009/65/2014-09-17.
[57] Undertakings for collective investments in transferable securities, UCITS.
[58] Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP), http://data.europa.eu/eli/reg/2019/1238/oj.
[59] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC http://data.europa.eu/eli/dir/2013/11/oj.

respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive".

Although ADR mechanisms are not necessarily tailormade for financial services, the main regulatory frameworks for banking, securities, insurance, crowdfunding, and crypto-asset markets oblige EU Member States to establish or to organise ADR bodies for these consumer sectors as well.

General principles of ADR. According to the ADRD, the rule is that consumer sectors should have their (specialised) ADR bodies and procedures based on the requirement of expertise (Art. 6(1) ADRD), and a general (residual) ADR body for all matters not covered by specialised ADR bodies. ADR bodies and procedures are governed by 6 principles (simplified):

These principles are meant to create a fast-tracked, cost-efficient, fair, and transparent procedure to solve disputes between consumers and professionals for which the two parties could not reach an agreement.

Consumers retain the right to pursue their rights in court.

1. Expertise, independence, impartiality (Art. 6 ADRD): persons working in the ADR bodies (incl. those involved in the dispute resolution) must possess the necessary expertise, be independent and impartial;
2. Transparency (Art. 7 ADRD): all information regarding the ADR body or procedure must be made available to the public in a clear and understandable manner;
3. Effectiveness (Art. 8 ADRD): the procedure is finalised swiftly and with easy access to parties, without an obligation (but a possibility) to retain legal counsel, as well as adequate rules on costs and deadlines are in place;
4. Fairness (Art. 9): parties are allowed to present their view, have the right to withdraw from the procedure, as well as to accept or not the solution proposed (which has to be justified); the only exception is where the parties are informed and accept in advance that the solution proposed is binding (Art. 10(2) ADRD);
5. Liberty (Art. 10): consumers cannot be bound to participate in ADR procedures through agreements (contracts) with professionals concluded before the dispute materialises;
6. Legality (Art. 11): participating in an ADR procedure does not pre-empt court action (particularly important for collective redress), nor does it affect periods of limitation or prescription.

Deadlines, costs, and assistance for consumers. ADR procedures should normally last for a maximum of 90 days following the start of the procedure but can be extended by an additional 90-day term for "*highly complex*" cases (Art. 8(e) ADRD). ADR bodies can impose a monetary threshold (value of claims in question) to filter cases, but these cannot significantly impact consumers' access to such procedures (Art. 5(6 ADRD) nor should other procedural rules be used to refuse dealing with a case (Art. 5(4) ADRD): for instance, an ADR body can refuse dealing with a case if the consumer did not attempt to mediate the claim with the professional or if the case is "*frivolous or vexatious*". Where the ADR body moves to refuse the case, it must inform the consumer within a 3-week deadline.

Accessing an ADR procedure should be either free of charge or through a nominal fee for consumers (Art. 8(c) ADRD) and should be available through all means (both online and offline) for consumers. In cross-border cases (where the competent ADR body is in another EU Member State), public authorities should provide assistance to consumers in order to ensure effective access to such procedures (Art. 14(1) ADRD).

According to a report produced by the 2nd ADR Assembly at EU level,[60] in 2021 there were a total of 430 ADR bodies in the EU27, or the equivalent of an average 16 ADR bodies in each Member State. Almost half of all these ADR bodies are established or competent for financial services, namely 183 of them. The countries with most out-of-court dispute settlement bodies for financial services are France (48) and Spain (22). However, in many EU Member States, financial services have one general body dealing only with financial services (such as the Financial Ombudsman) or simply one general consumer dispute

[60] Available at: https://ec.europa.eu/info/sites/default/files/summary_report_on_the_2nd_adr_assembly.pdf.

resolution body. The full list, available in all 24 official languages ,of ADR bodies, categorised by country or consumer sector, is available on the European Commission's website:

https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2.

Further practical information on ADR can also be found on the European Commission's webpage:

https://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/out-of-court-procedures/index_en.htm

Unfortunately, even after 8 years following the adoption of the ADRD, the uptake of ADR procedures is insufficient. Both the European network of financial ADR bodies and consumer associations point to this finding. According to the latest survey results from the European Consumer Condition Scoreboard (March 2021), only 5% of consumers that encountered a problem with service providers have made recourse to an ADR body (generally), but the most alarming is that the range (lowest and highest by EU Member State) is between 0% and 12% (making recourse to ADR). The survey shows that, in the future, only 8% of consumers will consider settling disputes through an ADR body (very small increase), whereas 15% will consider challenging the provider in court. Furthermore, only 47% of consumers believe that it is easy to settle disputes with retailers through out-of-court bodies, 35% through courts, and only 27% have good knowledge of consumer rights.

