



OMBUDSMAN'S
REPORT
2019

AUTORITÉ
DES MARCHÉS FINANCIERS

AMF



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The Ombudsman's editorial



"In the unprecedented circumstances brought about by Covid-19, the AMF Ombudsman's Office has taken steps to ensure that its work can continue despite the health crisis, with its entire team working from home since 16 March 2020."

29 April 2020

■ The fact that European stock exchanges jumped 26% (EuroSTOXX50 index), posting their best performance since 1999, is certainly a factor in the 11% drop in the number of mediation cases received in 2019 (1,295 against 1,438). It is not surprising, therefore, that complaints relating to poor information and advice now represent only a quarter of requests instead of around a third.

■ However, a series of other equally positive reasons also contributed to this.

■ **First, the new computerised screening system introduced from spring 2018 for retail investors using the form on the AMF website has proved successful:** requests that are inadmissible based on the answers to the questions asked are screened out before being recorded as a request in our system. Inadmissible requests from retail investors are redirected but are no longer counted as requests received. Unfortunately, the vast majority of requests (73%) are still received by post rather than via the online form, and the number of inadmissible cases received by post has doubled.

■ Second, if we look at the requests received by business sector, it can only be good news that there has been a sharp decline in the number of requests received relating to unauthorised companies offering investments in Forex, the notorious currency speculation that

is so dangerous for retail investors. This is clearly the result of measures taken by the European Securities Markets Authority (ESMA) to prohibit the marketing of binary options to consumers and of very strict regulation, which has in particular reduced the leverage of contracts for difference (CFDs). These measures amplified the effect of the ban on advertising in this sector imposed by the AMF the previous year. In 2019, the AMF also decided to make the temporary measures taken at the European level permanent.

■ However, financial scams did not disappear; instead, they shifted. After false diamond investments in 2018, many scammers switched to Bitcoin in 2019. Faced with fraudulent platforms that are increasingly impersonate authorised companies, the Ombudsman can only declare scam-related cases inadmissible for processing once the actions have been identified as a criminal offence. All that remains is the possible question of verifying the enhanced due diligence of banking institutions during debit and credit transfers, if the conditions are met.

■ **This decrease in the number of requests has inevitably led to a decrease in the number of opinions issued by the Ombudsman:** 451 compared with 523 in 2018. It is worth noting that the percentage of opinions unfavourable to applicants increased to 59% (from 55% in 2018).

■ What should we think about this? In the main area of employee savings schemes (more than a third of the requests processed), the policy of establishing a constructive relationship with the two main retail account-keepers has helped to improve the information provided to retail investors, which is easier to understand and available on the internet. More often than

before, it is with regard to fairness and not the law that I have had to become involved with account-keeping institutions, to obtain an early release of the assets, i.e. by pointing out the applicant's difficult financial circumstances rather than a deficiency of the account-keeper. Where appropriate and on a case-by-case

basis, I may request support from the French General Labour Directorate. At the same time, through a series of more general recommendations, in 2019 the AMF Ombudsman's Office also contributed to the project to overhaul the official Employee Savings Guide, which is due to be published in 2020.



WHO IS THE AMF OMBUDSMAN?

The AMF Ombudsman is Marielle Cohen-Branche. She was first named AMF Ombudsman on 16 November 2011. Her appointment has since been renewed, most recently for a further three years on 12 November 2018.

In accordance with new consumer mediation rules, the AMF Ombudsman was registered with the CECMC (the French Commission for the Evaluation and Monitoring of Consumer Mediation) as the AMF's public Ombudsman on 13 January 2016.

Ms Cohen-Branche spent eight years as a judge on special assignment to the Court of Cassation with responsibility for banking and financial law (2003-2011). At the same time, she was also:

- a member of the AMF Enforcement Committee;
- a member of the Banking Mediation Committee chaired by the Governor of the Banque de France, responsible for supervising the independence of banking Ombudsmen (2003-2012);
- a member of the World Bank Sanctions Board responsible for anti-corruption (2007-2013).

Formerly, she worked as a legal expert in banking for 25 years. Since 15 October 2013, in parallel with her duties as AMF Ombudsman, Ms Cohen-Branche has been a member of the International World Bank Administrative Tribunal. Her five-year team was renewed in November 2019, when she also became its Vice Chairman.

She is an *Officier de la Légion d'honneur* and an *Officier de l'Ordre national du mérite*.

As Ombudsman, she relies on a team of five legal experts who work exclusively for her. This team is led by François Denis du Péage, Deputy Ombudsman in the AMF's Retail Investor Relations and Protection Directorate.

▣ **What remains stable in terms of statistics, and what is most important to me, is the follow-up rate on the opinion proposals issued.** Only 4% of unfavourable opinions were disputed by investors. Opinions favourable to investors were not followed by 4% of the parties (2% by firms and 2% by investors when the opinion was partially favourable).

▣ **In 2019, more than 250 financial institutions and practitioners were invited to enter into mediation.** I thought it would be useful to take this opportunity to remind everyone of how an investigation is conducted during mediation. For the first time, this Ombudsman's Annual Report will name the firm that abruptly and systematically refused to enter into mediation. Confidentiality, pursuant to Article 1531 of the Code of Civil Procedure, protects only those parties who have agreed to enter into mediation in an attempt to resolve disputes amicably. It is of course always possible for a firm to refuse to enter into mediation from time to time. However, a policy of systematically refusing to enter into mediation is not covered by this confidentiality.

▣ **The general recommendations, to which I also remain committed as a result of the AMF's very productive collaboration with the AMF's Retail Investor Relations and Protection Directorate (DREP) headed by Claire Castanet, have led to real progress through the PACTE Law,** whether in the case of PEAs, concerning shares in companies in administration, or in the case of employee savings schemes, where the early release of retirement savings arising from the default investment is now possible within a month of notification. This progress will be presented more fully in this 2019 report.

