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Financial Ombudsperson Authority: the missing piece to complete the System [(*)]

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Summary

The lack of an out-of-court dispute resolution system between financial institutions and their clients undermines the trust needed to create a Single Capital Market in the European Union. The FIN-NET network created to resolve cross-border disputes and create quality standards has not had the expected result. This paper analyses the reasons for this failure and the most recent regulatory developments. The Spanish Bill for the creation of a Financial Customer Protection Authority (ADCF for its Spanish acronym) in charge of managing the financial dispute resolution (ADR) system is an avant-garde project that could serve as a model for a future harmonisation of financial ADR in the European Union. For this reason, the nature of the planned Authority, its status as manager of a sectoral dispute resolution system and its place in the financial architecture are studied, with some proposals to be considered *lege ferenda*. The purpose of this paper is to justify the creation of a financial ADR as a component that completes the financial system. It is a doctrinal work based on the map of the FIN-NET network and the analysis of the recent Bill passed by the Spanish Congress in order to clarify concepts, justify the creation of a financial ADR and propose ways for its better implementation.

Sumario

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La falta de un sistema extrajudicial de resolución de controversias de las entidades financieras con sus clientes perjudica la confianza necesaria para crear un Mercado Único de Capitales en la Unión Europea. La red FIN-NET creada para resolver las controversias transfronterizas y crear unos estándares de calidad no ha tenido el resultado esperado. El presente trabajo analiza las razones de este fracaso y las mas recientes novedades normativas. El proyecto de ley español para la creación de una Autoridad de Defensa del Cliente Financiero (ADCF) encargada de gestionar el sistema de resolución de controversias financieras (ADR) es un proyecto vanguardista que podría servir de modelo a una futura armonización de los ADR financieros en la Unión Europea. Por esta razón se estudia la naturaleza de la Autoridad proyectada, su estatuto como gestor de un sistema sectorial de resolución de litigios y su encaje en la arquitectura financiera, con algunas propuestas a considerar de lege ferenda. El objeto de este trabajo es justificar la creación de un ADR financiero como pieza que completa el sistema financiero. Es un trabajo doctrinal que parte del mapa de la red FIN-NET y del análisis del reciente proyecto de Ley tramitado por el Congreso español para aclarar conceptos, justificar la creación de un ADR financiero y proponer las vías para su mejor implementación.

Keywords: Financial Authorities, Alternative Dispute Resolution, ADR, Mediation, Arbitration, Complaints Services, Customer Ombudsperson, ADCF, Financial Education, Financial Inclusion

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Committee. 2.3. Sections. 2.4. Members. 3. Financial resources. V. CONCLUSIONS. VI. BIBLIOGRAPHY.

I. INTRODUCTION

This article addresses the need to create an independent system for the resolution of disputes arising between financial institutions and their clients as a missing piece to complete the financial system. Financial regulation has a complex system of sources.[1] Financial authorities act as supervisors, but also as regulators. They claim to create doctrine. They use their complaints services to guide the conduct of financial institutions. But they do so in conflict of interest. Their mandate on stability, solvency or transparency conflicts with client protection. For this reason, it is both desirable and necessary to create a new independent administrative authority whose main mandate is client protection outside the financial supervisors. This authority would be charged with resolving customer complaints, creating a doctrine aimed at reinforcing legal certainty in the financial market.

Alternative Dispute Resolution (ADR) mechanisms are common in consumer law. In the European Union, Member States must develop ADR mechanisms in accordance with the provisions of Directive 2013/11/EU.[2] However, their reception in the financial sector calls for special provisions due to the nature of financial activity, an activity based on trust and characterised by its technical complexity and comprehensiveness. The weaknesses of the harmonised ADR framework,[3] with a lack of consumer awareness and knowledge of this type of tool, are exacerbated in the financial sector.

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[1] GRANIER, C., *Les sources du droit financier: étude sur la singularité de la production de la norme financière*, 2023, passim.

[2] *Cf.* Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes. In the monitoring report on the implementation of this Directive, the European Commission acknowledges that the new ADR framework "remains under-utilised" [COM(2019) 425 final, Brussels, 25.9.2019]. Each Member State is required to appoint an online dispute resolution contact point within the meaning of Art. 7.1 of Regulation (EU) 524/2013 of 21 May 2013 on online consumer dispute resolution. The European Commission intends to repeal this Regulation given the low number of cases that are resolved through the platform managed by the Commission (Minutes FIN-NET plenary meeting 24 november 2022).

[3] As highlighted in the European Commission's follow-up report [COM (2019) 425 final, Brussels, 25.9.2019].

In 2001, the European Commission launched the FIN-NET network of financial ADRs. It was in 2016 that this network took Directive 2013/11/EU[4] as its reference framework. The objective of FIN-NET is to ensure cooperation between its members so that claims relating to cross-border disputes are dealt with effectively. At the time of writing, the network has 57 members. All EU Member States have at least one ADR registered in the network. However, 5 States have registered general ADRs, not specific to the financial sector. Their effectiveness is limited. According to the latest published annual report for 2019, 3759 cross-border cases were handled out of a total of 441,600 cases handled by members in 2019.

In this paper we will use as a source of information the factsheet of each FIN-NET member, with references to its nature and the corresponding complaint procedure.[5] These factsheets reflect the diversity of solutions ranging from mediation to arbitration, with *sui generis* bodies based on the deterrent power of the authority in charge of managing the ADR. In the European Union, there is no financial ADR model that is independent of the financial authorities and capable of imposing its decisions on financial institutions.

With a view to harmonising financial ADR in the European Union, there is a regulatory development worthy of attention. Beyond mediation or arbitration, in Spain, by legal mandate, the government has passed a Bill creating a financial ADR in charge of an independent agency.[6] The processing of this Bill has opened a rich debate on the

[4] *Cf.* Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services, 12 May 2016.

[5] Available at https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net/members-fin-net-country_en.

[6] Bill creating the Independent Administrative Authority for the Defence of Financial Customers for the out-of-court resolution of disputes between financial institutions and their customers, approved by Congress on 18 May 2023, published in the BOCD of 25 May 2023, although the Bill has lapsed due to the dissolution of the Cortes Generales (Royal Decree 400/2023 of 29 May on the dissolution of the Congress of Deputies and the Senate and the calling of elections). Bill commented by Benito ARRUÑADA, "La protección administrativa de las relaciones financieras", *Apuntes Fedea 2023/1*, May 2023 (Revised version of 5 June 2023: "La protección administrativa de las relaciones financieras", *Apuntes Fedea 2023/1*, May 2023 https://documentos.fedea.net/pubs/ap/2023/ap2023-11.pdf). The post-election government has taken up the text approved by Congress as a new draft Bill, available at https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/audienciapublica/Paginas/audiencia_publica_ECO_Tes_20231226_AP_APL_ADCF.aspx .

opportunity to create an *ad hoc* authority dedicated to the protection of the financial client, of interest for future financial regulation in the European Union. We will approach this assessment from a comparative law perspective and focus on the issues that have been the subject of parliamentary debate, with the aim of formulating some recommendations de *lege ferenda*.

The purpose of this paper is to justify the creation of an *ad hoc* financial ADR as a piece that completes the financial system. It is a doctrinal work based on the map of the FIN-NET network and the analysis of the recent Bill passed by the Spanish Congress to clarify concepts, justify its creation, and propose ways for its better implementation.

II. BACKGROUND

In the European Union, customers of financial institutions lack adequate protection[7] . It is common for banks to take advantage of their market power and information asymmetry to place products that do not meet the needs of savers.[8] As a consequence of these malpractices, mistrust is aggravated, and the creation of a Capital Markets Union is compromised. It is always difficult to deal with new contracts that are not covered by the civil or commercial codes, but even more so when they arise in other legal systems, such as the Anglo-Saxon ones, and are highly complex in technical and financial terms. In many cases they are designed by the treasury departments of large banks, in multidisciplinary teams made up of lawyers, economists, mathematicians, psychologists and other professionals.

In Spain, the relationship between banks and their customers has been brought before the courts. Tens of thousands of lawsuits collapse the judicial system and damage the

[7] As evidenced by the five studies published in June 2018 by the European Parliament on "mis-selling of financial products ": Pierre-Henri CONAC, Subordinated Debt and Self-placement; Fernando ZUNZUNEGUI, Mortgage Credit; Kern ALEXANDER, Marketing, Sale and Distribution: O. O. CHEREDNYCHENKO, J.-M. MEINDERSTMA, Consumer Credit; V. COLAERT, Drs. T. INCALZA Compensation of Investors in Belgium.

[8] Cf. Proposal for a Directive amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the rules on the protection of retail investors in the Union of 24 May 2023.

reputation of banks. Specific measures have not solved the problem.[9] Floor clauses, mortgage charges, revolving credit cards and a host of other cases are multiplying the number of disputes.[10] At the same time, supervisors' complaints services do not fulfil their function of preventing judicialization.[11] There is a missing piece in the financial system that resolves disputes, provides legal certainty and allows banks to recover their reputation.

In an avant-garde measure, chapter five of Law 44/2002, of 22 November, created the "Commissioners for the protection of the rights of financial services users", which, despite having had their corresponding regulatory development,[12] were never appointed due to the rebelliousness of the supervisors.[13] A wasted precedent, because if they had

[9] Such as the fictitious arbitration tried out for preference shares and floor clauses. See for preference shares Royal Decree-Law 6/2013 of 22 March, on the protection of holders of certain savings and investment products and other financial measures, which in addition to regulating this fictitious arbitration controlled by auditors of credit institutions, created a Monitoring Committee which should have analysed "the factors that have led to the filing of judicial and extrajudicial claims by holders of hybrid capital instruments and subordinated debt against institutions", a regime commented on by the author in "Comercialización departicipaciones preferentes entre clientela minorista", Revista de derecho bancario y bursátil, no. 130, 2013, pp. 264-264. 130, 2013, pp. 264-265. The first report of the Monitoring Committee gave rise to an individual vote by the president of the Consumers and Users Council for denying the problem by considering that it is a materialisation of the risks of the instrument due to the crisis "when the root of the problem does not derive from the instrument, but from its incorrect marketing among retail customers" https://consumo-ccu.consumo.gob.es/pdf/VotoPresidentaPreferentesCNMV.pdf In relation to floor clauses, see Royal Decree-Law 1/2017, of 20 January, on urgent measures to protect consumers with regard to floor clauses, aimed at facilitating "the return of the amounts unduly paid by the consumer". With regard to these measures, seven monitoring reports have been published, the last one in December 2020, in which, according to the dissenting opinion of Vicente PASCUAL, there is evidence of a "stabilisation of the number of cases pending resolution in the region of 250,000 cases, and with this the failure of the specialisation of the provincial courts for general contracting conditions, as a supposed solution to the problem posed" https://portal.mineco.gob.es/RecursosArticulo/mineco/economia/ficheros/pdf/Septimo_informe_Comision_Clausulas_Suelo.pdf.

