THE CONSUMER FINANCE LAW REVIEW

SIXTH EDITION

Editors
Rick Fischer and Jeremy Mandell

THE LAWREVIEWS

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This article was first published in February 2022
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-385-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

HOGAN LOVELLS

MORI HAMADA & MATSUMOTO

MORRISON & FOERSTER LLP

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

URÍA MENÉNDEZ

WOLF THEISS

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PREFACE

Consumer choice for financial products and services is continuing to proliferate across global markets. The ability to reach consumers at any time on their mobile phones, tablets or other devices has helped attract substantial capital investment in consumer financial services. Consumers in many diverse markets, with varying degrees of size, sophistication and modernisation, can now access myriad financial products and services with just a swipe, tap, wave or click. Traditionally cash-based economies now also have a wide range of options for electronic payments, alternative lending and other banking and financial services.

The substantial capital investments continue to attract non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar valuation technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are developing increasingly innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and other non-bank financial services providers, are responding by innovating to improve their product and service offerings in order to retain and strengthen their customer relationships.

At the same time, the political landscape in various global markets continues to evolve, and this evolution may affect cross-border investments and payments, broader investments in financial technology, and the nature of regulatory and enforcement oversight.

The ever-increasing rate of innovation in consumer financial services, the changing profile of market participants and the evolving political landscape give rise to new legal questions or a different spin on long-standing legal theories. This country-by-country survey of recent developments in consumer financial services considers how these new and different legal theories are being addressed in 10 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

One fundamental question confronting policymakers around the world is what entity in the financial value chain should be viewed as the provider of the financial product or service. In the alternative lending context, for example, non-bank platform operators are partnering with banks to originate loans funded on the bank's balance sheet, or on the balance sheet of the platform provider, or through raising capital from investors of varying degrees of sophistication. These 'marketplace lenders' in many cases are not lenders at all, but merely technology companies providing a platform that enables lenders to more efficiently source capital. In other cases, regulators and courts have taken the view that the marketplace lender is using a bank partnership to take advantage of the special powers of the regulated bank, without itself being subject to similar regulation. Courts and regulators are taking varying approaches to determine the rights and obligations of each entity participating in an increasingly disintermediated market.

In the payments context, policymakers have taken varying approaches to regulating electronic money and digital currency schemes, as well as payment interfaces that rely on established payment networks, such as the payment card networks or batch processing networks. These approaches require careful consideration of the precise flow of funds to determine whether the payment provider accepts liability to one or more participating consumers.

Another defining characteristic of global consumer financial products and services is an increasing reliance on third-party service providers. This characteristic has led many banking regulators to put more focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have a hands-on, risk-based approach to managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. Notwithstanding the use of a risk-based approach, these regulatory expectations are imposing significant costs on banks and their downstream service providers.

Other legal issues are affecting payment providers, consumers and regulators, as payment system stakeholders pursue faster payments and digital currencies. Jurisdictions around the world are at varying stages of developing or implementing a ubiquitous, secure and efficient electronic payment system. Stakeholders are pursuing faster payments and digital currencies as a means to make more convenient, timely and cost-effective payments, including cross-border payments. Well-settled legal issues, including settlement finality and consistent consumer protections, must be considered anew in these contexts.

Established payment system stakeholders, including payment card networks, are also refining fraud protections and data security measures to address an ever-evolving risk landscape. For example, tokenisation in the payment card space is one fraud prevention measure that continues to achieve greater penetration by card issuers, card networks and mobile wallet providers.

The evolution of consumer demands also continues to raise new and interesting legal questions. For example, consumers and service providers are seeking to access and aggregate account or transaction data from multiple financial institutions. There is an ever-growing number of apps and other tools by which consumers can aggregate account information and receive financial advice and personal wealth management services. These services present significant legal issues for market participants and regulators, including issues related to privacy, data security, data ownership, liability, and consumer choice and control.

High-profile cyberattacks and data security incidents underscore a continuing focus on cybersecurity and data security issues, as they relate to consumer financial services, however delivered. Regulators in many jurisdictions are trending towards more prescriptive requirements, including specific security controls, as well as aggressive enforcement.