Focused on financial services, BETTER FINANCE researched a case study in France with the public ADR body attached to the French Securities Markets supervisor, the AMF. According to their latest figures, it seems that a large share of consumers has a misunderstanding of which ADR body is competent for their case: 38% of complaints registered with the public mediator of the AMF were rejected for falling outside of the latter's scope of competence, of which 50% were related to banking services and 25% to insurances. Consumers' lack of knowledge about the procedure to follow is further highlighted by an additional 267 dismissals (14%) for failing to complain first to the financial services provider. Finally, only 763 (40%) are seen through with the ADR body and receive a solution, in which case:

- 54% are solved in favour of the consumer, having a follow-up (agreement) rate of 98%;
- 46% are solved in favour of the financial services provider, with a 93% follow-up (agreement) rate.[61]

According to reports produced by the European Commission, almost all EU Member States have incentive legislation for the promotion of ADR as an out-of-court settlement for consumer disputes, but still the adoption rate by consumers seems to be slow, probably also due to signposting issues and consumer awareness.[62]

MiFID II. According to Art. 75 of the Markets in Financial Instruments Directive (MiFID II), EU Member States must ensure, by virtue of national law, that financial services providers (securities markets) adhere to either specialised or general (residual) ADR bodies for the resolution of disputes with consumers (out-of-court settlement of consumer disputes). Thus, in comparison with other consumer sectors, non-professional clients or prospective clients always have the choice to challenge the response of the financial services provider with one ADR body in their jurisdiction.

IDD. The Insurance Distribution Directive (IDD) obliges Member States to establish procedures allowing consumers (in particular consumer associations) and other interested parties to register complaints about insurance and reinsurance companies (Art. 15 IDD). The main difference to the analogous MiFID II provisions is that IDD prescribes explicitly that such dispute settlement mechanisms should concern

[61] Rapport annuel du Mediateur (AMF), 2021, available at: https://www.amf-france.org/sites/default/files/private/2022-04/RMED%202021_VF_BD.pdf.

[62] See BEUC, *BEUC Preliminary List of Issues to Consider When Revising the Regulatory Framework for Consumer ADR/ODR in Europe* (July 2021), BEUC-X-2021-123, available at: https://www.beuc.eu/publications/beucx-x2022-123_preliminary_list_of_issues_for_revising_the_consumer_adr_framework.pdf.

the rights derived from IDD. All the rest being equal, out-of-court settlements for insurance and reinsurance claims can use existing ADR bodies as well.

UCITS. The regulatory framework applicable to the most common form of mutual investment funds in the EU (UCITS) obliges EU Member States to ensure that "*efficient and effective complaints and redress procedures are in place for the out-of-court settlement of consumer disputes concerning the activity of UCITS using existing bodies where appropriate*" (Art. 100(1) UCITS V Directive).

Consumer Credit Directive. According to the Consumer Credit Directive[63] (thus, applicable to credit institutions granting credits to non-professional clients), the information that must be comprised in the credit agreement with the consumer counts, among others, "*whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it*" (Art. 10(2)(t) CCD).

MiCAR. Although not yet in force, the proposal for an EU Regulation applicable to all crypto-assets that fall outside of the scope of securities markets (MiFID II), insurances (IDD) and banking and payments (CCD, MCD, PSD2), also may require information disclosure to consumers about the existence of out-of-court settlement of disputes with the services provider. In the legislative proposal of the European Commission, a standalone provision is dedicated to complaint-handling procedures and stipulates that issuers of crypto-assets must establish mechanisms for dealing with consumer complaints that are "*prompt, fair, and consistent*" (Art. 27(1) MiCAR). Such complaints should be filed free of charge and be available based on templates that must be recorded internally by the issuer and the procedure should be finalised fairly and promptly (Art. 27(4) MiCAR).

Comparing with all other provisions on complaint-handling mechanisms, we note that these requirements included in the MiCAR proposal are the most robust and efficient in terms of consumer complaints. First, it is the only regulation to stipulate that complaint-handling mechanisms must be prompt, fair, and consistent, which comes on the back of practices identified with certain financial services providers that aim to wear down the consumer and disincentivise him or her from pursuing the claim. Moreover, the fact that templates are required significantly enhances the accessibility for non-professional customers (consumers) to such procedures, further improved by the fact that the European Banking Authority and the European Securities and Markets Authority will standardise these templates for issuers of crypto-assets.