▣ Beyond these general recommendations, I am pleased to see that visits to the Ombudsman's *Online Diary*, which each month anonymously analyses a mediation case selected on the basis that it offers the broadest possible lessons learned, continue to grow steadily year after year (up 8% in 2019). It is also encouraging to be told that these monthly cases are building into a "corpus of AMF Ombudsman policy" that both major financial institutions and retail investor publications claim to follow and consider.

▣ More often than not, financial instruments continue to be a very complex area, and the work of the entire team of legal experts led by François Denis du Péage, my deputy, is absolutely essential to unravel the tangle of obligations of the various parties. This complexity sometimes even leads to a long chain of actors who sometimes require even more time because there is currently no legal time limit in our country for a firm to respond to a consumer ombudsman.

▣ This year, I thought it would be useful to examine PEA issues in greater depth, especially in light of the significant parallel changes that the legislator made to its major rules in the 2019 PACTE Law. In addition, another study also focuses on complex, highly speculative products such as warrants, turbos and certificates issued by banks.

▣ Lastly, I cannot end this editorial without mentioning that the CECMC (the French Commission for the Evaluation and Monitoring of Consumer Mediation) is now chaired, since March 2019, by a State Councillor, Marc El Nouchi, and vice-chaired by a Justice of the Court of Cassation, Edith Sudre. At a time when various forms of amicable mediation are constantly developing, sometimes in disparate ways, it is important to highlight that, following the transposition into French law of a European Directive, consumer ombudsmen are the only ombudsmen who are available free of charge to consumers, are required to publish an annual report to justify their results and are regulated with regard to their appointment and processes. It is because of this type of legal mechanism, intended to instil confidence in all parties, that the process of amicable dispute resolution is almost guaranteed to be successful.

Paris, 3 February 2020
Marielle Cohen-Branche

2019 Key Figures

■ In 2019, the Ombudsman's Office recorded a decrease in the number of requests received: 1,295 compared with 1,438 in 2018 (-11%). However, this decrease was less marked (-6%) for requests received in the Ombudsman's jurisdiction: 762 requests compared with 813 in 2018. The Ombudsman's Office therefore received a smaller proportion of requests that fell outside its jurisdiction. This downward trend can be attributed to the implementation of screening in 2018, which asks a series of questions for requests submitted using the online form. Since its introduction, the number of cases outside the AMF Ombudsman's jurisdiction received through this channel has fallen from 46% in 2017 to 27% in 2018 and 22% in 2019.

■ If this trend is to continue, investors should make greater use of the form available on the AMF website for referring cases to the Ombudsman's Office. This referral channel accounts for only 27% of requests received. Unfortunately, the vast majority of retail investors continue to refer cases to the Ombudsman's Office by post (73%), and these percentages do not change significantly from one year to the next.



Deputy Ombudsman

■ The fact remains that analysis of the responses to users of the form show that only 11% of visitors declare that they have met the various admissibility requirements and that only 50% of these potential applicants actually send the form and therefore take action.

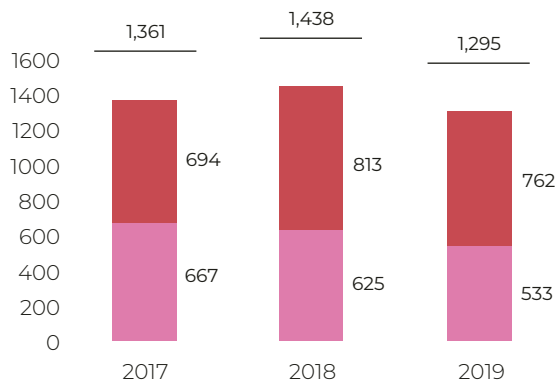
■ The admissibility of cases is examined as soon as they arrive. Some can then be closed for various reasons: absence of prior complaint, late requests (where the complaint is made over a year ago), requests referred to another Ombudsman (a case cannot be referred to two Ombudsmen at the same time or as a result of the same dispute), legal proceedings (legal action has been taken), a request that is a consultation or an alert and not a mediation request, and requests that cannot be processed.

■ In total, the number of cases processed and closed in 2019 was 1,322, compared with 1,406 in 2018 (-6%). Each year, the difference between the number of cases received and the number of cases processed and closed is reflected in the change in the backlog of open cases at the beginning and end of the year. As at 31 December 2019, the backlog of open cases was 298 compared with 323 a year earlier (-8%).

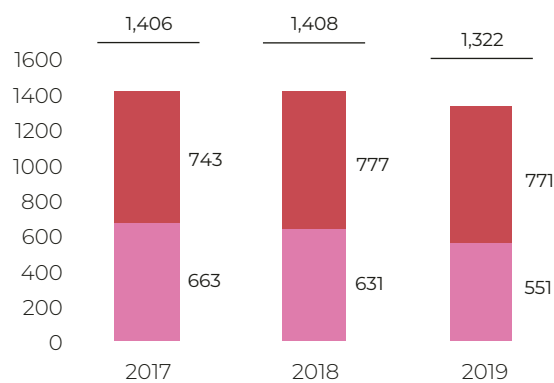
■ Cases received outside the Ombudsman's jurisdiction are quickly redirected to the appropriate Ombudsman. Of the 551 cases processed and closed outside the Ombudsman's jurisdiction in 2019 (compared with 631 in 2018), 372 were from the banking sector, representing, as every year, almost two thirds of these cases.