The entry of new market participants also raises questions related to fair access to financial services for consumers. For example, marketplace lenders are using new and alternative credit models and sources of data to evaluate the creditworthiness of potential borrowers who might not meet the underwriting criteria of traditional lenders. These models and data may not be as thoroughly tested or as demonstrably statistically sound as the time-tested credit models and data used by traditional lenders. As a result, in addition to evaluating whether use of alternative data adversely affects the lender's credit risk, lenders also must carefully consider whether use of alternative credit models and data sources has any unintended adverse impact on protected classes of potential borrowers. In addition to considering the potential adverse

impact of the use of alternative credit models or data on potential borrowers, regulators and courts in some jurisdictions are revisiting the classes of consumers that are protected by fair lending or equal credit opportunity laws.

Consumer protection authorities continue to focus on combating unfair trade practice, particularly with respect to new market entrants that may not have the same culture of compliance as traditionally regulated financial institutions. Prohibitions on unfair trade practice have been enforced against a broad range of market participants in consumer financial products and services, including payments, credit cards and other credit products, as well as deposit products.

Notwithstanding the many legal issues, this is a time of expanding choice for consumers and an exciting opportunity for consumer financial services providers. Accelerating advancements in technology have given consumers in developing markets, as well as unbanked or under-banked consumers in more well-developed markets, access to financial products and services previously unavailable to them. Thus, regulators and consumer protection agencies are challenged to ensure financial stability and a level playing field, while also promoting consumer choice.

This survey of consumer finance law describes the legal and regulatory approaches taken in the jurisdictions covered. Each chapter addresses the key characteristics of, and current climate within, a particular jurisdiction. Although payments, lending and deposits are the focus of this survey, other financial products and services are discussed where relevant.

Rick Fischer and Jeremy Mandell
Morrison & Foerster LLP
Washington, DC
January 2022

Chapter 2

AUSTRIA

Mimo Hussein and Helena Nyikos[1]

I OVERVIEW

Consumers – in particular borrowers – are generally very well protected in Austria. The rules protecting consumers directly and indirectly are enforced by Austrian courts and – as far as they derive from financial regulatory acts – the Austrian Financial Market Authority (FMA). During 2021, the FMA continued to put an emphasis on collective consumer protection, in particular, ensuring their trust in the financial market by securing transparency. The priorities for consumer protection in 2021, also in response to the coronavirus pandemic, increasing digitalisation and ongoing changes in the economy, included, among other things:

a providing information to consumers in a comprehensive and understandable manner;
b improving market and cost transparency for consumers;
c strengthening financial literacy among consumers and investors; and
d providing consumers with efficient tools (such as e-banking and smart contracts) to keep up with ongoing digitalisation.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

In Austria consumers benefit from a very high level of statutory protection. Consumer finance issues are mainly provided for in the following laws and – where applicable – their European law equivalents:

a the Federal Act concerning the Distance Marketing of Consumer Financial Services implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services;
b the Federal Act Establishing Provisions for the Protection of Consumers (KSchG) implementing Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights;
c the Federal Act on Off-Premises and Distance Contracts (FAGG) implementing Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights;
d the Federal Act concerning Consumer Credits (VKrG) implementing Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (CAFCD);

1 Mimo Hussein is counsel and Helena Nyikos is a legal trainee at Wolf Theiss.

e the Federal Act concerning Consumer Credits with respect to Mortgages (HiKrG) implementing Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property; and

f further, various consumer protection rules and provisions derive from MiFID II,[2] PSD2,[3] CRD[4] (respectively, their national implementation acts) and other financial regulatory regulations and directives.

Additional provisions in other laws such as data protection laws, general civil laws or certain other administrative laws further strengthen the very high statutory safety level for consumers.

ii Regulation

Generally, laws are implemented by the Austrian parliament, ordinances are established by the competent authorities and both are enforced by the relevant administrative authorities. With respect to financial market issues (including consumer finance regulations), the supervising authority for banks are the FMA, partially the Austrian National Bank and the European Central Bank (the latter being the single supervisory mechanism). In general, banks that infringe the administrative provisions of consumer protection laws face administrative fines (in a worst-case scenario the loss of their banking licence is theoretically also possible) and also may be sued by consumers who incurred damage as a result of the breach.