[10] The CENDOJ, not including first instance, as of 10 June 2023, includes 45,485 rulings on floor clauses, with 1,825 from the Supreme Court; 17,976 on mortgage interest, 205 from the Supreme Court; 7,090 on bank cards, 17 from the Supreme Court; and 17,886 on investor protection, 482 from the Supreme Court. Increasing litigiousness also reaches insurance, with 34,753 rulings on this contract, 821 from the Supreme Court.

[11] Ineffectiveness highlighted in the Consumers and Users Council's Allegations to the Preliminary Draft Bill, p. 3.

[12] Royal Decree 303/2004, of 20 February, approving the Regulations of the commissioners for the defence of financial services customers, which "are conceived as independent and autonomous and are provided with the professional and operational means necessary to ensure the effectiveness of their actions".

[13] Manuel CONTHE, chairman of the CNMV, in an appearance before Congress on 1 December 2004, stated that "I have recommended to the current Vice-President of the Government and Minister of Economy that I did not see any need to create the post of commissioner for investor protection", as it would be "an

been appointed, the bad banking practices that are the seed of the current judicialisation could have been prevented.

After the 2008 crisis, the creation of a financial customer protection agency was the main response in the US system to restore confidence in the banking system. The Consumer Financial Protection Bureau was created to protect financial consumers from unfair, misleading, or abusive practices and to provide them with information and education so that they can make good financial decisions.[14] But this design is not exportable to other countries. It responds to the unique financial architecture and culture of the United States.

In the European Union, the creation of a financial customer protection authority has been framed within the framework of alternative dispute resolution mechanisms, known as ADR. Directive 2013/11/EU obliges Member States to guarantee consumers the possibility of resolving their disputes with entrepreneurs through the intervention of "ADR entities" that offer procedures that are independent, impartial, transparent, effective, fast and fair. Law 7/2017, transposing Directive 2013/11/EU into Spanish domestic law, includes in its first additional provision that for the resolution "of consumer disputes in the financial sector, a single entity shall be created by law, and communicated to the European Commission, after its accreditation by the competent authority". To this end, it gave the government eight months to submit to Parliament "a Bill regulating the institutional system for the protection of financial customers, as well as its organisation and functions". With more than four years of delay,[15] on 16 December 2022, the

impersonation of the functions entrusted to me by law". However, he added: "in the case of the Bank of Spain and insurance, the situation is very different. Its primary concern is to see the financial health of credit and insurance institutions, and so, perhaps, a commissioner who takes the other perspective, that of the investor, that of the ordinary customer, might make sense, because that is not sufficiently incardinated within the function". In other words, CONTHE was in favour of appointing commissioners for the defence of the depositor and the insured but did not consider it necessary for the defence of the investor. This approach of the supervisor, opposed to ceding competences on the defence of the financial client, has been reproduced in the debate that has accompanied the creation of the Financial Client Protection Authority.

[14] Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 7 July 2010. See Adam J. LEVITIN, "The Consumer Financial Protection Bureau: An Introduction", Review of Banking and Financial Law, 32, no. 2 (Spring 2013), pp. 321-370.

[15] Following the corresponding public hearing of the preliminary draft Bill of 5 April 2022. A draft of 7 March 2019 had previously been circulated.

government submitted to Parliament the Bill creating the Independent Administrative Authority for the Defence of Financial Customers for the out-of-court resolution of conflicts between financial institutions and their customers. This delay shows that financial customer protection is not a political priority. After its approval by Congress, pending its processing in the Senate, the Bill lapsed when Parliament was dissolved due to the call for elections. Once again, the creation of a public body responsible for the protection of financial customers is frustrated. As a result, Spain still does not guarantee the possibility of resolving financial disputes through the intervention of an ADR.[16] In fact, in the list of this type of entities kept by the European Commission, there is no entity dedicated to resolving disputes with financial institutions in Spain[17] , which by legal mandate must be a single entity. Although they are part of the FIN-NET network, the complaints systems of Spanish supervisors do not meet the requirements of independence and neutrality required by Directive 2013/11/EU.[18] The other accredited entities on the list, which cover consumer complaints from all economic sectors, "may also hear this type of dispute, provided that both parties have voluntarily submitted to the procedure".[19] But the banks systematically refuse to accept this out-of-court procedure.

III. OUT-OF-COURT SETTLEMENT SYSTEM (FINANCIAL ADR)

1. NATURE AND FUNCTIONS

[16] We are facing a lack of transposition of Directive 2013/11/EU, set for 9 July 2015, in relation to the financial consumer.

[17] Accessible at https://ec.europa.eu/consumers/odr/main/?event=main.adr.show.

[18] According to the third section of the first additional provision of Law 7/2017, of 2 November, which transposed the Directive, until the Law regulating the alternative dispute resolution system in the field of financial activity comes into force, "the complaints services regulated in Article 30 of Law 44/2002, of 22 November, on Financial System Reform Measures, shall adapt their operation and procedure to the provisions of this law and, in particular, their organisational and functional independence shall be guaranteed within the body in which they are incorporated in order to be accredited as an alternative financial dispute resolution entity. "But they have never been accredited as ADR entities, as can be deduced from the fact that they are not registered as such in the list maintained by the European Commission. The entities referred to in art. 30 of Law 44/2002, of 22 November, on Financial System Reform Measures, as confirmed by art. 31 of Law 2/2011, of 4 March, on Sustainable Economy, are the complaints services of the Bank of Spain, the National Securities Market Commission and the Directorate General of Insurance and Pension Funds, whose resolutions are to be complied with on a voluntary basis. In June 2013, the Executive Commission of the Banco de España agreed to create the Market Conduct and Complaints Department.

[19] Final clause of the first section of the first additional provision of Law 7/2017.

Having complaints and redress systems available to financial consumers is an OECD principle, to which the European Union has adhered.[20] An independent redress process should be available for complaints that are not resolved through the internal services of financial intermediaries.

The European Union lacks a harmonised financial ADR. As can be seen from the fact sheets of the FIN-NET members, there is no shared model. Most ADRs, 32 of the 57 registered, have been created by law. Slightly more than half are public, 27 out of 57. And slightly less than half, 21 out of 57, are voluntary. In 12 Member States more than one ADR has joined FIN-NET. Most of them are managed or operated by financial authorities. Some FIN-NET members are general ADRs, not specialised ADRs; this option should be discarded, as they lack the necessary knowledge and expertise on financial contracts to be able to base their decisions on. In short, there is no model of financial ADR in the European Union, which is public, independent of the financial authorities and specific to the financial sector.

In this area, it is of particular interest to comment on the Spanish initiative to create a financial ADR under the responsibility of an independent administrative authority. This Bill updates and reconfigures the financial services customer protection system provided for in Chapter V of Law 44/2002. It creates an "institutional system of extrajudicial conflict resolution" composed of a private and a public system. It maintains as a "private system" the customer care services and customer ombudsmen of financial institutions, regulated in art. 29 of Law 44/2002.[21] The "public system" is the responsibility of the Financial Ombudsperson Authority. It is a complementary system to the judicial system and prevents the judicialisation of disputes. It is the missing piece in the financial system

[20] Principle 12 Complaints Handling and Redress, High-Level Principles on Financial Consumer Protection of the OECD of 12 December 2022, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394, updating the principles of 17 July 2012, which already included this principle.

[21] Developed by Order ECO/734/2004, of 11 March, on customer service departments and services and the customer ombudsperson of financial institutions. The majority of ADRs adhered to FIN-NET contemplate as a prior formality the prior presentation of the complaint to the financial institution in order to give it the opportunity to attend to the customer. It is a system of minimum intervention in which only complaints that have not received a satisfactory response in the first step are admitted.

that should be explored in the future harmonisation of financial ADR in the European Union. Mass litigation damages the reputation of banks and undermines customer confidence in financial intermediation.

The envisaged Authority accepts and handles complaints from customers against financial institutions for restitution or redress of their interests or rights. Rather than disputes, these are " controversies" over the application of the rules of conduct,[22] where customer and bank have conflicting positions that have not been reconciled internally[23] . These are contentious issues that the customer can bring to the Authority for resolution through the Public Dispute Resolution System. This serves the function of preventing litigation. The Bill does not define the term "dispute" specifically, but uses it in a generic way, broader than litigation or court proceedings. Properly, there is no litigation before the Authority, as there is no dispute in court. Indeed, if the dispute has been brought before a court, it is excluded from its scope.

The planned public system cannot fit into an existing category. It is unique in its kind.[24] It is not arbitration, with decisions based on party autonomy. But neither is it mediation, in which the parties voluntarily try to reach an agreement on their own with the intervention of a mediator. It is a sui generis form of dispute resolution.

The System is designed as a mechanism for "access to justice", understanding this expression in a broad sense as "access to jurisdictional and extrajudicial procedures".[25] Legally created with organisation and guarantees that are not comparable to jurisdictional

[22] This is the term used in the Italian translation of Directive 2013/11/EU, "sulla risoluzione alternativa delle controversie dei consumatori". Term used by the Council of State in its report on the Preliminary Draft Bill, p. 34.

[23] That it must be accredited in the manner provided for in art. 32 of the Draft Bill, as a necessary condition for access to the public system.

[24] See on the uniqueness of the Arbitro Bancario Finanziario G. LIACE, Diritto dei mercatti finnziari, 2023, p. 172.

[25] As stated in the Communication from the European Commission: "Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market" (COM (96)0013 - C4-0195/96).

ones.[26] But the Authority is not a judge, nor is it endowed with judicial functions,[27] which would be invading the judiciary.[28] It is merely a technical interpreter deflating banking and financial litigation, with the effect of shaping banking conduct by orienting it towards best practice.[29] It is also a mechanism for promoting regulatory compliance.