■ It is actually very difficult for retail investors to distinguish between bank investments (regulated savings and fixed-term accounts), insurance investments (euro-denominated or unit-linked life insurance policies) and financial investments (stock market, OPCs, tracker, SCPIs, FCPIs, PEAs, etc.). Similarly, a distinction should be drawn between services linked to execution orders, financial advice, custody account-keeping (with cost

GRAPH 1.
Number of cases received

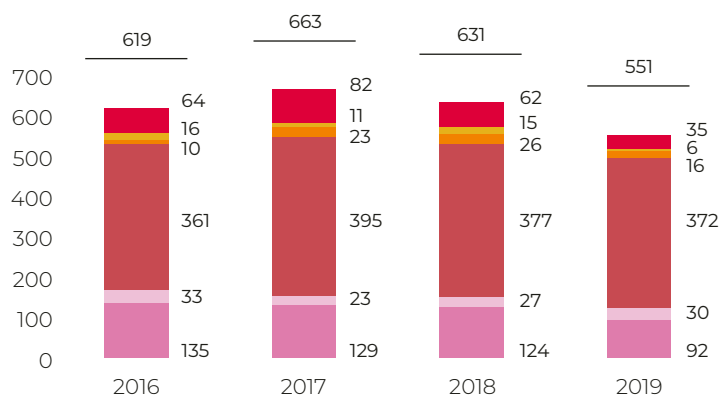


GRAPH 2.
Number of cases processed



■ Outside the Ombudsman's jurisdiction
■ Within the Ombudsman's jurisdiction

GRAPH 3.
Details of lack of jurisdiction processed



■ Insurance ■ Banking ■ Geographical
■ Other ■ Tax ■ Criminal

price calculation) and account transfers, which are covered by the AMF Ombudsman, and tax calculations linked to securities account-keeping, tax interpretations of financial transactions, disputes over bank fees, etc., which are not covered by the AMF Ombudsman.

■ The fact remains that financial institutions are required to inform their customers as clearly as possible about the relevant consumer ombudsmen.

■ For cases outside the Ombudsman's jurisdiction where the dispute relates to a criminal offence, there can be no mediation. The case is then sent to the Public Prosecutor (35 cases in 2019). Of these, 17 complaints concerned crypto-asset fraud.

■ In 2019, 771 cases were processed and closed within the AMF Ombudsman's jurisdiction (777 in 2018). Of these cases, 320 of which have not yet resulted in an opinion proposal, the following should be noted in particular:

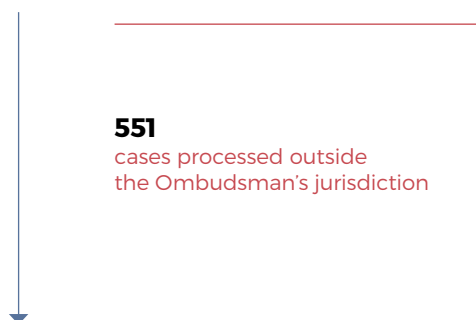
- 194 cases were closed because they were referred prematurely, since the retail investor provided no proof that a prior claim had been rejected or gone without a response for at least two months;
- 9 cases were closed because they could not be processed;
- 3 because they were subject to legal proceedings incompatible with mediation, which is an amicable process;
- 12 because the case had also been submitted to another Ombudsman;
- 3 as late requests where the prior complaint was dated more than a year before, which is no longer admissible since the transposition into French law of the European directive on mediation;
- 11 cases had to be reclassified as alerts, as they sought to expose a practice without claiming compensation. Once reclassified as alerts, these cases are forwarded to the relevant AMF staff for monitoring;
- 12 cases had to be reclassified as consultations, as they involved questions for the Ombudsman but no dispute was referred;
- 39 cases were closed because they were abandoned, as permitted under the charter, either because the dispute was settled after the referral was received, or because the retail investor did not provide the evidence necessary to continue processing the case;
- 27 cases involved firms who rejected the mediation procedure, compared with 16 in 2018. There is a box on page 20 on the loss of confidentiality that accompanies the firm's right not to enter into mediation from time to time.



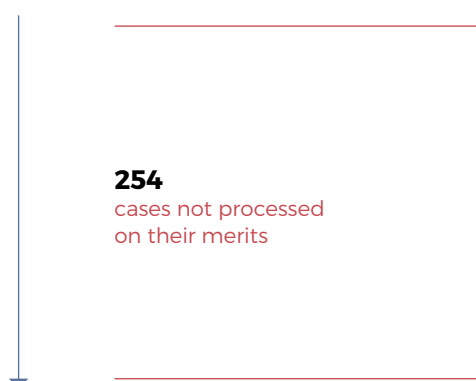
The questions asked of retail investors on the AMF website as part of the mediation request form, supported by specific examples, are as follows: what is the nature of your dispute (banking, life insurance, tax, credit or financial)? Has your dispute been reviewed by another ombudsman? By a court? Have you filed a complaint? Have you submitted a prior written complaint to the relevant institution? On which date?

GRAPH 4.

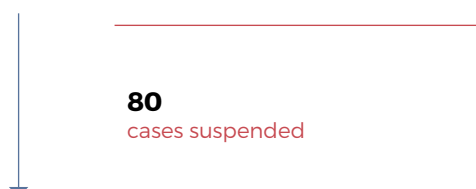
Reasons for closing the 1,322 cases processed in 2019 compared with 2018

1,322 -6% on 2018 (1,408)**cases processed in 2019**

Lack of jurisdiction type	Number of lack of jurisdiction cases processed
Banking	372
Life Insurance	92
Criminal	35
Geographical	6
Tax	16
Other	30

771 -1% on 2018 (777)**cases processed outside the Ombudsman's jurisdiction in 2019**

Reasons for closing	Number of cases closed
Premature request	194
Request reclassified as consultation	12
Request reclassified as alert	11
Late request	3
Legal proceedings	3
Submitted to another Ombudsman	12
Not able to be processed	9
Other	10

517 -14% on 2018 (603)**mediation procedures initiated in 2019**

Reasons for closing	Number of cases closed
Abandoned by the applicant	39
Mediation procedures rejected or abandoned by the firm	27

451 -14% on 2018 (523)**opinions issued in 2019**

■ In total, 451 cases were subject to an opinion proposal in 2019, compared with 523 in 2018.

■ Those 451 opinion proposals, also referred to as Ombudsman's recommendations, were favourable to the applicant in 183 cases (i.e. 41%) and unfavourable to the applicant in 268 cases (i.e. 59%). It is noted that a high rate of favourable recommendations cannot be an objective in itself, since the nature of the recommendation depends on the intrinsic characteristics of the case, i.e. on the merits of the request.