Legal advice should be sought only from persons authorised as such according to national law.

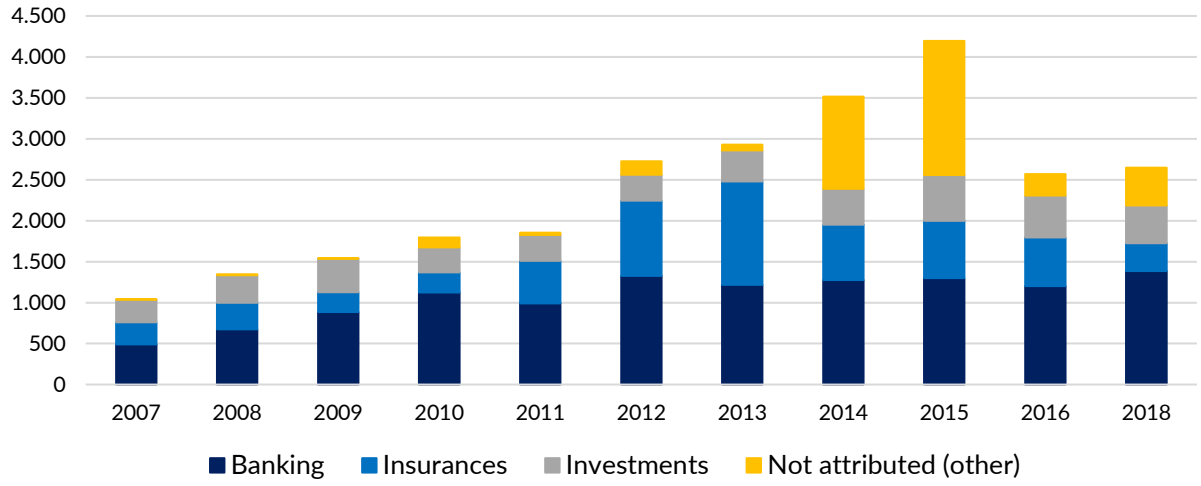
The Fin-NET

In 2001 the European Commission established the European network for organisations responsible for the out-of-court settlement of consumer disputes in financial services, with the primary aim of ensuring cooperation between its members (basically, national ADR bodies competent for financial services) in solving cross-border disputes.

Although the Fin-NET is not *per se* an ADR body and, thus, not an individual redress tool, it is worth mentioning it as a way of raising awareness among consumers: the Fin-NET is not mandatory and works on the basis of voluntary affiliation. In terms of topics covered, on average, 48% of cross-border complaints received from affiliated ADR-bodies pertained to disputes in the banking sector, followed by insurances (23%) and investments and securities markets (18%).

[63] Directive 2008/48/EC Of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, http://data.europa.eu/eli/dir/2008/48/2019-07-26.

Chart 1. Number of cross-border cases handled by Fin-NET members by type



Source: BETTER FINANCE own composition based on the annual reports of the Fin-NET[64]

In terms of the share of cross-border cases out of the total handled by ADR bodies in financial services, in a handful of countries more than 70% of cases are cross-border, whereas for the rest this figure represents less than 1% of complaints.[65]

The Fin-NET adopted a Memorandum of Understanding (MoU) for cooperation in settling cross-border consumer disputes with financial services providers.[66] According to the MoU, members should strive to handle consumer complaints *effectively in the interest of supporting a cross-border market in financial services through the recourse to high-quality out-of-court settlement*". At the same time, it is meant to facilitate the exchange of best practices between members.

In its Guidelines for the procedure, the MoU of the Fin-NET stipulates that the ADR body contacted (to which the complaint is initially registered) in the domicile of the consumer should make an initial assessment and provide the consumer with all necessary information about the network and the competent ADR body (thus, the MoU applies when the contacted ADR body is not the competent one and there is a cross-border element). The contacted ADR body should warn the consumer of the possibility of formally submitting the complaint to the services provider before contacting the ADR body since this requirement may affect the admissibility of the request.

Finally, the contacted ADR body should either transfer the complaint to the competent ADR body in the other EU Member State, advise the consumer to do it on his own or handle the complaint in those circumstances where the financial services provider accepted its competence.

In terms of language, Fin-NET members should allow the consumer to use the language of the contract concluded with the financial services provider or otherwise the habitual language of communication with the former.

Further information can be found here: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net/make-complaint-about-financial-service-provider-another-eea-country_en.