The jurisdiction is overloaded with thousands of complaints because the current complaints system does not fulfil its preventive function of ensuring access to a lawful resolution. The new Authority is not intended to create a lower-tier jurisdiction, but to complement the jurisprudential function.[30] Its decisions should serve as technical guidance on banking and financial contracts for entities and the market as a whole. On highly complex technical issues such as those at stake in most financial litigation, the courts are most likely to follow the criteria of the independent administrative authority specialised in the field. Thus, given the high likelihood that judges will uphold the Authority's rulings, banks will have no incentive to prolong litigation in court.

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[26] However, the procedure must comply with the principles of equality, equity, impartiality, independence, transparency, contradiction, legality, freedom of evidence, efficiency and speed (art. 35.1 Draft Bill). Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations, applies in a supplementary capacity.

[27] Although the Arbitro Bancario Finanziario has a different physiognomy, it is interesting to note the ruling of the Italian Constitutional Court of 4 July 2011, which rules out the jurisdictional nature of this body, among other reasons because the fate of its decisions, which it describes as "stragiudiziale", depends on the power to appeal to the judicial authority. See MAUREGUI, M.R., "ADF e legittimazione a sollevare quesiti costituzionali", in Giuseppe CONTE (Dir), Arbitro bancario e finanziario, 2021, pp. 28-32.

[28] According to the Report to the Preliminary Draft Bill of the General Council of the Judiciary of 17 November 2022: "the Administration cannot create administrative instances to coercively resolve disputes between private parties governed by private law, as this would entail the invasion of the space that the Constitution reserves exclusively for the Judiciary" (p. 48).

[29] Cfr. Laura ALBANESE and Michael LECCI, Report: ABF e ACF: deflattori o interpreti tecnici? Giurisprudenze a confronto, 2019, p. 3. 3, citing Fernando GRECO: "point of reference, not in a substitutive function of the jurisprudence, but with a role of specificity of the complex activity of interpretation and perhaps also as deflattori del contenzioso, in consideration of the formative capacity of their decisions, with respect to the behaviour of the intermediaries. "Ibidem, p. 9. Conformative effect aimed at preventively neutralising the risk of non-compliance with the rules of conduct. See MAIMERI, F. "La definizione delle controversie concernenti i contratti dei risparmiatori davanti all'ABF " in F. CAPRIGLIONE (dir,), I cotratti dei risparmiatori. 2013, p. 574; CANDIAN, A., "Tutela del consumatore nei rapporti bancari", in LLAMAS POMBO, E., MEZZASOMA, L., RANA, U., and RIZZO, F. (dirs.) La tutela del consumatore nella moderna realtà bancaria, 2020, pp. 35-50.

[30] Cf. Laura ALBANESE and Michael LECCI, Report: ABF e ACF: deflattori o interpreti tecnici? Giurisprudenze a confronto, 2019, p. 2, citing Riccardo FUZIO. On the relationship between ADR and jurisdiction, see Andrea TUCCI, "L'Arbitro Bancario Finanziario fra trasparenza bancaria e giurisdizione", Banca Borsa Titoli di Credito, vol. 72, no. 5, 2019, pp. 623-649.

The planned System is designed to resolve disputes by creating a doctrine to guide judicial decisions and the conduct of entities. Its aim is to create doctrine in order to provide the financial market with legal certainty. The aim is to protect the customer against bad banking practices, strengthening confidence in the financial system. This would help to overcome the reputational crisis affecting banking.

The planned system applies the rules of conduct to the resolution of disputes. It thus creates and develops private regulatory law.[31] Conduct of business rules deriving from EU directives are part of public law and non-compliance with them constitutes administrative offences. They are minuscuamperfect rules without civil sanction. In investment services, the Spanish Supreme Court has started to build a rich jurisprudential doctrine on the civil effects of non-compliance with conduct of business rules, starting with the breach of information obligations.[32] This jurisprudence rules out radical nullity on the grounds that it is contrary to economic public order and admits that it may give rise to nullity on the grounds of error of consent or contractual liability for damages. The Public Dispute Resolution System is called upon to develop this doctrine,[33] a quasi-regulatory function,[34] a laboratory on the degree of compliance with financial regulation. It would fulfil a certain nomophylactic function, of purifying the rules of conduct, which would be exercised through its proposals for modification of this type of rules.[35]

The System must operate independently and impartially. Its main function is to resolve disputes in the out-of-court system by applying the rules of conduct. In exercising this function, it is aware of cases of non-compliance that give rise to disputes. This

[31] See MICKLITZ, H.-W., "The public and the private-European regulatory private law and financial services", European Review of Contract Law, 2014, vol. 10, no. 4, pp. 473-475; DELLA NEGRA, F., MiFID II and Private Law: enforcing EU conduct of business rules, Bloomsbury Publishing, 2019.

[32] With its ups and downs. See AGÜERO ORTIZ, A.: La evolución de la normativa de protección a los inversores y los remedios aplicados a los contratos de inversión, 2020; and, by the author, "Remedios contractuales a la mala conducta bancaria", Revista de Derecho del Sistema Financiero, March 2021, pp. 63-114.

[33] Cf. Pietro SIRENA: "'Translating' market regulation into individual rights and duties " ("ADR systems in the banking and financial markets", in Le tritement des difficultés des établissements bancaires et istitutions financières. Approche croisée. 2017, p. 147).

[34] Ibidem, p. 140.

[35] However, this power is not expressly included in the Bill, which limits itself to empowering the Authority to urge supervisors to propose best financial practices (cfr. art. 50.2 in fine).

information is highly relevant for supervisors. For this reason, the Authority would be obliged to inform them of facts that could constitute breaches of conduct of business rules.[36] The loss of this source of information was raised as an argument against its creation. In principle, this means of knowing about possible breaches of conduct of business rules makes it easier for supervisors to initiate sanctioning proceedings. But the truth is that the model of complaints handling through supervisors has failed to discipline the conduct of entities.[37]

The System would also be responsible for declaring the unfairness of contractual terms or, rather, for verifying it in the event of a customer's complaint when such a term or another identical term has been declared void by the Supreme Court and is registered as unfair in the Register of General Terms and Conditions of Business or the unfairness is the result of a judgment of the Court of Justice of the European Union. The extension of the objective scope of the system to unfair terms is justified by the mass of this type of litigation. Most litigation against banks is for unfair terms. In this area, protection only applies to customers who are consumers. In order to fulfil this function of purging abusive practices, the proposed authority should not only be an expert in financial regulation, but also have knowledge and competence in consumer law.

Claims for disputes other than those arising from the application of the rules of conduct or abusivity are excluded from the objective scope of the projected system. The Bill contains a long list of exclusions that will be defined in practice.[38] Some are clear, such as those relating to disputes concerning competition, data protection or insurance of large risks. Others are more problematic, such as the exclusion of claims "for damages caused

[36] Art. 51 Bill. This duty is reflected in the OECD's High-Level Principles on Financial Consumer Protection in the following terms: "Information concerning consumer complaints should be available to supervisory bodies to support their supervisory or enforcement functions" (Principle 12, § 35).

[37] The banking misconduct evidenced by thousands of administrative complaints and court convictions of banks has not been matched by corresponding administrative sanctions. The Bank of Spain, according to its supervisory reports, initiated 6 proceedings on rules of conduct in 2018, 6 in 2019, 1 in 2020, 5 in 2021 and 1 in 2022. In turn, the CNMV, according to its annual reports, initiated 4 proceedings on standards of conduct in 2018, 5 in 2019, 2 in 2020 and 6 in 2021. The Directorate General of Insurance and Pension Funds does not provide a breakdown of the proceedings initiated for breach of conduct of business rules.

[38] Art. 3.

by the breach or defective performance of the clauses of the financial contract, without prejudice to the compensation regime provided for in the Law".

2. ON THE DISTINCTION BETWEEN THE ADR SYSTEM AND THE AUTHORITY MANAGING IT

In the European Union, complaints systems are usually included in the activity of the financial supervisor. This is the case in France, where the AMF manages a mediation system between financial institutions and their customers,[39] or in Portugal, where the CMVM is legally mandated to manage the public complaints system. By contrast, in Italy, the Arbitro Bancario e Finanziario is endowed with a certain degree of autonomy, although it has been criticised that its secretariat is provided by the Bank of Italy.[40]

In Spain, the existing public complaints systems are managed by financial supervisors. They lack autonomy. The new Financial ADR is a system that should be run by an administrative authority other than financial supervisors. Once the system is designed and regulated, the agency that will be in charge of the system should be created. The Bill does not have a good systematic approach.[41] After a long explanatory memorandum, which the Council of State has asked to simplify[42] , the Bill aims at creating an administrative authority in charge of managing a public out-of-court dispute resolution system. It designs and regulates a "public dispute resolution system", which we will refer to as "the System", on the one hand, and creates an Authority in charge of managing the System, on the other. But it starts by creating the Authority and then regulates the System when it would have

[39] The AMF Mediator was approved by the Commission d'évaluation et de contrôle de la médiation de la consommation (CECMC) on 13 January 2016 as a public mediator. It has a team of 6 full-time lawyers. It intervenes in all financial disputes within the AMF's remit. The amount of compensation obtained by clients is testimonial. In 2022, it amounted to 864,519 euros. See Report 2022 of the AMF's mediator: https://rapportsannuels.amf-france.org/rapport-annuel-2022.

[40] Cfr. LIACE, G., "Il supporto della segreteria tecnica", in Giuseppe CONTE (dir), Arbitro bancario e finanziario, 2021, p. 160.

[41] For a critical approach, see RABANETE MARTÍNEZ, I., "Comentario al Anteproyecto de Ley de creación de la Autoridad Administrativa Independiente de Defensa del Cliente Financiero: Posibles problemas jurídicos y de aplicación de la norma ", Revista de Derecho del Sistema Financiero: mercados, operadores y contratos, núm. 5, 2023, pp. 201-222, who considers that the projected regulation "does not seem to solve the current problems", aligning himself with the criteria of the CNMV's Advisory Committee, which does not consider such a far-reaching legal amendment to be necessary (p. 220).