Additionally, consumers may contact the ombudsman of the Joint Alternative Dispute Resolution Institution of the Austrian Credit Institution Sector, or – but only with respect to foreign currency loans – the Alternative Dispute Resolution Institution for Consumer Deals. Both bodies are responsible for out-of-court settlement of consumer disputes and are competent bodies under Article 3 of the Alternative Dispute Resolution Act, which implements Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. Generally, alternative dispute resolution procedures require the consent of the defendant and are not mandatory, meaning that a bank may refuse to participate, which leaves the consumer with the option to file a claim.

Furthermore, consumers may approach the Consumer Association for Consumer Information (VKI), the most well-known, organised and powerful consumer association in Austria. The VKI is very active with respect to the supervision of general terms and conditions of banks and other financial institutions. Its aim is to inform and advise consumers and to fight for the enforcement of their rights. The VKI continues to win many cases for consumers, leading to a very detailed and consumer-friendly Austrian Supreme Court practice. Case law has certainly proved that consumers are generally very well protected in Austria.

2 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

3 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

III PAYMENTS

i Overview

The Federal Act on the Provision of Payment Services 2018 (ZaDiG)[5] sets forth the rules under which payment service providers may operate and service users are protected. Payment service providers are not able to opt out of various transparency, information and other obligations when providing their services to consumers. Direct cash transactions between payer and payee, under Section 3(3)(1) ZaDiG, are, however, exempted. The general civil law rules apply to direct cash transactions.

Consumer protection measures are mainly set forth as part of the duties of payment service providers to inform consumers (Article 26 et seq. ZaDiG) as well as the rules applicable to transaction content (HiKrG with respect to a mortgage credit, etc.).

ii Recent developments

The market for online payment services, including mobile payment services, continues to increase rapidly, in part because of the continuously developing fintech culture, but also due to the overall advancement of technology in the context of digitalisation and the growing negotiation power of consumers. Hence, innovative ideas with respect to the identification of new clients and the use of mobile and online payment methods are becoming increasingly important. Therefore, banks are looking to cover the gap between client demand for easy and quick payment methods and the legal framework requiring the financial institutions to provide high safety standards and comply with anti-money laundering and anti-terrorism financing regulations, and know-your-client duties.

Financial technology start-ups (fintechs) and financial innovation think tanks are driving the market's development and continuously bringing new challenges with them. The FMA operates a Fintech Navigator on its homepage, which is continuously updated and includes the option of contacting the regulator directly if the company does not already have a licence.

The replacement of the 'old' Payment Service Directive with the PSD2, not only increased transparency but also introduced the information requirement and led to a development of new and innovative payment systems. One of the prominent developments resulting from the shift is the use of third-party providers upon customer request, leading to two additional types of payment service providers, detailed below.

First, providers of payment initiation services (PIS), who are third-party providers, can initiate payments on behalf of customers. For customers, this means a great variety of secure payment options, allowing for a better customer service. However, customers are not the only ones who reap the benefits of this convenient alternative to conventional online payments by credit card. Online merchants also appreciate the option of PIS, as it is often cheaper than other payment services and its technical implementation is fairly easy.

Second, in comparison to PIS, providers of account information services (AIS) access information stored with account-keeping financial institutions on behalf of a customer. They analyse and consolidate customer and account data so that in turn they can be used for services from other banks and third-party providers. Popular services include multi-banking

5 The Federal Act on the Provision of Payment Services 2018 came into force on 13 January 2018 – implementing PSD2.

apps that use AIS to aggregate various online banking accounts under one user interface, or online credit platforms that conduct a real-time credit check based on an aggregated expenditure account and liquidity assessment.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

Banks must hold a banking licence under the Austrian Banking Act (BWG)[6] to administer funds or accept deposits (deposit business) and for the provision of non-cash payment transactions, clearing services and current-account services for other parties (current-account business). Most of the regulations are protective laws allowing the consumer – if a bank breaches its obligations – to claim damages from the bank.

ii Recent developments

In 2020, Austria officially onboarded the first Austrian bank to one of its digital deposit platforms, and since then several of Austria's well-known credit institutions have relied on this concept. Basically, open banking deposit platforms allow banks to offer attractive third-party deposit products to their own customers through their existing accounts. As a result, customers who desire a choice of deposit products are not forced to laboriously open additional accounts elsewhere anymore. The product bank – as far as requiring additional funding for strategic or regulatory aims – is able to access this deposit market without having to operate its own expensive retail infrastructure in each foreign country.