Legal advice should be sought only from persons authorised as such according to national law.

[64] These figures are incomplete as not all ADR bodies in financial services participate in the Fin-NET statistical survey.
[65] Fin-NET Annual Report, 2018, available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2018-activity-report_en.pdf.
[66] Memorandum of Understanding on a Cross-Border Outof-Court Complaints Network for Financial Services, 12 May 2016, available at: https://ec.europa.eu/info/sites/default/files/memorandum-of-understanding_en.pdf.

Financial supervisory authorities: sanctions and enforcement

Financial markets are supervised by specially appointed authorities who serve a dual purpose: to regulate (at varying degrees) and impose measures when financial stability, market integrity, or investor protection are at stake. However, these authorities traditionally do not have competencies to settle disputes and potentially award compensation for consumers (they do not intervene in the relationship between the consumer and services provider *per se*), since such an attribute is reserved for out-of-court resolution (non-binding) or judicial action (binding, see below).

From a consumer's perspective, however, supervisory authorities can play a role in remedying a breach of consumer protection rights **indirectly**, although the landscape is fairly complicated in EU financial markets: first, due to the divide between European authorities (ESMA, EBA, EIOPA; together the ESAs) and national regulators; second, due to the fragmentation of applicable legislation; last, due to the segregation between securities markets, banking and insurances.

The ESAs coordinate regulation and supervision at EU level, and rarely dispose of investigative and intervention powers.

For the purpose of this contribution, BETTER FINANCE will briefly explain the role of national financial supervisory authorities and that of the European Supervisory Authorities (ESAs), what types of measures can be imposed and how these can affect the situation of a retail financial services user as a consumer.

The three ESAs have a subsidiary role in terms of supervision of financial services providers and product manufacturers and intervention in matters pertaining to these: their role is to ensure coordination of practices (how the law is implemented and enforced) at national level by the 27 supervisory authorities. However, the founding regulations[67] do provide certain exceptional powers where the ESAs can directly intervene. These are product intervention powers (PIP), for which there is both a general legal basis in the founding regulations and in sectoral legislation (e.g., the Markets in Financial Instruments Regulation, MiFIR). Exceptionally, ESMA has been granted direct and single supervision of a limited number of market participants, but with which individual, non-professional ("retail") investors may rarely come in contact: credit rating agencies, trade repositories, and securitisation repositories.

Notwithstanding their coordination role, consumers can report breaches of EU law by their national competent authorities to the ESAs, depending on the market and competence: Article 17 of each founding regulation provides that when a national competent authority has not applied or incorrectly applied an act within its scope which seems to be in breach of Union law, the ESAs have the power to investigate and address a recommendation to the authority in relation to the alleged breach of Union law. The follow-up to this procedure can be triggering the infringement mechanism by the European Commission under Art. 258 of the Treaty on the Functioning of the European Union (TFEU) and, in parallel, the ESAs can adopt an individual decision pertaining to a market participant "*requiring the necessary action to comply with its obligations under Union law including the cessation of any practice*" (Art. 17(6) founding regulations).

The ESAs also have *product intervention powers* granted under certain EU law instruments, such as the Markets in Financial Instruments Regulation (MiFIR). However, these are subsidiary to the same powers granted to national competent authorities, as these can be taken only where "*a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat*" (Art. 40(2)(c) MiFIR) and can only be temporary, whereas national competent authorities may be allowed to take such measures on a permanent basis (Art. 40(6) MiFIR – same provisions are laid down for the EBA in Art. 41 MiFIR).

[67] EU Regulations 1093, 1094, and 1095 of 2010 establishing the European Insurance and Occupational Pensions Authority (EIOPA), European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) – these regulations we created to mirror one another, although differences in the precise wording of certain provisions differ.

The product intervention powers have two conditions in substance (besides what was mentioned above), which must be assessed through the lens of three risks that must be avoided:

- conditions (Art. 40(2) MiFIR, same for EBA):
  - *the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union;*
  - *regulatory requirements under Union law that are applicable to the relevant financial instrument or activity do not address the threat;*
- risks to avoid (Art. 40(3) MiFIR, same for EBA):
  - *does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action;*
  - *does not create a risk of regulatory arbitrage, and*
  - *has been taken after consulting the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where the measure relates to agricultural commodities derivatives.*

Submitting a complaint to national financial supervisory authorities can be done regardless of whether a consumer is or isn't in a contractual relationship with the financial services provider. However, as mentioned above, national competent authorities cannot intervene directly in the relationship with the customer *per se* but can adopt measures aimed at the financial services providers under their scope, requiring them to stop or remedy a certain practice, as well as issue sanctions and fines.