■ The level of compliance with the Ombudsman's recommendations can be expressed in two ways: firstly, 97% of proposals, when they are favourable to retail investors, were followed by both parties; and secondly, only 4% of recommendations unfavourable to retail investors were appealed by them. This results in an overall compliance rate of 96%. These percentages are again good, as every year. They mean that, for most cases submitted, retail investors have found mediation to be a way of resolving their disputes without resorting to the courts. It should be noted that in the event of persistent disagreement, retail investors always have the possibility of bringing their dispute before the courts. They are systematically reminded of this, as required by regulations (Article R. 612-4 of the French Consumer Code).



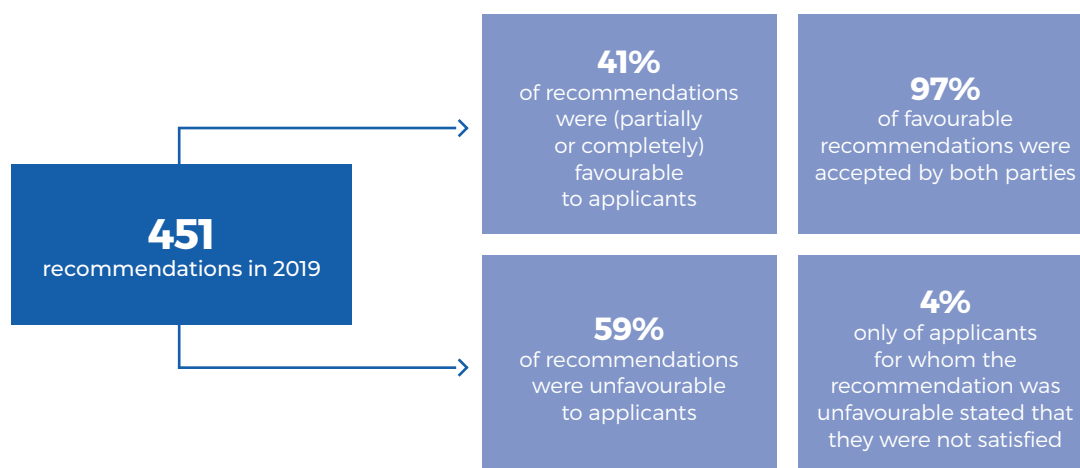
Ombudsman's Office trainee
legal expert



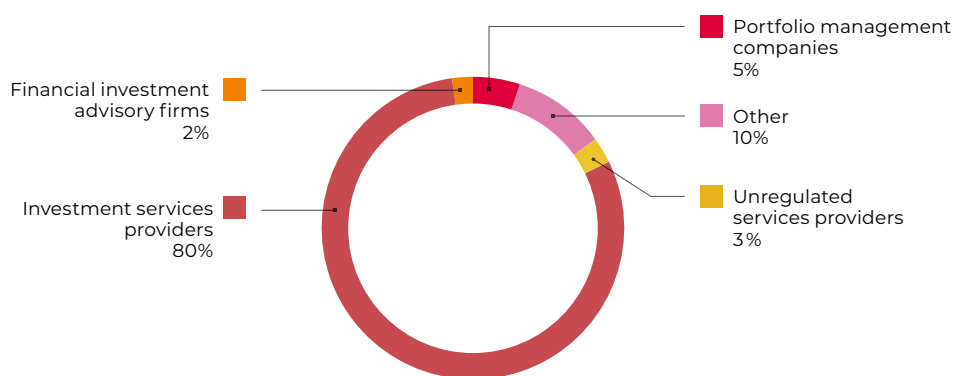
**IN 2019, CASES PROCESSED
AND CLOSED CONCERNED
250 DIFFERENT INSTITUTIONS
(308 IN 2018):**

investment services providers, financial investment advisers, market undertakings, unregulated service providers, listed companies and portfolio management companies. The vast majority of cases (80%) were related to investment services providers.

GRAPH 5.
Breakdown and acceptance of opinions issued in 2019



GRAPH 5.
Breakdown of financial institutions involved in mediation in 2019



Mediation topics

■ A topic-based classification system has been developed according to the type of complaint encountered:

- poor execution;
- poor information or advice; mismanagement;
- issuer complaints;
- others.

■ In 2019, the top two categories of complaints represented 89% of mediation cases processed. Mismanagement accounted for only 5%.

■ Each year, the topics addressed differ widely, as illustrated by the *Ombudsman's Online Diary*, which is published monthly on the AMF website (see page 45).

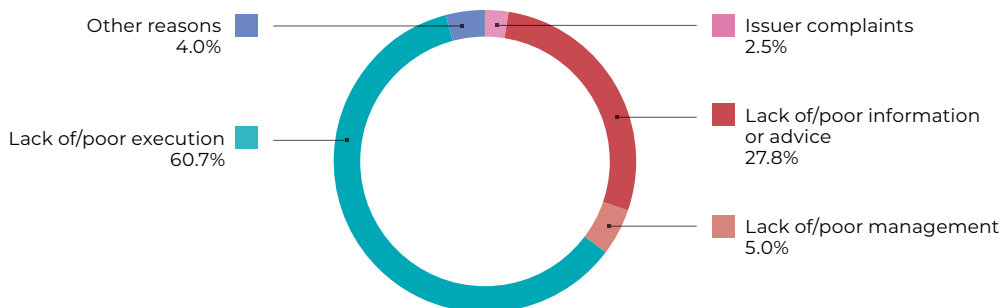
■ In addition to recurrent disputes, the Ombudsman noted three significant trends in 2019:

- cases linked to Forex speculation by individuals decreased significantly again and represented only 1% of cases (6% in 2018);
- there are still a significant number of cases related to employee savings schemes;
- there is a trend towards an increase in the number of cases related to PEAs (Equity Savings Plans).