In February 2021, the European Banking Authority (EBA) issued an opinion regarding the removal of obstacles to open banking.[7] Its opinion, which is based on the EBA Regulation (Regulation (EU) 1093/2010), addresses national banking authorities directly, which is the FMA in Austria. Evidently, its key message is that national supervisory authorities should take action against payment service providers that still have obstacles in place that hinder the service of open banking.

V REVOLVING CREDIT

The decision to give credit to a consumer is at the sole discretion of the credit institution, which must comply with all its obligations under the VKrG (and HiKrG), and the general obligations under the KSchG, the FAGG and the general civil law rules. These regulations do not actually differentiate between revolving credits or instalment credits (hence, see the applicable provisions below). From an Austrian point of view, the use of revolving credits is only of little significance for consumers.

6 Implementing CRD.

7 EBA/Op/2021/02 (18 February 2021) 'Opinion of the European Banking Authority on supervisory actions to ensure the removal of obstacles to account access under PSD2'.

VI INSTALMENT CREDIT

i Overview

The most relevant law, the VKrG, applies to (non-property) loan agreements involving a total loan amount of a minimum €200 (there is no maximum limit) entered into by an entrepreneur as the lender on the one hand and a consumer as the borrower on the other hand; this also applies to instalment loans.

The VKrG contains, inter alia, certain pre-contractual information and audit obligations for the lender. In particular, Articles 3 to 10 CAFCD have been implemented by the VKrG almost identically into national law and must be complied with by the lender. Before the conclusion of the loan agreement, the lender must assess the consumer's creditworthiness on the basis of sufficient information, where appropriate, obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database.

The VKrG also contains a right of withdrawal for the consumer according to which the consumer shall have a period of 14 calendar days in which to withdraw from the loan agreement without giving any reason. The consumer is entitled at any time to terminate unlimited loan agreements free of charge whereby a period of notice is only permissible where it has been explicitly agreed and, if so, only up to one month. The consumer is entitled at any time to discharge fully or partially his or her obligations under a loan agreement whereby he or she shall be entitled to a reduction in the total cost of the loan, this reduction consisting of the interest and the costs for the remaining duration of the contract.

Even if not specifically stipulated in the VKrG, where the lender grants the consumer a loan that the borrower will not be able to repay (because he or she is financially too 'weak'), there may be a risk that enforcement over a certain amount will not be permissible; that rule nowadays becomes even more relevant owing to covid-19 and the connected uncertainty resulting from it.

ii Recent case law

In recent years, the topic of negative interest rates and banks' obligation to let borrowers benefit from them dominated the discussion of market participants. However, the Austrian Supreme Court has in the meantime developed a standard practice that with respect to 'old' loans, which have no limitations, wording or clauses on negative interest rates — negative interest rates must be passed on to the consumer (but capped at zero).[8] Nowadays, every variable rate arrangement contains such a zero-cap.

The European Court of Justice confirmed in one of its recent judgments that consumers have the right to withdrawal if any of the mandatory disclosures required to be provided in the credit agreement under the Consumer Credit Directive has neither been accurately included in the agreement nor properly communicated retroactively.[9]

iii Current developments

Over the last two years, the covid-19 outbreak has led to a sudden slowdown in consumer lending in Austria, with the pandemic significantly reducing appetite among consumers to take on debt. Declining incomes and rising uncertainty over economic prospects also negatively impacted demand for loans. In 2021, the situation has only looked slightly better

8 9 Ob 35/17p.

9 EuGH 9.9.2021 C-33/29, C-155/20, C-187/20.

and the growth in consumer loans has just been a gradual process. The reasons for this are continued low consumer confidence and a decline in the use of public guarantees for borrowing. In contrast to consumer loans, other loans to households, such as loans for home improvement, recorded growth.