[42] See State Council Opinion No. 1637/2022 of 17 November 2022 on the Preliminary Draft Bill, pp. 34 and 35, which judges it to be excessively long and cumbersome.

been preferable to design the System first and then create the Authority in charge of managing it. This is the order followed when regulating other financial market systems in Spain, such as the payment system or the book-entry system.[43]

The choice made in the Bill leads to mixing in the statute of the Authority aspects which belong to the organisation of the system. With a view to a new procedure, the system could be improved by distinguishing more clearly the statute of the new administrative authority from the dispute settlement system which it is called upon to manage. The order could even be changed under a new system under the title proposed in the opinion of the Council of State: "Law establishing the System for the resolution of disputes between financial institutions and their customers and creating the Independent Administrative Authority for the Defence of Financial Customers".[44]

3. LEGAL RULINGS IN THE BEST INTERESTS OF THE CLIENT

The ADRs participating in the FIN-NET network must base their decisions on equity or law. This may seem contradictory, but it is not. In the financial market, fairness is incorporated into the contract through the duty to act in the best interest of the client.

The Authority in Spain must decide on disputes on the basis of Law, with reasoned decisions.[45] The term “Law" is understood in a broad sense that includes both *Hard Law* and *Soft Law*.[46] The Authority should apply the standards of conduct and sound financial

[43] See Law 41/1999 of 12 November 1999 on payment and securities settlement systems, which first regulates these systems and then the Spanish Payment Systems Company (Sociedad Española de Sistemas de Pago); or Royal Decree 116/1992 of 14 February 1992 on book-entry securities representation and the clearing and settlement of stock market transactions, which first regulates the securities registration, clearing and settlement system and then the organisation and operation of Iberclear as the company responsible for managing it, in accordance with the system set out in the current Securities Markets and Investment Services Act 6/2023 of 17 March 1992 (LMVSV).

[44] Opinion of the Council of State, p. 34.

[45] Therefore, fairness is not the main criterion for resolution. See G. LIACE, "Chap. XI L'Arbitro Bancario Finanziario", in F. ARATARI-G. ROMANO (dirs.), Il diritto bancario oggi: aspetti sostanziali e processuali, 2023, p. 1408, who justifies it by the strong technical content of the issues to be resolved.

[46] This approach responds to the system of regulating the financial market in the European Union. See, for example, Marnix WALLINGA, "EU Investor Protection Regulation and Liability for Investment Losses", Studies in European Economic Law and Regulation, Volume 20, 2020, for whom "soft law's influence on the financial markets can be considered to be considerably stronger than its formally non-binding nature suggests" (p. 66).

practices and usages to be compiled by supervisors,[47] annexing the self-regulatory protocols.[48] It cannot decide *contra legem*. But it should be borne in mind that the Authority's decisions are not case law. They are decisions of an administrative body applying the law with knowledge of financial technology. In these reasoned decisions it can deviate from case law, especially on novel issues to contribute to the development of case law. Of course, it is the courts that have the final say, creating and updating case law when deciding on appeals against decisions of the Authority.

4. SCOPE OF THE CLAIM

FIN-NET ADRs have different complaints procedures. Most are governed by the rules of the supervisors to which they are attached. Each system determines who can claim and whether there are limits to the amount of compensation that can be claimed.

It is planned that the new Authority will resolve customer disputes against financial institutions, usually banks. These are customer complaints against financial market professionals.[49] It should be remembered that financial institutions are subject to special relationships of subjection. They live off the public's savings. Their services are of general interest. There are only 48 established banks in Spain with market power of large banks.[50] In case of crisis they are subject to resolution, with public aid if necessary. A bank crisis can spread and generate an economic crisis. These characteristics of the banking activity, in which the rest of the financial activities participate, justify the attribution of the

[47] Article 12 of the Regulations of the Higher Banking Council, dated 16 October 1950, imposed on the Council the obligation to compile banking business practices, but this task has not been fulfilled. This function corresponds to the Spanish Banking Association, having assumed the competences of the Council by Ministerial Order of 13 May 1994, a function which has also not been fulfilled.

[48] This function of transparency of the applicable regulation is a function of the regulators that should be separated from the publication by the Authority of its resolutions and doctrine. These two functions are mixed in the Opinion of the Economic and Social Council of 26 October 2022 to the Preliminary Draft Bill, as if they were the Authority's own (p. 9).

[49] The Law classifies the bank as an eligible counterparty, beyond the professional who is presumed to have the necessary experience, knowledge and qualifications to make his own investment decisions and correctly assess his risks (Art. 196.1 LMVSI). He is certainly not a retail client or a consumer. Asymmetry of knowledge and means of analysis that differentiates the bank from the client.

[50] The president of the CNMC has described as "tacit collusion" the concerted action of large banks not to remunerate deposits despite high interest rates in bank lending. See https://www.infobae.com/espana/agencias/2023/06/23/la-cnmc-considera-que-existe-colusion-tacita-en-la-falta-de-remuneracion-de-depositos/.

functions of conflict resolution to an independent administrative authority. There is a public interest in creating a system for resolving customer disputes, which, if they develop into mass disputes, compromise the reputation of the banking industry and the smooth functioning of the financial system.

The proposed Authority in Spain is competent to resolve customer complaints against financial institutions,[51] including entities providing services in the crypto-asset market.[52] Large firms are not considered customers.[53] In a mechanism based on consumer protection, it was considered appropriate to exclude those who are not in need of protection. Large companies have the means and resources to protect their interests without the need to resort to an alternative judicial mechanism. This exclusion of professional clients is common in ADRs that are members of FIN-NET. Most of them restrict legal standing to consumers, some of them extended to SMEs.[54] However, there are also schemes open to all clients.

The General Council of the Judiciary (Consejo General del Poder Judicial, hereinafter CGPJ) questions the legal standing of the Bill as it extends it to the "financial client", a broader subjective scope than that of "consumer", to which Directive 2013/11/EU is limited.[55] However, there are precedents for this type of extension of consumer protection

[51] Art. 1 Bill.

[52] With reference to Regulation 2023/1114 of 31 May 2023 on crypto-asset exchanges (MiCA), Art. 1 (16) defines 'crypto-asset service' as the following: (a) safekeeping and administration; (b) management of a trading platform; (c) exchange of crypto-assets for funds; (d) exchange of crypto-assets for other crypto-assets; (e) execution of orders; (f) placement of crypto-assets; (g) reception and transmission of orders; (h) advice; (i) portfolio management; (j) provision of crypto-asset transfer services.

[53] Instead of using the categories of Directive 2014/65/EU of 15 May 2014 on Markets in Financial Instruments (MiFID II), which distinguish between retail and professional client, it has been preferred to use the definition of large companies as those that are not considered micro, small and medium-sized enterprises according to Annex I of Regulation (EU) 651/2014 of 17 June 2014.

[54] 3 million, in respect of the Financial Services and Pensions Ombudsman, Ireland.

[55] Forty-sixth conclusion of the Report on the Preliminary Draft Bill. To solve this problem, the Council of State proposes restricting the binding nature of complaints to consumers, provided that they are of small amounts (Cfr. Opinion on the Draft Bill, p. 32). From another perspective, the ESC opinion criticises the use of the "generic masculine" in the expression "financial customer" (p. 8), but without indicating how the name of the Authority would be used.

rules to other subjects. In mortgage lending, all natural persons are protected, whether or not they are consumers.[56]

Although the planned system is part of alternative dispute resolution in consumer matters, its specific regime places it in financial regulation. Directive 2013/11/EU is specifically transposed in the financial sector, in response to the requirement in various directives for Member States to implement alternative dispute resolution mechanisms, such as in consumer credit,[57]payment services,[58] distance contracting,[59] investment services,[60] and insurance distribution.[61] Resolution mechanisms to be mentioned in the white paper accompanying the issuance of crypto-assets.[62] Reconciling this dual mandate of consumer law and financial market law, the Bill adapts a consumer law concept to the specificities of the financial market.[63] It creates a single system, managed by an administrative authority, for the defence of financial customers, whether or not they are consumers.

Standing to sue extends to "potential customers" who have had direct contact with the entity in order to obtain the provision of a financial service.[64] Contrary to the criterion of

[56] See the transposition of Directive 2014/17/EU of 4 February 2014 on credit agreements concluded with consumers for residential immovable property by Law 5/2019 of 15 March on real estate credit agreements.

[57] Art. 24 Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers.

[58] Art. 102Directive 2015/2366/EU of 25 November 2015 on payment services (PSD2).

[59] Art. 14 Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of financial services.

[60] Art. 75 MiFID II.

[61] Art. 15 Insurance Distribution Directive 2016/97/EU of 20 January 2016 (IDD).

[62] Annex II and III MiCA.

[63] According to the Explanation of the Bill, "the significant asymmetry of information with respect to customers, as well as the disproportionate economic power of financial institutions vis-à-vis individual citizens, explains the existence of specific rules of conduct for the sector and of a consumer protection framework that goes beyond that generally applicable to economic transactions".

[64] An issue criticised in the parliamentary debate. According to María MUÑOZ of the Citizens' Parliamentary Group. "It is complicated for there to be direct damage caused by an entity that can be the object of compensation by a potential client who does not exist" (DSCD, Comisiones, núm. 857, 22 February 2023, p. 15). Doubts shared by Miguel Angel PANIAGUA, of the Popular Parliamentary Group, because "we have many doubts about the potential customer, as do many of the groups, because, of course, imagine that even a person, because they are refused a credit operation or a loan, lodges a complaint and can force the institutions to grant it. This goes absolutely against responsible lending, and it seems to me to be a clear attack on the solvency of the institutions. I think that the issue of potential customers should disappear" (Ibidem, p. 30).

the CGPJ, which considers that the object of the Directive is disputes over contractual obligations, then "only the breach of real contractual obligations could, where appropriate, give rise to liability". In order to clarify this aspect of legal standing to sue, it is necessary to determine when the customer relationship arises, on the one hand, and when the financial institution's liability arises, on the other. "Customer" according to the Bill is any user of a financial service who has been duly identified, e.g. by entering a framework contract for financial services or payment services. It is within the framework of the customer relationship that credit is given or orders for payment or purchase of financial instruments are given. The status of customer precedes the execution of specific financial transactions. The conduct of business rules applied by the authority include customer assessment, information and, where appropriate, advice, services prior to the customer's decision to trade in the market. The financial institution's liability arises from the moment the customer contacts the institution and from that moment onwards duties arise from the breach of which a liability arises. Even if we consider that we are in a pre-contractual relationship, the failure of the entity to comply with these pre-contractual duties also gives rise to a liability that can be the subject of a claim before the Authority.