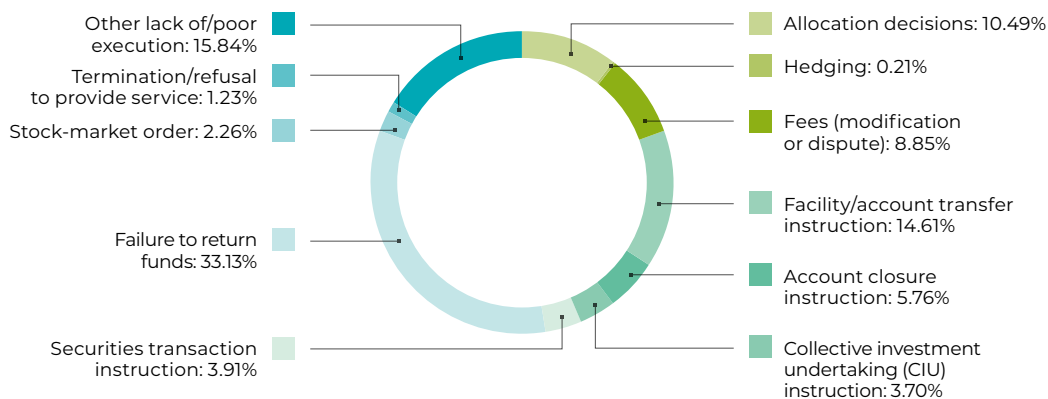
■ As every year, the Ombudsman also receives cases dealing with shares, bonds, company shares and warrants (BSAs) held directly and through collective investment products. It should also be noted that there are cases involving certificates, warrants and turbos, which are speculative products with very specific problems concerning issuers, clearing members and account-keepers, which are examined by the Ombudsman and are discussed in part of this Annual Report.



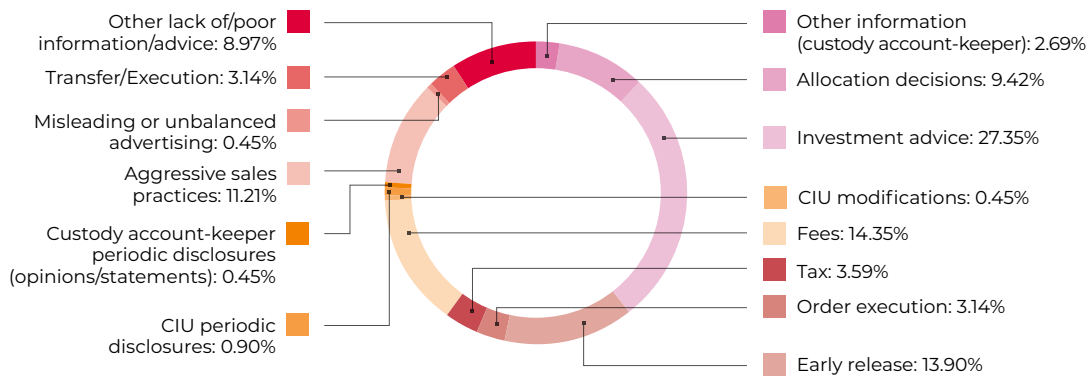
GRAPH 7.
% cases by reason for the complaint



GRAPH 8.
Cases closed due to poor execution



GRAPH 9.
Cases closed due to inadequate information or advice



Investigating a mediation case

Mediation process

■ The AMF's mediation process consists of several stages.

■ A case is created as soon as the complainant contacts the Ombudsman's Office.

■ In accordance with Article L. 612-2 of the French Consumer Code, the case may not be admissible for various reasons:

- the dispute does not fall within the Ombudsman's jurisdiction;
- no prior complaint has been made to the firm concerned;
- the case has been referred to another ombudsman;
- legal proceedings have been commenced;
- the prior complaint is too old (made more than a year ago);
- the request is not a mediation request but an alert or a consultation;
- the request cannot be processed.

■ The case must be declared inadmissible within 21 days.

■ If the case is admissible, and unless the Ombudsman is able to give her opinion based only on the attachments to the complainant's request, which is rare, an examination of the case requires that the Office send a written questionnaire to the financial institution to obtain its comments and supporting documentation and that it requests clarification or additional information from the complainant.

■ Financial institutions are invited to answer the Ombudsman's request for comments within 30 days. However, there is no legislation requiring them to do so. It is sometimes necessary to chase up an institution several times or to send the questionnaire again before obtaining a full response, accompanied by the relevant supporting documents enabling the Ombudsman to make a recommendation based on a complete case file.



Ombudsman's Office legal expert

■ If a response is not forthcoming after two reminders, as occurred with 27 cases in 2019 (5% of cases opened on their merits), half of which were FIAs and the investment management company Nestadio, the Ombudsman considers that the firm is refusing to enter into mediation, which is its right. However, the Ombudsman also reminds the firm that its refusal is not covered by confidentiality because mediation has not yet been able to begin due to a lack of agreement between the two parties.

What makes a case complex and what are the implications?

■ Requests submitted to the Ombudsman, which cover the AMF's entire jurisdiction, are diverse and relate to an extremely broad and generally complex field. In addition to this very broad scope, complexity varies from case to case. Complexity, which remains the determining factor in investigating a mediation case, is assessed according to various criteria that can sometimes be combined.

■ Complexity may also lie in the fact that a case raises a technical or even entirely new issue. While some of the problems encountered in mediation are recurring – and are therefore well known and dealt with without any particular intrinsic difficulty – a case may involve unique aspects and therefore require further in-depth research in order to fully understand the dispute and better identify the issues it raises.

■ A case can also be complex because it involves several parties. This increases not only the number of requests sent to the various firms involved, but also the time required to examine the answers provided to these requests and, in some cases, to analyse the chain of responsibility of each of the parties involved. This situation, as perfectly illustrated by the cases relating to the early delisting of certificates (see page 19), obviously has an impact on the length of time it takes to investigate the case.

■ Sometimes, certain requests require the Ombudsman to go beyond a "traditional" investigation of a case by collecting and comparing the written observations of both parties and analysing them from the perspective of law and fairness.

■ The Ombudsman, in order to support her analysis, may invite, for informational purposes, third parties to participate in the mediation process while ensuring that it remains confidential. Most of the time in these cases, this information is invaluable in reaching a solution; at the very least, it improves the overall understanding of the case.

"Sometimes, certain requests require the Ombudsman to go beyond a 'traditional' investigation."