VII OTHER AREAS

i Use of smart contracts

The use of smart contracts has been a topic of discussion in various areas of the finance sector. Smart contracts can be understood as digital computer programs that can automatically and independently (without human intervention) carry out processes if a specific event occurs. With the growing interest in sustainability and with the changing customer expectations for faster and easier processes, smart contracts could be a solution by providing these mechanisms to efficiently reduce costs and time.

The areas of application for smart contracts are widespread and include corporate finance, banking systems and the insurance sector. Also, in the credit sector, further developments in the use of smart contracts are to be expected. One relevant application could be found in the monitoring of conditions of interest and repayments for loan agreements.

ii Statutory limitation periods

The Austrian Supreme Court's practice with respect to statutory limitation periods and consequential damages in foreign currency loans should be noted. In summary, the Supreme Court holds that the moment when the borrower recognises (or has been in the position to recognise or should have recognised) that the loan is detrimental to the borrower's purpose, the statutory limitation period of three years for a damage claim commences. If the borrower is not in the position to claim an exact amount, the borrower must file a claim for a declaratory judgment. If the borrower waits until the damage has actually occurred but the court finds out that the borrower has known (or should have known) that the loan was detrimental for more than three years without filing a claim, the borrower's claim becomes time-barred, and – which is in many cases very important – the same applies to consequential damages resulting from foreign currency loans.[10]

iii Changing legislation

The year 2022 brings new legislation, some in respect to consumer protection.

The EU Regulation on European Crowdfunding Service Providers for Business (the ECSP Regulation) entered into force on 10 November 2020 and has been applicable since 10 November 2021. It allows crowdfunding service providers to offer crowdfunding services across the EU, thereby establishing a union-wide harmonisation. Member States had to designate an authority responsible, and in Austria the FMA has taken over the roles as supervisor. Two of the instruments included in the ECSP Regulation are loans and transferable securities within the meaning of MiFID II.

The Directive on representative actions for the protection of consumers' collective interests (Directive (EU) 2020/1828) entered into force on 24 December 2020, repealing the Injunctions Directive of 2009 (Directive (EU) 2009/22/EC). The Directive must be

10 10 Ob 51/16x.

transposed into national law by 25 December 2022 and its provisions must be applied as of 25 June 2023. For consumers, this change should mean that any obstacles regarding the access to legal protection should be removed, or at least diminished, and consumers should also have the possibility to obtain compensation for damages suffered.

The recently adopted Warranty Directive Implementation Act (GRUG), implements the provisions of the Sale of Goods Directive (EU) 2019/771 and the Digital Content Directive (EU) 2019/770 and applies to all contracts entered into as from 1 January 2022. The new warranty law has been implemented in the new Consumer Warranty Act (VGG) and has led to amendments of the Austrian Civil Code and the KSchG. The new VGG will apply to agreements conducted between consumers and businesses relating to, in particular, (1) contracts for the purchase of goods (tangible property) and (2) contracts for the provision of digital services. It also includes several amendments, including the right to amend contracts, withdrawals from contracts and warranties.

VIII UNFAIR PRACTICES

Over the years the Austrian Supreme Court and inferior courts have dealt with many claims challenging general terms and conditions clauses with respect to unfair and non-transparent practice. As the Supreme Court has implemented a very strict standard with respect to transparency, many of the clauses used by banks have been found invalid, especially under the KSchG. In general, the transparency requirement is intended to allow customers to be informed about their rights and obligations in an understandable manner. As such, the general terms and conditions ought to state provisions as transparently as possible and be modified based on the type of the contract.

Especially regarding terms and conditions of banks and credit institutes, there has been an increased interest in the correct application of provisions regarding transparency, also owing to the involvement of the VKI. The following cases are noteworthy: (1) a case in which the court held that the consumer must be able to calculate or to understand the calculation of adjustments of the applicable interest rate to the loan – the court of appeal confirmed the court's decision that clauses that do not meet these criteria are not transparent and consequently invalid;[11] and (2) a case in which the court held that the consumer must have precise information on potential cost with respect to a loan and its securitisation – the Supreme Court confirmed the court's view that unclear provisions are invalid[12] and that unspecified debt collection costs that – in the worst case – might lead to unjustified cost transfers to consumers are also invalid.[13]

In general, many cases dealt with the following aspects:

a interest calculation including the lack of transparency of calculation methods, leading in most cases to the invalidity of clauses, which the courts hold should be transparent and understandable; and

b shifting of cost to consumers and extending the term 'cost' to fees and expenses that might be generated in connection with a business relationship, whether or not the consumer has caused this cost, leading in most cases to the invalidity of such clauses as the courts would like costs to be proportionate.