The planned system is mandatory for the entity and voluntary for the customer. It is the customer's option to activate the procedure. It is an inalienable right.[65] Although there are dissuasive fines of 50 to 500 euros for customers who file reckless claims in bad faith.[66] These fines may have the effect of deterring customers from going to the Authority, and in this respect may be contrary to EU consumer law.[67]

The target scope of the proposed Scheme is claims by customers "to restore or redress their interests or rights on the grounds that these have been infringed in the provision of

[65] A settlement with the entity to avoid or terminate litigation in the internal complaint's mechanism does not constitute a waiver (Art. 4.2 Bill).

[66] Although the Bill describes this fine as a "pecuniary sanction", it is not in the nature of a sanction, and therefore does not require a sanctioning procedure for its imposition. See ESTEBAN RÍOS, J., "El largo camino hacia la creación de una autoridad independiente para la protección del cliente financiero necesidad, funciones y cuestiones controvertidas", Revista de derecho del mercado de valores, núm. 30, 2022, IV.3.

[67] A fine which the ESC opinion considers unnecessary as it deals with exceptional cases which could be detected by the Authority at the preliminary investigation stage (p. 11).

a financial service", without limitation as to the amount.[68] The Proposed Scheme even admits claims of indeterminate amount that can give rise to compensation for damages of between 100 and 2,000 euros.[69]

Most of the ADR schemes participating in FIN-NET do not have limits on the amount. Only 13 of the 57 systems set a maximum limit.[70] In turn, 4 exclude cases below a minimum amount.[71] This measure is intended to avoid abuse of the system with claims of derisory value. This solution should be discarded as it is a system designed to improve the functioning of the market. Small claims, if they arise from mass practices, can lead to serious damage to customers and undermine their confidence in the system. Therefore, even in the case of small claims without significant harm, it may be justified to process them.[72]

In the projected system, the resolutions have the value of an expert report if any of the parties decides to go to the civil jurisdiction.[73] Therefore, regardless of the amount, the strategy of the clients' lawyers may be to complain to the Authority to obtain such an expert report and submit it with the legal action in support of their claims. It should be

[68] In Italy, claims before the ABF are limited to 200,000 euros, following the update of 12 August 2020, ordered by the Bank of Italy.

[69] Art. 41.1.III Bill.

[70] 12,500 for the Center for Alternative Dispute Resolution "Consensus" in Bulgaria; EUR 10,000 for the resolution to bind the institution at the Real Asset Investment Arbitration Board and the Ombudsman Scheme of the Private Commercial and EUR 5,000 at the Banks Insurance Ombudsman in Germany; EUR 500,000 at the Financial Services and Pensions Ombudsman in Ireland; EUR 200,000 at the Arbitro Bancario Finanziario, EUR 10.10,000 to the Banking Ombudsman and EUR 50,000 to the ACF in Italy; EUR 14,000 to the Commission for Solving the Consumer Disputes in Latvia; EUR 250,000 to the Office of the Arbiter for Financial Services in Malta; EUR 1,000.1,000 to the Financial Services Complaints Institute (Kifid) in the Netherlands; EUR 1,850 to the Banking Ombudsman in Poland; EUR 5,000 to the Centro de Arbitragem de Conflitos de Consumo in Lisbon; and SEK 2,000 to the National Board for Consumer Disputes in Sweden.

[71] A minimum amount of 30 euros is set by the National Association for Out-of-Court Settlements - NAIS in Bulgaria; 20 euros by the Commission for Solving the Consumer Disputes in Latvia; 120 euros by the Arbitration Court at the Polish Financial Supervision Authority in Poland; and 30 euros by the Mediation Centre of Slovenian Insurance Association in Slovenia.

[72] In Italy, the ABF considers it contrary to good faith to claim derisory amounts. See G. LIACE, "Cap. XI L'Arbitro Bancsrio Finanziario", in F. ARATARI-G. ROMANO (dirs.), Il diritto bancario oggi: aspetti sostanziali e processuali, 2023, p. 1407.

[73] It is a "pro veritate" decision based on the law of an authority with expertise in the field. See MAIMERI, F. "La definizione delle controversie concernenti i contratti dei risparmiatori davanti all'ABF" in F. CAPRIGLIONE (dir,), I cotratti dei risparmiatori. 2013, p. 572,

noted that in well-established ADRs such as the Italian one, more than half of the claims are brought through a lawyer.[74]

5. BINDING AND APPEALABLE DECISIONS

In the ADRs participating in FIN-NET, only 9 out of 57 leads to binding resolutions for the financial institution. The others are mediation or arbitration schemes whose binding nature depends on the prior agreement of the parties.

In Spain, as an important novelty with respect to the previous system managed by supervisors, the Bill envisages that complaints of less than 20,000 euros will be binding for financial institutions.[75] This is accompanied by the corresponding sanctioning regime. In this respect, when entities do not comply with the sentencing decisions within 30 days, they may be fined up to a maximum of 2 million euros, to which may be added a fine of up to 1 million euros for the senior officer responsible. These are not high fines, but they may have some deterrent effect.

The binding nature of claims below EUR 20,000 is not a requirement of Directive 2013/22/EU, nor is it customary in the FIN-NET network.[76] It is one of the most debated

[74] See Relazione sull'attività dell'Arbitro Bancario Finanziario, anno 2021, p. 20. In contrast to the projected system, the Spanish Bar Association has stated that it "leaves citizens in the most notable defencelessness" by portraying the figure of lawyers "as an obstacle to the effective exercise of the rights of complaint" https://www.abogacia.es/actualidad/noticias/victoria-ortega-la-autoridad-de-defensa-del-cliente-financiero-deja-en-la-indefension-mas-notable-a-la-ciudadania/.

[75] 50,000, which was more appropriate to make the authority's rulings effective, available at http://www.rdmf.es/wp-content/uploads/2019/06/Proyecto-de-ley-de-creaci%C3%B3n-de-la-Autoridad-Administrativa-Independiente-de-Protecci%C3%B3n-del-Cliente-Financiero.pdf. The reduction to €20,000 leaves a large proportion of claims for breaches of insurance conduct of business rules out of the binding nature. However, it should be noted that most bank litigation is for amounts below 20,000 euros, for example, most disputes over mortgage charges or abusive commissions. Referring to data provided by the Bank of Spain, the Secretary General of the AEB, Javier RODRÍGUEZ PELLITERO, suggests that the figure of 1,000 euros would cover 90% of claims (Diario de Sesiones del Congreso de los Diputados, Comisiones, 2023, No. 857, p. 24).

[76] See Marcello STELLA, "L'ABF nel panorama europeo", in Giuseppe CONTE (dir), Arbitro bancario e finanziario, 2021, pp. 43-71, with references to the binding decisions of the Austrian Gemeinsame Schlichtungsstelle der österreichischen Kreditwirtschaft up to 4,000 euros (p. 48), the Irish Financial Services Ombudsman (p. 63) and, outside FIN-NET, the UK Financial Ombudsman Service (FOS) up to 150,000 pounds (p. 63). 48), the Irish Financial Services Ombudsman (p. 63) and, outside FIN-NET, the UK Financial Ombudsman Service (FOS) up to 150,000 pounds, albeit based on a "contract of the parties in favour of a third party" (p. 69), which places it in a quasi-arbitral system.

issues of the Bill. The Spanish banking association considers that the projected system entails a risk of unconstitutionality because it crosses the limit of the competence reserved to the Judiciary. In turn, the CGPJ's report considers that it "entails a kind of violation of the exclusivity of the Jurisdiction enshrined in art. 117.3 EC and of the effective judicial protection of art. 24.1 EC". According to his criterion, we are dealing with binding resolutions of contracts between private individuals reserved to judges. However, the planned system does not encroach on the powers of the judiciary. The air transport sector serves as a precedent to justify the admission of binding rulings in the financial sector. The second additional provision of Law 7/2017 creates a dispute resolution system for air transport users that is binding on the airline.[77]

The opinion of the Council of State accepts the binding nature of complaints, citing the Charter of Digital Rights of 14 July 2021, which, in the framework of modern public law, admits this type of administrative protection provided that "three conditions are met: the existence of a process established by law to resolve the conflict, the subsequent control of such decisions by the judicial authority and that the jurisdictional competence attributed by law is compatible from a substantial point of view with the field of activity of the administrative authority, taking into account the principle of speciality". The planned system meets these three requirements. It is designed by a regulation with the force of law, its decisions may be appealed before a judge and the function it performs complies with the principle of speciality without overlapping with that performed by the supervisors.

These are binding decisions that put an end to administrative proceedings. Both the financial institution and the customer may appeal against these decisions before the civil courts. They can be appealed before the courts of first instance of the capital of the province of the customer's domicile, whether or not the customer is a consumer.[78] The

[77] Whose decisions may be appealed by the airline before the competent commercial court, following the modification of this provision by final provision 6 of Law 3/2020 of 18 September.

[78] They will be decided by oral proceedings with some special features included in the second final provision of the Draft Bill, among which it is worth highlighting that for claims for an amount of less than 2,000 euros, a brief claim may be made on standardised forms.

decision may be annulled as unlawful, or the individual legal situation may be re-established. Of course, if the binding decision is overturned by a final judgment and the financial customer becomes a debtor, he must repay the amount advanced.

In the original wording of the Bill, binding decisions could be appealed before the contentious-administrative jurisdiction. However, since the application of the rules of conduct is a contractual matter, appeals should correspond to the civil jurisdiction.[79] The text approved by Congress wisely takes this into account, avoiding the risk of disparity of criteria between civil and contentious-administrative jurisdiction. This technical improvement reflects the opinion shared by parliamentary groups, the Council of State[80] , the CGPJ[81] , the banking association,[82] and other interlocutors.[83]

IV. FINANCIAL OMBUDSPERSON AUTHORITY

1. NATURE AND FUNCTIONS

The creation of an independent financial ADR as administrative agency with the power to impose its rulings on banks would be a novelty in the European Union.