■ This was the situation in the case where an applicant, a holder of turbo calls that he wanted to sell, argued that there was a lack of activity in the market concerned until the turbos were deactivated. The applicant considered that he had been the victim of a computer malfunction suffered by the issuer of the turbos concerned, which had deprived him of the option to sell his securities before they were deactivated, and he asked the Ombudsman to intervene.

■ In this case, the first step was to talk to the issuer, which indicated that it had indeed suffered a computer malfunction on that day and that it had set up a procedure that same day for its clients to request a gesture of goodwill by post, email or phone.

■ The issuer stressed that the applicant had not taken advantage of this procedure but that his request was still admissible subject to the provision of certain supporting documents, in particular proof of the client's willingness to sell his certificates (screenshot, confirmation of the sell order, etc.).

■ The complainant who was asked to provide the supporting documents indicated that he did not have a written document, but that on the day of the computer malfunction, he had called his financial intermediary's call centre. The Ombudsman immediately contacted the intermediary concerned, a third party to the mediation, to ask them to send her the recorded phone conversation, which they did without any problem. Having listened to the phone conversation, it was obvious to the Ombudsman that the applicant intended to sell. This information was therefore passed on to the issuer, which agreed to pay the applicant a gesture of goodwill equivalent to the difference between the residual value of the product at the time of its deactivation and the level of his limit order, i.e. €450.

■ In most cases where the dispute between the applicant and their financial intermediary concerns a stock market transaction, the Ombudsman may have to consult Euronext Paris directly to obtain information that only it holds in its capacity as a market operator.

■ In another case, the applicant challenged the cancellation of a sell order executed at a price that was particularly favourable to him.

■ After careful examination, it appeared that the order had been executed at a price 36 times higher than the limit set by the applicant, which explained not only why the transaction could be cancelled – because it was executed at an aberrant price – but also why the applicant strongly contested this cancellation.

■ When questioned by the Ombudsman, the market operator was able to provide proof that it had not cancelled the trade at issue in the dispute¹, as the applicant had assumed. No trade corresponding to the characteristics of the applicant's order had been recorded on that day. The Ombudsman then referred the matter to the client's account-keeper, who told her that a computer malfunction had in fact had an impact on the order in question and resulted in a bogus execution.

“In cases where the dispute between the applicant and their financial intermediary concerns a stock market transaction, the Ombudsman may have to consult Euronext Paris directly.”

¹ - On this specific subject, see the October 2017 Case of the Month: Stock market order executed at an “aberrant price”: Euronext can cancel the transaction in exceptional cases.

■ However, while the computer malfunction was regrettable, the Ombudsman did not find any loss was caused as a result since, had this incident not occurred, the client's order would not have been executed anyway, as the limit set had not been reached on that day. The Ombudsman also advised the applicant that, having set a limit consistent with the market trend, the applicant could not disregard the aberrant nature of his order executed at a price more than 36 times higher.

■ In other instances, investigating the case requires the Ombudsman's Office legal experts to listen to recordings of phone conversations, most often of calls made by the applicant to the customer service department of the institution implicated in the case. The Ombudsman cannot, of course, settle for a simple "they told me that...". Listening to these calls is therefore essential to determine the truth about what was said.

■ For example, in a case concerning an application for the early release of assets from an employee savings scheme on the grounds of acquiring a main residence to be bought off plan (known in France as "VEFA: *Vente en l'État Futur d'achèvement*"), a retail investor referred the matter to the Ombudsman because he disputed the sum of money released to him, which did not meet his expectations. The institution informed the Ombudsman that the sum released corresponded to the assets available on the date of the supporting documentation provided by the investor, i.e. the reservation contract for the VEFA. However, the investor thought that he would receive the value of the assets available in his employee savings scheme on the day the sale was signed and claimed that he had not been duly informed about this aspect. In order to prove his claim, the applicant mentioned that phone conversations had taken place between him and the account-keeper's customer service department. The Ombudsman therefore requested the recordings of these phone conversations. The recordings established that the account-keeper had fully complied with its information obligations in respect of the investor, had not at any time misled him regarding the supporting documentation required and had informed him that only assets available at the date of that supporting documentation would be released.

■ Lastly, in some cases, the solution recommended by the Ombudsman is the result of a comparative analysis of the practices of other financial institutions that is carried out while investigating the case.



“In other instances, investigating the case requires the Ombudsman's Office legal experts to listen to recordings of phone conversations.”

An example of complexity: processing cases relating to warrants and certificates

■ For several years – and 2019 was no exception – the Ombudsman has received regular requests for mediation relating to warrants and certificates. These are highly speculative leveraged products reserved for very sophisticated clients. These cases, which are often very complex, raise a wide variety of issues.

■ It is important to provide an overview of the issues that can be referred to the Ombudsman in cases where the product in dispute is a warrant or certificate.

■ Some disputes are, in fact, merely a reflection of a lack of understanding of how this type of product works. Some investors who hold turbos are surprised by, or even dispute, their deactivation, which very often results in a redemption value of zero. In these cases, it is often necessary to educate investors and remind them that the deactivating barrier is an inherent characteristic of this type of product and that it is effectively deactivated once the underlying asset has exceeded the barrier, as stipulated in the issue prospectus. However, the Ombudsman may need to examine the market conditions, in particular those of the underlying asset, in order to verify whether the price of the underlying asset has exceeded the barrier level over the relevant period.

■ In one case in particular, the investor complained that the EUR/USD currency turbo he held had been deactivated outside the turbo's trading hours. However, the Ombudsman pointed out that this situation was entirely possible since the underlying asset, in this case the EUR/USD currency pair, is an asset quoted 24 hours a day, seven days a week. The Ombudsman also observed that the risk of a deactivation event occurring outside trading hours was mentioned both in the contractual documentation and in various educational materials.



CHARACTERISTICS OF WARRANTS AND TURBOS

Warrants (or option certificates) are financial contracts with a leverage effect that give their holders the right (and not the obligation):

- either to buy (in the case of a call and a bullish strategy) or sell (in the case of a put and a bearish strategy) an underlying asset at a price fixed at the time of issue (the strike price) on a given date (the maturity date²);
- or to receive the difference, if positive, between the underlying asset's market price on the exercise date and the exercise price.