11 57 Cg 14/16h.

12 6 Ob 17/16t.

13 43 Cg 8/16y.

The Austrian courts have also decided cases where banks had new clauses implemented in their general terms and conditions that resulted in detrimental provisions for the consumer as to fees or other provisions, leading in most cases to the invalidity of such clauses, as the Austrian courts only recognise balanced new clauses for agreements with respect to consumers.

A slightly surprising turn regarding transparency clauses has been brought forward by the European Court of Justice in one of its recent judgments. The question on the admissibility of tacit consent clause has been a topic of discussion for many years (especially since the decision of the Austrian Supreme Court that found a generally used tacit consent clause to be void due to gross discrimination and non-transparency).[14] Now the European Court of Justice has decided that tacit consent clauses, which meet all essential requirement for the protection of consumers are permissible within the scope of ZaDig and the PSD2.[15] Therefore, they are not to be assessed as grossly disadvantageous or non-transparent under Austrian national law. In summary, tacit consent clauses that regulate the procedure for a contract amendment, and that meet all the requirements for consumer protection, are permissible.

IX RECENT CASES

i Enforcement actions

The FMA is not obliged to publish its sanctions, but it will do so in certain situations where publishing is justified for reasons of investor protection. The following descriptions are based on the sanctions made public on the FMA's homepage but should not be seen as representative of the FMA's focus. The FMA regularly imposes sanctions against:

a non-authorised entities providing licensable banking, payment or investment services or activities to Austrian investors, especially consumers;

b an authorised credit institution not fulfilling the credit institution's obligations to its creditors, in particular for the safeguarding of assets that have been entrusted to it; and

c private investors breaching the ban on market manipulation or providing a public offering without publishing a prospectus.

Relating to infringements by authorised entities (such as licensed credit institutions), the FMA in certain cases does not impose administrative fines, but instead orders the entity to stop operation or to change its management board, or both, holding that certain directors are no longer fit and proper. Those actions are not made public according to current law but are one of the regulator's most powerful tools.

ii Disputes settled before the regulator

A dispute between a consumer and a bank may lead to an administrative fine for the bank or the bank's management, but the regulator will not settle the dispute between the consumer and the bank. Individual consumer protection cannot be derived from Austrian regulatory provisions and disputes cannot be settled before the FMA, but consumers can protect their rights before the competent Austrian courts.

As there is no standing practice in Austria with respect to the public disclosure of alternative dispute resolution, neither the Joint Alternative Dispute Resolution Institution

14 1 Ob 210/12g.

15 ECJ 11.11.2020, C-287/19.

of the Austrian Credit Institution Sector nor the Alternative Dispute Resolution Institution for Consumer Deals has published any relevant cases with respect to consumer finance issues. In most cases publication would not be expected, as from a bank's point of view the confidentiality of out-of-court settlement prevails; while, from a consumer's perspective, there seems to be no interest in publication because the consumer will have already benefited from the alternative dispute resolution (as the consumer's claim is likely to have been fulfilled).

Austria is 'overbanked', meaning that many banks are competing for a limited number of wealthy clients, which could be interpreted as a very consumer-friendly environment where consumer expectations and claims are more often satisfied than denied.

iii Litigation

One of the most important cases for the protection of consumers (apart from the above-mentioned negative interest decisions by the Austrian Supreme Court) has been decided before the European Court of Justice.[16] In this case, a major bank operating in Austria was offering contracts for internet e-banking to its customers and providing payment services. As part of the general terms in its e-banking contracts, it included a term under which 'notices of changes' were communicated to the customer through the internal mailbox of the bank's internet e-banking system. The bank created a mailbox for every customer in its e-banking system. Customers could access their personal mailbox by logging in with their personal password through the e-banking website. Electronic messages were then transmitted by the bank to that mailbox. There was no supplementary communication, for example, through a message sent to the personal private email of the client informing him or her that a message had been sent to the corresponding e-banking mailbox. The VKI considered that the term and the described set-up did not comply with the duty of providing information in a 'durable medium' set out in Directive 2007/64.