National competent authorities and the ESAs have an indirect role in remedying consumer detriment and they cannot impose compensation of damages in individual cases.

Generally, there are four types of measures that a competent authority or the ESAs may take against financial market participants (ordered according to a decreasing scale of severity – see also Art. 40(1) MiFIR):[68]

- outright ban of a service or product;
- banning certain features or aspects of a product or service;
- restricting the marketing of a product to retail clients (e.g., the Belgian FSMA with retail AIFs);
- soft measures, such as recommendations for financial services providers to adhere to a certain conduct of business.

The ESMA and EIOPA provide annual reports on the sanctions applied by the national competent authorities within the scope of the main financial instruments (all data reported below is for 2020):

- sanctions applied to UCITS: 57, amounting to €1,100,986;[69]
- sanctions applied to AIFMs: 61, amounting to €3,354,407;[70]
- sanctions applied under the Market Abuse Regulation: 559, amounting to €17,750,000;[71]
- sanctions applied under MiFID II: 613, amounting to €8,400,430;[72]

[68] See Veerle Colaert, The MiFR and PRIIPs Product intervention Regime: In Need of Intervention? (2019) Working Paper no. 2019/3, available at: https://deliverypdf.ssrn.com/delivery.php?ID=550083013021095028094120090098120109019053019081050000104121072004026108095113101007032035042036057108108082065119118010116006107011054000040118114102119125110029087001059076065077105014121092026075064025001098085024025025071020074126065101104073121127&EXT=pdf&INDEX=TRUE.

[69] ESMA, *Report: Penalties and Measures Imposed Under the UCITS Directive in 2020* (20 July 2021) ESMA34-45-1269, available at: https://www.esma.europa.eu/sites/default/files/library/esma34-45-1269_2020_ucits_sanctions_report.pdf.

[70] ESMA, *Report: Penalties and Measures Imposed Under the AIFMD in 2020* (20 July 2020) ESMA34-32-865, available at: https://www.esma.europa.eu/sites/default/files/library/esma34-32-865_2020_aifmd_sanctions_report.pdf.

[71] ESMA, *Report: Administrative and Criminal Sanctions and Other Administrative Measures Imposed under the Market Abuse Regulation in 2020* (20 October 2021) ESMA70-156-4673, available at: https://www.esma.europa.eu/sites/default/files/library/esma70-156-4673_annual_report_on_mar_administrative_and_criminal_sanctions_2021.pdf.

[72] ESMA, *Report: Sanctions and Measures Imposed under MiFID in 2020* (19 July 2021) ESMA35-43-2571, available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-2751_report_mifid_ii_sanctions_2020.pdf.

- sanctions applied under IDD: 1,942 amounting to €793,571 (mostly for breaches of Art. 10 of IDD in relation to information that must be communicated to consumers).

Consumers should not be discouraged from reporting any practice – even as a tip-off or as whistle-blowers – that may constitute a breach of Union or national law to the national competent authorities or to the ESAs, but the best channel to obtain remedy and compensation would probably be through direct contact with the provider, out-of-court settlement, or judicial action (see section below).

Legal advice should be sought only from persons authorised as such according to national law.

Judicial action

Ultimately, court action is a certain channel to obtain redress and compensation for damages. However, in most cases it is accompanied by many procedural requirements and formalities, can involve high(er) costs for consumers, and be much lengthier than ADR. According to the European Commission, in almost all EU Member States the average time necessary to obtain a decision in first instance for consumer disputes (thus, without appeals and other challenges) exceeds 6 months, and it can go on for as long as 3 years.[73]

Although civil procedure is designed to be accessible for any subject (many reforms have been passed to simplify and speed up court proceedings) the fact is that specialised assistance for the consumer is necessary in most cases. In fact, most consumers indicated they will not go to court to enforce their rights if the value of the claim is not significant, even less with regard to cross-border disputes.[74] However, as mentioned above, ordinary judicial action trumps all other individual redress tools and has the highest authority.

Nevertheless, the EU adopted two special judicial procedures in order to simplify settlement of disputes and claim recognition within the single market. These two procedures, the *European Small Claims Procedure* and the *European Payment Order*, are applicable to consumer disputes and are described briefly below. It should be noted that both procedures are an alternative to existing measures under national law.