Through the use of leverage, these products amplify the price movements of the underlying asset.

Turbo certificates differ from warrants in that they have a deactivating barrier (if the underlying asset reaches or exceeds the barrier level, the product is deactivated). Some turbo certificates may have an "open" maturity date, i.e. they have no maturity date and are therefore referred to as unlimited or infinite turbo certificates. One of the essential characteristics of unlimited turbos is that the deactivating barrier is updated monthly.

Leverage and short certificates have a daily fixed leverage effect, which amplifies the variations of a benchmark index, upwards for a leverage or downwards for a short. They have neither a deactivating barrier nor a maturity date but have a suspension mechanism that is triggered in the event of significant unfavourable variations.

2 - A distinction is made between the European warrant exercisable at maturity and the American warrant exercisable at any time.



Employee from
the Ombudsman's Office

“With these requests, it is not uncommon for the underlying dispute to in fact be a suspicion that the price of the warrants or certificates was manipulated.”

■ Moreover, in this case, after examining the pricing of the underlying asset, the Ombudsman concluded that the EUR/USD price had indeed exceeded the barrier in the relevant time frame. The applicant was therefore informed that, in light of all this information, there was no reason to consider this deactivation as abnormal.

■ In addition, investors regularly challenge the valuation of the warrants they hold. In most cases, they consider the valuation of their warrant to be inconsistent with the price movements of the underlying asset. In these cases, the Ombudsman notes that applicants often only take into account the market performance of the underlying asset, which, although being an important parameter, is not the only factor influencing the value of the product. The price of a warrant during its listing period depends not only on the value of the underlying asset, but also on the ratio between the price level of the underlying asset and the strike price, and on the maturity date, interest rates, estimated dividends and the volatility level. The influence of these factors depends on the characteristics of each product and therefore on each product's specific sensitivity factors.

■ In this type of case, the Ombudsman often has to talk to the issuer implicated. The issuer generally provides very detailed information on how the price of the warrant or turbo is calculated, along with explanations of the valuation methods used. These extremely complex calculation formulae require the Ombudsman to examine various parameters that have an influence on the product price, in particular the theta coefficient (which measures the effect of the passage of time on the product's value) and the vega coefficient (which measures the sensitivity of the product price to the volatility of the underlying asset), or for turbos, the gap risk premium (which is the difference between the product price and its intrinsic value and represents the cost of the risk of a significant variation in the underlying asset between two successive gap valuations), the effect of roll over, etc.

■ With these requests, it is not uncommon for the underlying dispute to in fact be a suspicion that the price of the warrants or certificates was manipulated. However, in such cases, the Ombudsman's Office is often compelled to remind the applicant of the limits of its prerogatives and in particular to explain to the applicant that an Ombudsman does not have a supervisory role and has neither means nor authority to investigate. The Ombudsman can therefore neither control the extent to which the value of the certificates is influenced by the value of the underlying asset nor recalculate their valuation, and the Ombudsman is not in any event responsible for identifying breaches of stock market regulations.

■ Moreover, investors frequently complain about a lack of market-making activity around the warrant or certificate they hold. Warrants and certificates listed on Euronext Paris are subject to a market-making contract between the issuer, considered as a liquidity provider, and Euronext Paris. The main provisions of such a contract are generally included in the issue prospectus for warrants and certificates.

■ The market-making contract requires that, under normal market conditions, the issuer must be present for all purchases and sales of a given quantity of securities. All investor trades are processed at or within the issuer's price range. However, the issuer may be absent from the order book, often due to a computer crash, and no trading can then take place. This was the situation in the case where an applicant, a holder of turbo calls that he wanted to sell, argued that there was a lack of activity in the market concerned until the turbos were deactivated. The applicant considered that he had been the victim of a computer malfunction suffered by the issuer of the turbos concerned, which had deprived him of the option to sell his securities before they were deactivated. He therefore asked the Ombudsman to intervene.

■ In this case, the Ombudsman spoke to the issuer, which admitted that it had indeed suffered a computer malfunction that day. The issuer indicated that it was prepared to compensate the applicant for the loss suffered, provided that the applicant produced certain

supporting documentation, in particular a certificate from his financial intermediary attesting to an attempt to place an order on the day of the incident. When the investor was able to provide the requested proof, the issuer, following the Ombudsman's recommendation, paid him a gesture of goodwill equivalent to the price at which his securities could have been sold, i.e. €3,000.

■ However, in certain circumstances where market conditions are considered abnormal, the issuer may be authorised to temporarily suspend the display of its price range. This may occur in particular if the issuer no longer has a sufficient number of securities to meet demand. In this case, complainants are reminded that the issuer is entitled to display a bid price only. The issuer is then said to be in a bid-only situation: it continues to offer a bid price, but it is no longer possible in this situation to buy new units from the issuer. The same applies when the issuer can no longer reliably know the valuation of the warrants or certificates, particularly in the event of the suspension of the underlying asset.

■ In some cases, the issuer may be required to terminate its obligations. For example, cases have been referred to the Ombudsman in which the applicants complained that the issuer had permanently suspended the leverage certificate they held and at a zero value. In these cases, the CAC 40 index had fallen sharply during a trading session, triggering the mechanism for the temporary suspension of the CA15L CAC 40 Leverage index³ underlying the certificates in question.

■ The Ombudsman, who conducted an in-depth investigation, found, after referring the matter to the issuer, that the CA15L index had theoretically fallen by 105% (7% x 15) during the session in question, and that, in accordance with market rules, the Euronext market operator had therefore stopped calculating the CA15L index. As the underlying index was no longer available, the issuer was therefore obliged to terminate its obligations, in accordance with the terms of the prospectus, because the index calculation process had stopped. In light of this information, the Ombudsman considered

3 - The CAC 40 Leverage indices are calculated by Euronext and measure the performance of an investment on the CAC 40 index. They are updated each day with a leverage set between 2 and 15 times the daily variations (in this case, a leverage of 15).

that the issuer's decision, permitted according to the base prospectus, was the result of both the exceptional market conditions observed during the trading session and the market operator's decision to stop calculating the CA15L index.