Following the request for a preliminary ruling of the Austrian Supreme Court, the key question for the European Court of Justice was whether electronic information transmitted by the bank to its customer into the respective e-banking mailbox of the customer as described above was provided on a durable medium.

In its ruling, the European Court of Justice established the following two conditions that must be fulfilled for such a system to provide information in a durable medium: (1) 'that that website allows the user to store information addressed to him personally in such a way that he may access it and reproduce it unchanged for an adequate period, without any unilateral alteration of its content by that service provider or by another professional being possible'; and (2) 'if the payment service user is obliged to consult that website in order to become aware of that information, the transmission of that information must be accompanied by active behaviour on the part of the provider aimed at drawing the user's attention to the existence and availability of that information on that website'.

In summary, this decision led to the result that the e-banking solutions have been (heavily) 'renovated' to include some sort of notification (such as email) for customers regarding messages in their e-banking mailbox.

Another local important case[17] dealt with a bank that calculated the cost for reminder fees in cases of late payment without reference to cause or other limitation as 5 per cent on top of the other interest plus additional reminder fees. The court held that unlimited fees

16 C375/15.

17 4R 129/15t.

– without linking them to the consumer's fault or other circumstances – breach Austrian mandatory law, which provides that only the necessary cost for out-of-court expenses can be recovered, and the costs in this case were extremely detrimental and invalid as there was no balanced relation between the listed reminder fees and the actual delayed payment or enforced claim.

Throughout the last year, the Austrian Supreme Court has ruled over various questions regarding general terms and conditions of banks and financial institutions and has therewith offered valuable guidance on the practical use of these terms. For example, the Austrian Supreme Court deals with complaints concerning inadmissible disclosure obligations, clauses on interest and contractual provisions on the liability of customers in cases of abuse.[18] In one of its recent cases, the Austrian Supreme Court clarified that it is not called upon in any case to interpret general terms and conditions clauses, but only if the second instance disregarded principles of Supreme Court jurisprudence or if questions of importance for the unity and development of the law had to be resolved.[19] Accordingly, a decision in an individual case is only reviewable by the Supreme Court if a gross error in the interpretation of the applicable legal norm has to be corrected.

X OUTLOOK

It is without a doubt that the covid-19 pandemic has led to high levels of uncertainty and has had an overall negative impact on the economy. We have seen a small improvement in consumer lending compared to 2021; however, the chances of reaching pre-covid-19 levels in terms of financial certainty and economic improvements in the near future are slim. With all the negative outcomes, we should not forget that the pandemic has also brought enhancements and developments, especially in the digitalisation of the financial sector. The concept of open banking has certainly benefited from the restrictive movement of people during the pandemic, and the development of cryptocurrencies and the digitalisation of banking have flourished over time.

In general, it is very likely that digitalisation is unstoppable (in all areas) and will continue to drive the market and gain more and more popularity among all 'players'. Ultimately, digitalisation will revolutionise the classic 'old-school' banking business in Austria, and this development will not and cannot be stopped by any regulator. The introduction of several new regulations during the upcoming year will lead to some changes in the protection of consumers. Overall, regulators, in particular the FMA, will continue to focus on this area to ensure proper supervisory mechanisms are in place regarding new technologies. This becomes, in particular, evident in relation to virtual currencies, where regulators do all in their power to ensure the application of various supervisory laws (even where the interpretation of various regulatory laws is clearly wrong under a purely formal view).[20] Undeniably, supervisory authorities want to regulate any and all development in the fintech sector, regardless of whether the financial market rules are fitting to the relevant fintech service or activity.

18 For example 8 Ob 106/20a.

19 8 OB 94/21p.

20 We expect that affected market participants no longer will accept that situation and that in the near future case law – which will tip over clearly misguided regulator interpretation of various regulatory laws – will exist.

Appendix 1

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ISBN 978-1-83862-385-2