The descriptions provided below are summaries (omit certain details) and of an informative nature, are not meant as legal advice, but in fact serve the purpose of raising awareness of their (the procedures') existence. Legal advice should be sought only from persons authorised as such according to national law. Links to official EU websites where further information can be found are provided.

European Small Claims Procedure.

There can be many instances where the value of the claim is small and the costs and other efforts of going to court in another EU Member State and pursuing an ordinary civil action may demotivate the claimant to do so. Thus, EU law harmonised a simplified and abbreviated procedure for civil and commercial cross-border small claims (up to €5,000[75]) through the EU Regulation 861/2007, which presents several advantages; in essence, this procedure resembles an ordinary court action except for a few characteristics, described below.

First, the entire action is meant to be done in writing only, thus without requiring the presence in court of any of the parties (Art. 5(1) ECSPR). In cases where the consumer resides in another Member State than the provider, such a possibility can prove significantly useful as it can be finalised only through an exchange of documents between the parties and the judge. However, there are exceptions where

[73] See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on The 2021 EU Justice Scoreboard, COM(2021) 389, Figure 20 on page 17, available at: https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf.

[74] See Flash Eurobarometer, EU Commission, 2011 - http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_299_sum_en.pdf.

[75] See Article 2(1) ECSPR; please note there are certain fields of law (types of legal matters) in which the ECSP is not applicable.

physical presence before a judge is allowed (e.g., it can be required by the claimant or the judge – see Art. 5(1a) and Art. 8 ECSPR).

Second, the procedure should be swift – at least compared to the average length of ordinary court actions, as described above. In theory, the whole action should last for a maximum 2 months and a half (74 days) if the defendant has no counterclaim against the claimant, and a maximum of four months (118 days) otherwise (see Art. 5(3) to (7) ECSPR). The court, after receiving the application from the claimant (satisfying all conditions), sends it to the defendant, who can respond to it and/or formulate counterclaims, following which the judge disposes of 30 days to decide on the order.

Third, the procedure uses standardised forms (available in all official EU languages), thus guiding both the claimant and defendant in terms of information and explanations needed. The final order is also issued as a form, which the claimant can easily use in enforcement procedures (Arts. 20 and 21 ECSPR).

Last, the costs can be less significant than for ordinary judicial proceedings, but these vary depending on the jurisdiction and the applicable procedural law. For instance, in Belgium, the court fee is a fixed sum of €50 (notwithstanding lawyers' fees and enforcement costs); representation by a lawyer is not mandatory (Art. 10 ECSPR), but the losing party can be obliged to compensate litigation costs for the other party.

More information on the European Small Claims Procedure (including the standardised forms) can be found at:

- European Commission webpage: https://ec.europa.eu/info/law/cross-border-cases/procedures-simplify-cross-border-cases/small-claims-procedure_en;
- Step by step guide for the ESCP: https://ec.europa.eu/info/sites/default/files/step-by-step_guide_to_the_small_claims_procedure.pdf;
- European Consumer Centres Network: https://www.eccnet.eu/consumer-rights/how-enforce-my-consumer-rights/european-small-claims-procedure.

European Payment Order.

In addition to the small claims procedure, EU law also standardised[76] an abbreviated procedure for uncontested monetary (*pecuniary*) claims.[77] Although similar to the abovementioned, it presents a few important distinctive features: it must concern a **monetary**[78] claim that arises from an **uncontested**[79] civil or commercial **contractual**[80] relationship. Moreover, there is no value limit on the claim (unlike the €5,000 for the ESCP) to the extent that the defendant does not oppose or challenge it. In essence, the European Payment Order is meant, in fact, to simplify enforcement procedures (see Art. 19 on the abolition of exequatur) between parties and reduce costs, since it does not foresee a contradictory procedure. In this sense, it is worth mentioning that if the defendant challenges or opposes the claim of the claimant (made through the EPO), then the court must dismiss the claim and divert the parties to ordinary civil procedures. At the same time, it cannot be used if the case is not cross-border (does not have an extraneity element).[81]

The procedure is written and uses standardised forms. The claimant can fill and send the form to the competent court (Art. 7 EPOR), which can be found both in the Annex of the Regulation and on the European Commission's website and does not necessarily need legal representation. There are also harmonised time limits (e.g. for the court to issue the judgment), i.e. 30 days for the defendant to issue a statement and if the defendant does not oppose the order (Arts. 12(3)(a), 16 and 17 EPOR), the order