According to the Bill, the Financial Ombudsperson Authority is an independent administration with functions as an alternative dispute resolution mechanism between customers and financial institutions, in charge of ensuring financial education and preventing financial exclusion.[84] It is neither a market regulator nor a supervisor of financial institutions. It is essentially an independent administration in charge of

[79] Constitutional issue as it affects the distribution of competences between jurisdictions, as highlighted in the opinion of the CGPJ.

[80] Council of State Report, p. 54.

[81] CGP Opinion, p. 64.

[82] See appearance by Javier RODRÍGUEZ PELLITERO, Secretary General AEB, BOCD, Comisiones, no. 857, 22 February 2023, p. 25.

[83] See the statements to this effect by Judge José María FERNÁNDEZ SEIJO, BOCD, Comisiones, núm. 857, 22 February 2023, pp. 6 and 12.

[84] In the FIN-NET network there are ADRs that are entrusted with complementary financial guidance and education functions, in some cases in the development of their intermediary work.

managing an ADR, with binding resolutions for banks when they are less than 20,000 euros.

The Authority is governed by the law establishing it and by its organic statute, which must be approved by Royal Decree. This statute must develop its internal organisation and functioning, in particular that of the Governing Board, the Advisory Committee and the Sections. In addition, it must have internal rules of procedure approved by the Governing Board concerning the organisation and functioning of the Sections and Directorates-General. The Authority's legal framework forms part of the "bases for the regulation of credit, banking and insurance" which the Spanish Constitution assigns to the State.[85]

The Authority is created to strengthen legal certainty in the financial market with effective customer protection through a Complaints Resolution System. To this end, it is responsible for proposing "best financial practices" for assessment and incorporation by supervisors in the Compendium of Best Financial Practices and Usages.[86] In its annual report, it must include repeated practices or systemic problems, because they are systematic or significant, publishing the unification of criteria decisions.[87] This doctrine constitutes its main contribution to legal certainty.[88] In this way, it formulates its technical criteria in the application of the rules of conduct.[89] It thus contributes to better financial

[85] The twenty-sixth final provision of the Draft Bill includes the following titles of the exclusive competence of the State in Article 149.1 of the Constitution: commercial and procedural legislation (6th), bases for the regulation of credit, banking and insurance (11th), and bases and coordination of the general planning of economic activity (13th), bases for the legal system of the Public Administrations (18th).

[86] Art. 50.2LDCF.

[87] The publication of ADR decisions has been encouraged by the experts. Cf. Stefaan VOET, Sofia CARUSO, Anna D'AGOSTINO and Stien DETHIER, Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR), June 2022. (JUST/2020/CONS/FW/CO03/0196), pp. 67-70.

[88] The ESC opinion rightly considers that publicising the doctrine contained in the Authority's decisions would have positive effects on the system as a whole (p. 9). In Italy, the ABF publishes all its decisions. SICLARI describes this function as "virtuous" as it provides technical support without compromising its impartiality (SICLARI, D., "La tutela stragiudiziale in ambito bancario, finanziario e assicurativo: problemi e prospettive", Rivista Trimestrale di Diritto dell'Economia, 2022, vol. 4, p. 404).

[89] To be clear and effective. The ABF doctrine is a good precedent. See G. CONTE (dir.), Arbitro bancario e finanziario, 2021, which in its 1382 pages contains a good synthesis of this doctrine.

regulation and guides the conduct of entities.[90] Of course, the Authority's criteria are not binding on judges, but they can be very useful in informing their judgments.[91] It also has a pedagogical function for customers who will be able to know more clearly when their expectation of redress for financial conduct they consider improper has a basis for success.

The growing importance of financial education has been highlighted by its inclusion as a mandate to Member States in the proposed Directive on retail investor protection rules.[92] This mandate justifies that the proposed Authority becomes the public body that centralises and manages public policies on financial education, assuming as its own competence the National Financial Education Plan, in a natural concentration of powers related to the financial customer protection.[93] In this area, it should sign an agreement with supervisors, providing for their collaboration in the preparation of educational resources and information guides, particularly those on the mortgage market. It is also empowered to enter into other agreements with public and private entities to promote financial education with special concern for the financial inclusion of the most vulnerable. It may also collaborate with educational authorities in the development of financial education content.

The new Authority will inform supervisors and relevant ministries of complaints about practices affecting people at risk of financial exclusion. It thus assumes functions of surveillance and prevention of financial exclusion, in cooperation with other administrations. In Spain, supervisors do not have an explicit mandate to tackle financial

[90] See Giuseppe FAUCEGLIA, "L'esperienza dell'ABF manifestazione di una 'pedagogia' ", Banca, Borsa Titoli di Credito, vol. 74, no. 6, 2021, pp. 857-872, who frames the activity of the ABF as "flexible" or "elastic" law (p. 864).

[91] In Italy, where the Arbitro Bancario Finanziario's rulings are not binding, very few settled cases give rise to court proceedings and most of them confirm the ABF's judgement (Relazione sull'attività dell'Arbitro Bancario Finanziario, anno 2021, p. 27).

[92] Published by the European Commission on 24 May 2023.

[93] See, Bank of Spain, CNMV and the Ministry of Economic Affairs and Digital Transformation, Plan de Educación Financiera 2022-2025, https://www.cnmv.es/DocPortal/Publicaciones/PlanEducacion/Planeducacionfinanciera_22_25es.pdf.

exclusion.[94] However, the Bank of Spain, as a supervisor, is in charge of coordinating the Plan of measures to foster the financial inclusion to be promoted by the government.[95] But the Bank of Spain, focused on the solvency of the entities, is not responding to the problem of financial exclusion, nor has it even adopted criteria that guarantee access to cash and payment services for the elderly.[96] For this reason, the Authority's remit should be broadened to expressly assign it powers on financial inclusion in terms similar to those attributed to it on financial education, with powers to oversee a Financial Inclusion Observatory. In its founding regulation, the publication of best practice criteria to prevent financial exclusion, and in particular to overcome the digital divide affecting the elderly, should be envisaged as a key task of the new Authority.

1.1. On the independence of the Authority

The authority in charge of financial ADR should be an independent administrative authority, with auctoritas and doctrine. Customer perception of the new authority is important. It must be perceived as a quasi-judicial body that is not dependent on financial entities. Empirical studies show that customer service and procedural information are relevant in the design of financial ADR.[97]

In Spain, the Authority is envisaged as an independent administration, with legal personality and capacity to act. It is true that it will have ministerial links,[98] but only for organisational and budgetary purposes. This link should not compromise the autonomous

[94] In the UK, it has been proposed to broaden the mandate of the Financial Conduct Authority (FCA) to include financial inclusion among its objectives (HOUSE OF LORDS, Tackling Financial Exclusion: A country that works for everyone? Follow-up report, 24 April 2021, p. 31).

[95] Third additional provision of Law 4/2022 of February, on the protection of consumers and users in situations of social and economic vulnerability.

[96] See the author, "Exclusión financiera: actuaciones y propuestas", Revista de Derecho Bancario y Bursátil, no. 169, 2023; MARTÍNEZ NADAL, A., "Soluciones jurídicas para la inclusión financiera de la tercera edad (más allá de los protocolos voluntarios) ", Revista de Derecho Mercantil, no. 326, October-December 2022, who considers that the role of the Bank of Spain in this matter "could be improved", "obliged to combine contradictory roles", and suggests assigning this competence to the Financial Customer Protection Authority (Conclusions and Recommendations, 3).

[97] HERTOGH, M., WEVER, M. and MARSEILLE, B., "It's All About the Money. Or Is It?", Zeitschrift für Rechtssoziologie, 2023, pp. 19-20, who proposes to develop a sociology of ADR.

[98] To the Ministry of Economic Affairs and Digital Transformation, through the State Secretariat for Economic Affairs and Business Support (art. 8.1in fine LDCF).

and independent exercise of its powers. However, the Project designs an authority linked to and dependent on the financial supervisors. This is the most delicate point of the Bill which should be improved. The majority of the Governing Board corresponds to representatives of the economic administration, with the presence of the three financial supervisors, the Treasury, the Ministry of Economic Affairs, to which is added one from the Ministry of Consumer Affairs. In all, six of the ten board members represent other administrations. The chairperson, accompanied by the vice-chairperson and the two elected board members, is in a minority. In turn, the body's main function of creating doctrine on the application of rules of conduct in contractual relations is subordinated to the actions of the supervisors, who are given the power to draw up and keep up to date the annual Compendium of Good Financial Practices and Usages. Even the Authority's staff training programmes are subject to monitoring by financial supervisors. The Authority is thus designed as a weak Authority, as an appendix to the supervisors, lacking the power to set and implement its own policies. This design does not meet the requirement of independence required by Directive 2013/11/EU to be registered as a "dispute resolution entity". The System has guarantees of impartiality, but the Authority lacks independence.

1.2. On the desirability of establishing the Authority

The parliamentary process has served to highlight the general lack of understanding of the nature and functions of the new figure. The need for its creation is not fully understood. Either because it is considered superfluous or because there are other more appropriate alternatives. The planned figure has been described as a "supervisory body",[99] as an "arbitration system",[100]or as an "administrative mammoth".[101] These positions maintain that supervisors already offer complaints services and that a one-stop shop and binding decisions could achieve the efficiency sought, without the need to create a new authority. However, it is not a question of merging complaints services or creating an

[99] Pedro CASARES, of the Socialist Parliamentary Group, BOCD, 18 May 2023, p. 15.
[100] Edmundo BAL, of the Citizens' Parliamentary Group, BOCD, 18 May 2023, p. 7.
[101] Miguel Ángel CASTELLÓN, of the Popular Parliamentary Group, BOCD, 18 May 2023, p. 12.

authority to supervise compliance with conduct of business rules, but of creating an authority independent of supervisors to enforce conduct of business rules.