[76] This procedure applies in all EU Member States except Denmark.
[77] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, http://data.europa.eu/eli/reg/2006/1896/2017-07-14, hereinafter "EPOR".
[78] It must concern pecuniary claims (e.g. request for a payment) that have fallen due at the moment of seizing the court – see Art. 1(1)(a) and Art. 4 EPOR.
[79] Uncontested means that the defendant does not oppose or challenge it.
[80] See Art. 2(2)(d) EPOR specifying that it does not apply to non-contractual claims unless they have been the subject of an agreement between the parties or there has been an admission of debt or they relate to liquidated debts arising from joint ownership of property.
[81] Similar to the ESCPR, the domicile or habitual residence of the defendant must be in another EU Member State than that of the seized tribunal – see Art. 3(1) EPOR.

becomes enforceable in the claimant's EU Member State (Art. 18 EPOR) under the same conditions as for a decision issued by a national court (Art. 21(1) EPOR). However, it should be noted that there are procedures foreseen for the dismissal of the application, challenges, review, and refusal of enforceability.

For more information on the European Payment Order, consumers can consult the following sources:

- European e-justice portal: https://e-justice.europa.eu/41/EN/european_payment_order;
- European Consumer Centres Network: https://www.eccnet.eu/consumer-rights/how-enforce-my-consumer-rights/european-order-payment.

Unfair terms in consumer contracts.

Another important EU law instrument is the Directive on unfair terms in consumer contracts,[82] providing a valuable tool both for individual and collective redress. The Directive, which has been implemented into national law of all EU Member States, essentially stipulates that contractual clauses which create a "*significant imbalance in the parties' rights and obligations arising under the contract*", to the detriment of the consumer, shall be considered either null or will not be binding for the consumer if the following criteria are met (Art. 3(1) Unfair terms Directive):

- it has not been individually negotiated with the consumer or it was drafted in advance and the consumer could not influence the content (substance) of it;
- the clause is drafted contrary to the requirement of good faith.[83]

The Directive also comprises an "*indicative and non-exhaustive list of the terms which may be regarded as unfair*" (Art. 3(3) Unfair terms Directive) in the Annex, such as:

- "*enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract*"; or
- "*requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation*";

The purpose of this Directive was to re-balance the inferior position of a consumer when entering into agreements with services providers and suppliers, which is due to either a lack of knowledge, experience or economic and/or negotiating power. Thus, in theory, a consumer can challenge a clause in the contract on the basis that it contains *unfair terms* according to the national implementing law and request that the said clause is not binding to him.

Legal advice should be sought only from persons authorised as such according to national law.

Unfair commercial practices.

The EU Directive on unfair commercial practices[84] is the pinnacle of consumer protection in EU law as it obliged EU Member States to take action and sanction all commercial practices "*before, during, or after a commercial transaction*" with a consumer if those are **unfair**. The Directive attaches two criteria for a commercial practice to be considered unfair and further provides four types of unfair practices as well as a list of practices which will **always** be considered unfair in Annex.

To begin with, Art. 5(1) of the Directive specifies that, for a commercial practice to be unfair, it must:

- be "*contrary to professional diligence*";[85] and

[82] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, consolidated version 12/12/2011.
[83] Several other conditions apply, but for the purpose of simplicity, only the main ones were included above.
[84] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').
[85] A professional diligence means "*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity*" according to Art. 2(h) of the Directive.

- "*materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or whom it is addressed* (…)";[86]

Unfair practices are centred on the perception of the "average consumer", and it excludes those "*common and legitimate advertising practices of making exaggerated statements or statements which are not meant to be taken literally*" (Art. 5(3) of the Directive). The four categories of unfair practices defined by the Directive are:

- misleading actions (Art. 6) and omissions (Art. 7); and
- aggressive practices (Art. 8) and harassment, coercion, or undue influence (Art. 9).

Further, Annex I of the Directive provides a list of commercial practices that are always to be considered unfair under national law. For instance, and perhaps relevant in financial services, we list the following two:

- practice 10: "*presenting rights given to consumers in law as a distinctive feature of the trader's offer*"; for instance, if an advisor would claim that clients are offered a special feature of suitability assessment (which is a legal obligation when providing investment advice according to Art. 25 MiFID II);
- practice 20: "*describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item*"; in the same light, the European Securities and Markets Authority (ESMA) issued a statement in 2021 about commercial practices of certain brokerage firms claiming to offer "zero cost" or "free trading" services on their platforms.[87]

It is up to each EU Member State to decide what penalties must be taken against such practices in order to be "*effective, proportionate and dissuasive*" (Art. 13) and what tools and channels can be used for enforcement actions, both individually and collectively by consumers (Art. 11).

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POLICY RECOMMENDATIONS

Limit the response deadline for complaint-handling procedures at provider level to a maximum overall of 35 days.

All applicable regulatory frameworks in financial services oblige providers and product manufacturers to establish complaint-handling mechanisms. However, there is no prescriptiveness as to the procedure to be followed (except ESAs' Guidelines), which provides considerable flexibility for professionals.

Nevertheless, we believe it would be beneficial to reassure consumers of the swiftness and effectiveness of such procedures if MiFID II, IDD, and other sectoral legislation would require financial services providers to reply to consumer complaints within a certain deadline. In this sense, we refer to the deadlines provided in Art. 50 of the PEPP Regulation which obliges manufacturers to respond within 15 days, as a general rule, and within a maximum delay of 35 days (for exceptional cases, duly justified).

Initiate awareness campaigns to inform consumers of the possibility of recourse through out-of-court dispute settlements (ADR).

As identified by the EU Alternative Dispute Resolution (ADR) Assembly, one of the potential reasons for the "*insufficient uptake of ADR*" may be the lack of awareness of both ADR procedures and their

[86] Materially distorting the economic behaviour of the consumer means to "*appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise*" according to Art. 2(e) of the Directive.

[87] See ESMA Supervisory Statement, *ESMA Warns Firms and Investors About Risks Arising from Payment for Order Flows and From Certain Practices from "Zero-Commission Brokers"* (13 July 2021) ESMA35-43-2749, available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-2749_esma_public_statement_pfof_and_zero-commission_brokers.pdf.

characteristics (e.g., small or no fees, non-binding nature) among consumers. Although financial services providers must inform consumers both though a durable medium (e.g., on the website) and through regulatory documents (e.g., UCITS KIID, PRIIPs KID) of the possibility of recourse trhough out-of-court settlement, it seems that many are still unfamiliar with these procedures.

A potential solution could take the shape of awareness campaigns promoted by financial supervisory authorities to inform consumers of their rights and of the details to contact or access information about the relevant ADR bodies, at national level and on a cross-border basis (Fin-NET).

Strengthen the independence of ADR bodies (incl. financial ombudsmen) from the financial industry

An issue present in many EU Member States is the independence of ADR bodies, although the ADR Directive does not specifically oblige members to be independent of the financial services industry. In fact, Art. 7(1)(d) ADRD only requires transparency concerning "*the expertise, impartiality and independence of the natural persons in charge of ADR, if they are employed or remunerated exclusively by the trader*" which, in BETTER FINANCE's view, is very problematic.

- Impose a minimum 5-year cooling off period;

Mediators, or other persons working for ADR bodies established by members of the industry, should at the very least observe a 5-year cooling-off period after having been employed by one of the members.

- Restrict remunerations from the financial industry;

ADR bodies should be financed through contributions from the financial industry in the form of levies but receive no direct remunerations. In our view, the latter constitutes a conflict of interests for those employed by, or working for, the ADR body, and it should be expressly prohibited in the ADRD.

Reduce the fragmentation of ADR bodies, in particular in the banking industry.

In certain EU Member States, such as France, there are many non-judicial dispute resolution bodies that are set up at entity or group level, particularly in the banking sector. In this sense, BETTER FINANCE recommends public authorities at national level to work towards consolidating these bodies (e.g., at territorial level, see following recommendation).

Create territorial ADR bodies, as is the case in Spain.

A good practice observed when conducting BETTER FINANCE's research can be found in Spain, where territorial ADR bodies are established. We believe that, for some consumers, the "distance" and inability to participate physically to ADR procedures may act as a deterrent from using these mechanisms. Therefore we strongly encourage the establishment of territorial ADR bodies for financial services, coupled with amendments to the rules of procedure enabling the virtual (remote) participation of consumers in these proceedings.

Make ADR decisions (for cases under a certain threshold) binding for financial services providers.

In certain cases, it would be beneficial for consumers if the solutions proposed by ADR bodies in disputes with financial services providers would be binding for the latter for smaller claims, e.g., cases with a value under a certain threshold (€10,000), but not for the consumer. We believe that the option for the consumer to refuse the settlement and pursue his/her rights in court is key in increasing the attractiveness and effectiveness of consumer ADRs, and this should be kept (save where the consumer expressly agrees differently beforehand).

BETTER FINANCE

The European Federation of Investors and Financial Services Users
Fédération Européenne des Épargnants et Usagers des Services Financiers

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