From the hearings and the parliamentary debate, it could be concluded that it is not clear whether it is appropriate to create an Authority to take over the function that has so far been carried out by financial supervisors. But the fact is that the supervisors' complaints services do not fulfil the functions of an ADR. The current complaints services are not independent. Their decisions are mediatised, with stability taking precedence over customer protection. In fact, it is common for the defendant banks to accompany them to the judicial replies as a shield against their claims. However, these biased criteria are not usually heeded by the courts. This detracts from the *auctoritas of* their reports. This situation contrasts with the majority judicial follow-up of rulings in independent systems, as is the case in Italy with the rulings of the *Arbitro Bancario Finanziario.*[102]

In short, there is currently no financial customer protection authority in Spain. There are solvency and conduct supervisors with complaints services subordinated to stability, in accordance with their main mandate: the Bank of Spain, the protection of the solvency of entities, and the CNMV, the transparency necessary to ensure the proper functioning of the securities market. Supervisors subordinate customer protection to stability.[103] There are specific cases that highlight this subordination. For example, when the Bank of Spain urged the Senate not to act against floor clauses, because in its opinion this is a commercial practice of entities "consistent with the prudence that should characterise the activity of credit institutions and also constitutes a factor that favours financial stability,

[102] In 82% of cases the judge confirms the ABF's decision (Relazione sull'attività dell'Arbitro Bancario Finanziario 2021, July 2022, p. 27).

[103] This subordination has been supported by the controversial judgment of the Court of Justice of the European Union of 5 May 2022, according to which "although there is a clear general interest in ensuring strong and consistent investor protection throughout the Union, that interest cannot in any event be regarded as prevailing over the general interest in ensuring the stability of the financial system". Although qualified by the CJEU of 15 June 2023, according to which "the argument relating to the stability of the financial markets is not relevant in the context of the interpretation of Directive 93/13, the aim of which is to protect consumers", concluding that "it is for the banking institutions to organise their activities in accordance with that directive".

an element of public interest",[104] or when the Bank of Spain and the CNMV agreed to consider most of the swaps contracted by retail customers as linked products, so that banking legislation, focused more on solvency than on transparency, would apply to them instead of MiFID.[105]

The lack of a system offering an independent and fair alternative dispute resolution procedure has meant that hundreds of thousands of financial consumers have had to go to court to exercise their rights.[106] Had a Financial Customer Protection Authority been in place, customer protection against abusive practices would have prevailed and the judicialisation of such disputes could have been prevented, creating legal certainty and avoiding serious reputational damage to banking.[107]

The project to create a Customer Ombudsperson Authority is not only a question of the quality and efficiency of the current complaints' services, but also a substantial question about the nature of the body. It is about creating an independent administrative authority that does not subordinate customer protection to the interest of banking stability.

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[104] Report of the Bank of Spain on certain clauses in mortgage loans, BOCG, Senado, SERIE I, 7 May 2010, NÚM. 457, p. 22, according to which "the customer information obligations that current regulations impose on credit institutions that include these clauses in their contracts, their standardisation and, in particular, the notary's warning of their content, can be considered an adequate guarantee for the customer to be able to know with sufficient precision the scope of this element of the financial cost he is assuming", adding that "the most appropriate way to make the aforementioned financial stability compatible with the protection of consumer interests is to make customers aware of the fact that they have to pay the cost of the mortgage loan, and to make them aware of its content", is to make customers aware of the risks involved in taking out long-term products with variable interest rates and of the consequent need to incorporate instruments to mitigate this risk" (p. 23). 23).

[105] Under the supervision of the Bank of Spain, which would be responsible for dealing with complaints. See Communication on the delimitation of competences of the CNMV and the Bank of Spain in relation to the supervision and resolution of complaints affecting financial derivative hedging instruments or products, 20 April 2010 https://www.cnmv.es/Portal/verDoc.axd?t={01870bf4-55c8-4760-9182-19f00f217e79} .

[106] Proof of this is that in the years 2017 to 2021 alone, a total of 713,129 cases related to unfair terms were filed, according to data from the Judiciary, see https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/Los-Juzgados-de-clausulas-abusivas-han-resuelto-ya-el-71-6-por-ciento-de-los-713-129-asuntos-ingresados-desde-su-puesta-en-marcha--en-junio-de-2017.

[107] In November 2017, the International Monetary Fund warned in its Spanish Financial Sector Assessment Programme the following recommendation: "The approach to the prudential impact of conduct risk and consumer protection should be further developed in a proactive direction. Conduct and customer protection problems can have an impact on the reputation and profitability of banks (through complaints and/or fines) and ultimately also their solvency".

This is not at odds with the necessary collaboration between the Authority and supervisors.[108]

The Twin Peaks model[109] has been advocated by supervisors and banking associations as the best alternative. According to this model, solvency supervision would be assigned to the Bank of Spain and conduct of business supervision to the CNMV. It is also a model that has enjoyed local political consensus for years.[110] But the *Twin Peaks* alternative, although a helpful solution for dividing up the work of supervisors, is not an alternative to the creation of a customer protection authority, for the simple reason that this authority is not a financial supervisor. Its role is to apply the rules of conduct to redress the client when his rights have been violated, not to monitor compliance with them.

2. ORGANISATION

The proposed regime does not clearly distinguish between the organisation of the Authority as part of a public body and the organisation of the Dispute Settlement Scheme which is its main activity. The Management Board and the Advisory Committee extend their competence to both the general and the specific functioning of the complaints system. Other bodies such as the Sections or the Members are specific to the Complaints System. We will now describe the internal organisation of the new Authority because of its relevance for a future European harmonisation of financial ADRs.

2.1. Governing Board

[108] As envisaged in the Bill by the duty to provide supervisors with the relevant information for the exercise of their functions (Art. 50.1 Bill).

[109] A view shared by J. ESTEBAN RÍOS, J., ob. cit., III.3 and conclusions.

[110] Since it was presented by Gonzalo GIL and Julio SEGURA, "La supervisión financiera: situación actual y temas para debate", Estabilidad financiera, no. 12, 2007, pp. 9-40, with the following formulation: "the fundamental reform is the loss of supervisory competences of the DGSFP and their distribution between the Banco de España and the CNMV. 9-40, with the following formulation: "the fundamental reform is the loss of supervisory powers of the DGSFP and their distribution between the Banco de España and the CNMV, taking advantage of this to redistribute between them the tasks of prudential supervision that are still today in the hands of the CNMV, which would pass to the Banco de España, and those of conduct with banking clients, which would pass to the CNMV" (p. 39).

According to the Bill, the Governing Board is the governing body of the Authority, with some specific functions relating to the Complaints System, such as organising the Sections or establishing the allocation of complaints. It is made up of ten board members, four elected, including the chairperson and vice-chairperson, from among experts of recognised prestige, and six from the Administration, either ex officio or appointed. This composition does not guarantee the independence of the system. The majority of the Governing Board is made up of government officials. To ensure its independence, the number of elected board members should be increased to at least six, bearing in mind that the chairperson has a casting vote.

The Bill sets out the criteria for the selection of the Governing Board. There are ex officio directors because they are senior officials of the supervisors or of the Administration, and others elected. The presidency is freely chosen and is decided by the Congress at the ministerial proposal, having heard the supervisors, from among honourable and expert persons with 10 years' knowledge and experience in the legal, economic or financial field. It is not enough to be an academic or a financial professional. The chairperson should combine knowledge of law with professional experience in the financial market. Furthermore, to prevent conflicts of interest, he or she should not be a representative of banking or consumer associations. It is just as important to prevent banking from capturing the Authority as it is to make it clear to customers that the Authority is not their lawyer. Nor should a senior official from the Bank of Spain or other supervisors be chairperson. The Authority's Board already includes, as ex officio directors, a representative of each of the supervisors. Moreover, it should be recalled that the Authority was created in response to the failure of the supervisors' complaints services to fulfil their preventive function of avoiding the mass judicialisation of banking disputes. The appointment of a person from the Bank of Spain or the CNMV as chairperson would run the risk of failing to change the model and of failing once again to pacify contractual relations in the financial market. Of course, the chairperson of the Authority must have

independence of judgement and cannot be dependent on or linked to a political party. The Authority is a technical body that must function independently of politics.[111]

2.2. Advisory Committee

The Advisory Committee is intended to be the Authority's advisory body. In addition to the chairperson and vice-chairperson of the Authority, it is composed of twelve members appointed to represent sectoral associations, consumers, the elderly, the disabled and autonomous communities, together with two academics.[112] Its report is mandatory for the preparation of preliminary drafts of rules of conduct and for best practice initiatives proposed to supervisors for inclusion in the Compendium of Best Financial Practices and Usages,[113] as well as for the approval of the internal rules of procedure and the annual report.

2.3. Sections

In the planned regime, the Sections are the collegiate bodies competent to resolve complaints. They have the status of "alternative dispute resolution entity".[114] This provision must be reconciled with the mandate to create a single entity for the financial sector for the resolution of consumer disputes.[115] It must therefore be understood that the status of "alternative dispute resolution entity" is assumed by the Authority, which must be registered as such in the list maintained by the European Commission for this type of entity.

The Sections are grouped into the three sectorial areas: banking, securities and insurance, with the possibility of creating transversal units, such as the one dedicated to

[111] The statute of the Italian ABF expressly states that: "Persons holding political office may not be appointed as members" (Banca d'Italia, Disposizioni sui sistemi di risoluzione stragiudiziale delle controversie in materia di operazioni e servizi bancari e finanziari, 2 November 2016, p. 12).

[112] It is incomprehensible that industry associations have three representatives compared to one consumer representative (through the Consumers and Users Council), disregarding the recommendation of the Council of State (Report on the preliminary draft Bill, p. 44).

[113] Compendium provided for in Art. 53 LADCF

[114] For the purposes of Law 7/2017, transposing Directive 2013/11/EU.

[115] First additional provision Law 7/2017.

crypto-assets and other Fintech products.[116] There will be a Special Section dedicated to prior questions of unification of criteria and to challenges of members that may be requested due to lack of independence and impartiality.

Complaints may be raised as a "prior question of unification of criteria" by the chairperson, when technical, legal or public interest reasons justify the unification of criteria, or by the Sections, when in the face of similar facts, claims and grounds there are different decisions. This may also be raised by the parties before the examining magistrate. The "preliminary question of unification of criteria" is an essential mechanism for creating doctrine in cases that may result in systemic risk.

2.4. Members

In the proposed system, the members investigate the complaints files and submit the proposals for resolution to the corresponding section. They must have the knowledge and competence to perform their functions in relation to the files, accrediting experience and specialised legal knowledge in rules of conduct and good financial practices, whether through judicial practice, arbitration or mediation, or through having been involved in consumer protection or the provision of financial services. This does not preclude lawyers or academics from fulfilling these requirements.

3. FINANCIAL RESOURCES

FIN-NET ADRs are financed in a wide variety of ways. Some are publicly funded, as is the case in Malta or Sweden, although it is common for financial institutions to contribute to their support, as in the case of the Dutch Kifid. While industry funding is preferable, care must be taken to ensure that this option does not lead to a loss of independence of the organisation.

[116] As J. ESTEBAN RÍOS says, "it would be desirable that the areas do not adopt a purely subjective approach, taking into account the type of financial operator against whom a complaint is lodged, as this would imply continuity with the previous sectorial model" (op. cit., IV.2 in fine).

The Spanish Bill specifies the financial resources of the new Authority. It is envisaged that its expenses will be covered by a charge levied on financial institutions. According to the Council of State, this tax meets the requirements of the constitutional jurisprudence of legal reserve and coerciveness, as it "has sufficient rank and coercively imposes on financial institutions the payment of a patrimonial benefit for a public interest purpose".[117]

The design of the fee was the subject of intense parliamentary debate. The initial provision of a fixed fee of 250 euros per claim was criticised for lack of fairness and for not providing an incentive for the good conduct of the entities.[118] The final text approved by the Congress includes a technical improvement by establishing that 60% of the fee will be set according to the decisions unfavourable to the institution.[119] In this way, misconduct reflected in decisions that uphold the customer's claim is penalised.

On the other hand, it is argued that banks end up passing on this type of fee in the price of their services and in the end the fee ends up being paid by all customers, whether or not they are claimants.[120] As a lesser evil, this position proposes that the fee should be passed on to the customer when their claim is rejected.[121]

[117] Opinion on the Preliminary Draft, pp. 57 and 58, identifying the public interest in consumer protection, but also in the correction of market failures. The CGPJ is highly critical of the fee and its design, as it ignores the principle of equality since customers receive the service free of charge and financial institutions, which do not benefit from the service, have to bear the cost (Report on the Draft Bill, p. 70), in line with the dissenting opinion of the directors of CEOE and CEPYME to the Opinion on the Draft Bill of the Economic and Social Council, according to which it is legitimate to doubt a fee that taxes those who are not the beneficiaries (p. 9).

[118] The Governor of the Bank of Spain proposed "to make the rate proportional to the unfavourable claims" (OJCD, Commissions, 23 February 2023, p. 16).

[119] In the terms set out in the first additional provision of the Bill.

[120] See ARRUÑADA, B., "Comentario sobre la nueva Autoridad de Defensa del Cliente Financiero", Apuntes Fedea 2023/11, May 2023, who proposes that before creating another bureaucracy, the organisation of the judicial system should be reviewed (p. 3).

[121] ARRUÑADA, B., ob.ul. cit., p. 7. There are even voices that postulate that it should be the clients who pay for the complaints service as they are its beneficiaries.

In the FIN-NET network, 11 of the 57 ADRs set fees for consumers to pay when claiming.[122] This fee is in some cases refundable when the complaint is upheld.[123] In the Dutch Kifid system, a customer whose complaint is rejected has to pay 50 euros, which is not a deterrent but enough to make him think about the motivation of the complaint before lodging it, as it may cost him something.[124]

Wisely, the Bill rules out charging a fee to customers, a measure that could discourage the filing of complaints against the basis of consumer law as established by European case law. The charging of costs in ADR is a debated issue, but as a public system of general interest it should be free of charge for customers. But just because it is free of charge for the consumer does not mean that there are no ancillary costs. Customers can make use of lawyers and experts whose costs should be reimbursed to them if the claim is upheld.[125]

V. CONCLUSIONS

Having analysed the advantages and disadvantages of creating a financial customer protection authority in charge of managing a dispute resolution system based on the Spanish Bill, we can formulate some brief conclusions and recommendations for its better design and implementation and that it may serve as a model to inspire the future harmonisation of financial ADRs in the European Union.

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[122] 150 for the Mediation Centre at the Croatian Chamber of Economy in Croatia; 20 euros for the Cyprus Consumer Center for Alternative Dispute Resolution in Cyprus; 27 euros for the three ADRs in Denmark; 20 euros for the Arbitro Bancario Finanziario in Italy; 50 euros for the Commission for Solving the Consumer Disputes in Liechtenstein; up to 12 euros for the Banking Ombudsman and up to 60 euros for the Arbitration Court at the Polish Financial Supervision Authority in Poland; 50 at the Commission for Solving the Consumer Disputes in Liechtenstein; up to EUR 12 at the Banking Ombudsman and EUR 60 at the Arbitration Court at the Polish Financial Supervision Authority in Poland; and EUR 20 at the Mediation Centre of Slovenian Insurance Association.

[123] Case contemplated by the Arbitro Bancario Finanziario of Italy.

[124] Cfr. STELLA, M., "L'ABF nel panorama europeo", in Giuseppe CONTE (dir), Arbitro bancario e finanziario, 2021, p. 52.

[125] The terms and conditions of the Australian Financial Ombudsman Service provide for consumers to be paid up to $3,000 to compensate for costs incurred by the consumer, which can be increased to $5,000 by the Australian Financial Complaints Authority. Cf. PONDEL, C., "Legitimacy in Australia's financial system external dispute resolution framework: New and improved or simply new? UNSELD, 2019, vol. 42, p. 370.

Financial regulation has focused on the objectives of stability and transparency to ensure the smooth functioning of the market. Through administrative law rules, it protects solvency and disciplines conduct with a system of sanctions and exceptions in the event of a crisis. There is a lack of private law regulation to protect the financial customer beyond the rules of consumer protection. In the European Union, the regulation of civil liability is left to the Member States. However, there is a strong doctrinal trend in favour of a contract law regulating the financial market. The creation of a single capital market attractive to savers requires harmonisation of contractual remedies for non-compliance with conduct of business rules.[126] But the fact remains that the complexity of financial contracts makes its codification difficult. There are still countries such as Spain where most banking and financial contracts are atypical. Given the difficulties of harmonising civil remedies, the creation of an independent administrative authority to manage a dispute resolution system is an essential step towards legal certainty in the financial market.

The diversity of systems in the European Union for settling financial claims is an obstacle to the creation of a Single Capital Market. The FIN-NET network is a good example of the failure of a policy measure. It is in fact a disengaged network that since 2019 does not publish its annual report. It is a promising idea badly implemented. Clients of financial institutions lack adequate protection. As the European Commission's proposal on retail investment reflects, savers do not have access to relevant information and conflicts of interest are detrimental to them. Enforcing contracts, where appropriate with civil remedies for breaches by entities, helps to improve savers' confidence in the financial market. Being served and resolving a prompt remedy improves confidence in the system. The way to do this is through financial ADRs, experts in finance and financial regulation, run by authorities independent of both industry and supervisors. Effective

[126] Cf. Filippo ANNUNZIATA, Retail Investment Strategy - How to boost retail investors' participation in financial markets, European Parliament's Committee on Economic and Monetary Affairs (ECON), June 2023, p. 27, for whom: "efforts to develop a uniform corpus of private law for financial law are highly encouraged and deemed crucial for the development of the CMU and the enhancement of efficiency and trust of investors in markets" (p. 43).

financial ADR is a fundamental tool for better product governance.[127] It is a monitoring tool to tailor products to customers' needs and improve financial welfare. The best doctrine advocates the existence of a single financial ADR, as an expert authority capable of guiding the conduct of entities.[128] It is the missing piece in financial regulation to guarantee the protection of savers.

The Spanish legislative initiative to create an independent authority to manage a financial ADR provides a useful precedent for future European harmonisation. FIN-NET should pay attention to this proposal in order to improve its memorandum on cross-border cooperation. The technical and global nature of financial products and services allows progress to be made along this path, while respecting cultural differences and the historical evolution of each jurisdiction. In the financial sector, the malleability of the regulation is more of a weakness than a strength.[129]

After having analysed the gestation of the Spanish Bill for the creation of the Financial Customer Protection Authority and the wide-ranging debate it has generated, we can reach some brief *lege ferenda* conclusions.

- The adoption of a Single Dispute Resolution System in the financial sector is a mandate of the legislator that falls under the transposition of Directive 2013/11/EU. Spain may be sanctioned for failure to transpose this directive in the financial sector.

- The Dispute Resolution Scheme fills a gap in national law in relation to financial customer protection, as supervisors' complaints services lack the independence

[127] See on product governance in insurance distribution MONTEMAGGIORI, F., "Considering the IDD Within the EU Legal Framework on ADR Systems", in Insurance Distribution Directive: A Legal Analysis, 2021, p. 343.

[128] Cf. A. BIARD, "Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK", Journal of Consumer Policy, 2019, No. 42, p. 134.

[129] From a general and functional perspective, it has been argued that fexibility and malleability constitute a strength of the figure that has allowed it to be maintained over time. Cf. CREUTZFELDT, N., "The role of ombuds - a comparative perspective", in PALMER, M., MOSCATI, M. and ROBERTS, M. (ed.), Research Handbook in Comparative Law: Comparative Dispute Resolution, 2020, p. 390.

required by Directive 2013/11/EU, as evidenced by their lack of effectiveness in protecting financial customers. They have not prevented the mass judicialisation of financial disputes.

- The creation of a Dispute Resolution System in the financial sector is part of financial regulation, hence the protection is extended to all financial customers, whether or not they are consumers. This extension of standing to claim does not imply a breach of the provisions of Directive 2013/11/EU.

- The Twin Peaks model, which distinguishes between a solvency supervisor and a conduct supervisor, is not an alternative to the Dispute Resolution System dedicated to enforcing conduct of business rules.

- The Bill should be made more systematic, to regulate first the Dispute Resolution System and then the Authority that is created to manage it.

- A weak Authority is thus designed as an appendix to the supervisors, lacking the power to set and implement its own policies. The System has guarantees of impartiality, but the Authority lacks independence. To ensure its independence, the number of elected board members should be increased to a majority.

- The Authority should be empowered to propose to the government amendments to the conduct of business rules to promote best financial practices.

- The Dispute Resolution System should be free of charge for the financial customer, and it is justified that it is financed by entities through fees that discourage malpractice.

- The Financial Ombudsperson Authority should assume all powers related to financial customer protection, including financial education and inclusion. This would allow supervisors to concentrate their efforts on ensuring the stability of the financial system, the solvency of entities and market transparency.

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