■ In another case, several investors holding leverage certificates turned to the AMF Ombudsman to challenge the early delisting of the certificates they held, which the issuer had unilaterally carried out. These investors stated that they had not received any information prior to the early withdrawal and delisting of these certificates.

■ In addition to the loss recorded, in most cases absorbed, the investors also suffered a tax disadvantage: in the event of a sale before maturity (an option denied to the applicants in this case), the taxation of capital gains from the sale of securities applies, in particular the offsetting of losses against capital gains of the same nature. However, in the event of repayment at maturity, the capital losses recorded cannot be offset under tax law as they are not considered capital losses on sales.

■ While investigating these cases, the Ombudsman examined the legal documentation and noted that the prospectuses for the certificates involved in the dispute did indeed allow for early delisting at the issuer's discretion, with the sole obligation to disseminate the information by way of a notice published on the issuer's website and in the official journal of the country of the approving regulator.

■ The Ombudsman then paid particular attention to examining procedures in place for notifying the account-keeping banks of any early delisting so that they could pass on the information to their clients (the investors concerned) who hold these certificates, prior to the withdrawal of the certificates. The flow of information from the issuer was thus traced back to the various account-keepers, via the central securities depository, and the extent to which each party involved in each case could be held responsible was determined.

■ The Ombudsman considers that the announcement of the early delisting of a certificate is transferable and non-contestable information and that account-keepers (provided, of course, that they themselves have been informed in accordance with Article 322-12, II, 2° of the AMF General Regulation⁴) must supply this information directly to the clients concerned, the certificate holders.

■ The Ombudsman is very much aware of this issue and has been working closely with both marketplace associations and the specialised departments at the AMF. As a result of the discussions held on improving prior notification to investors, the Ombudsman succeeded in securing the addition of a requirement for future issue prospectuses approved by the AMF to specify that the issuer's delisting announcement must be posted on the issuer's website and also sent to the central securities depository, which must then disseminate it to its members, the account-keeping institutions.

Duration of mediation

■ In accordance with Articles R. 612-2 and R. 612-5 of the French Consumer Code, the Ombudsman's Office must examine admissible cases within 90 days. Recital 40 of the European Directive states that this period begins when the Ombudsman has received the documents on which the request is based, i.e. all the documents necessary to carry out the procedure.

■ The AMF Ombudsman's charter states that once the Ombudsman has received all the relevant information from all parties, she has 90 days to issue her opinion. The decree and charter specify that this time frame may be extended at any time by the Ombudsman when the complexity of the dispute so requires (see Appendix 3).

4 - Article 322-12, II, 2° of the AMF General Regulation stipulates that: "The custody account-keeper shall send, as quickly as possible, to each holder of a securities account [...] information relating to the other transactions in financial securities which give rise to a modification to the assets recorded on the client's account, which it receives individually from the issuers of financial securities."



REFUSAL TO ENTER INTO MEDIATION IS NOT COVERED BY CONFIDENTIALITY

Article L. 612-1 of the French Consumer Code provides that “the firm shall guarantee the consumer effective recourse to a consumer mediation mechanism”. However, in transposing Directive 2013/11/EU on Consumer Mediation, the French legislator, unlike other European States, has not provided for an obligation on the part of the firm to enter into mediation in each case.

The Ombudsman reminds firms that those who refuse, even occasionally, to enter into mediation are not covered by the rule of confidentiality guaranteed by entering into the mediation process. Confidentiality, pursuant to Article 1531 of the Code of Civil Procedure, and given the intent of the language used, protects only those parties who have agreed to enter into mediation in an attempt to resolve disputes amicably.

The Ombudsman reported this in 2019 by letter to investment management company NESTADIO CAPITAL, which manages retail local investment funds and retail venture funds.

Since 2018, the Ombudsman has received numerous mediation cases (40 cases in 2018 and 16 cases in 2019) concerning the same issue, namely the conditions for liquidating retail local investment funds (FIPs) and retail venture funds (FCPIs) managed by the *Société de Gestion des Fonds d'Investissement de Bretagne*, which trades as NESTADIO CAPITAL.

In 2019, when the Ombudsman received a second wave of mediation requests on the same issue, NESTADIO CAPITAL abruptly and systematically decided to stop responding to the Ombudsman’s requests and reminders. This firm was informed by letter that its persistent silence was interpreted by the Ombudsman, as is customary, as a refusal to enter into mediation, which is not covered by confidentiality.

The Ombudsman’s Office was therefore unable to investigate these mediation cases and was thus obliged to terminate its involvement by informing the fund holders and NESTADIO CAPITAL. To ensure their rights are upheld, fund holders therefore had to file a crime report and contact a lawyer who would be able to advise them and, in particular, assess their chances of winning their case and carry out the necessary procedural formalities.

Finally, although under the law the firm is not obliged to enter into mediation for each individual case, it must, however, in accordance with Article L. 612-1 of the Consumer Code, guarantee the consumer effective recourse to a consumer mediation mechanism. However, according to the Ombudsman, a firm that systematically refuses to enter into mediation no longer benefits from confidentiality and, in addition, runs the risk of committing an abuse of rights.

■ Furthermore, given the sometimes considerable time needed to obtain a full response from the firm, together with the supporting documents requested, the time taken from the date of referral to the Ombudsman may exceed 90 days. It should be noted that in the French legislation transposing the Directive, firms are not subject to any time limit for replying to the consumer Ombudsman, as they are in other countries, such as Italy.

■ In 2019, the entire process, from the date on which all documents relating to the case were received to the date on which the Ombudsman's opinion was issued, marking the end of mediation, took an average of five and a half months, with a median of four and a half months. In addition to this, however, the legislation (Article R. 612-4 of the Consumer Code) provides that the Ombudsman sets a time limit for accepting or rejecting the opinion issued. Of course, in the event of a favourable opinion, the Ombudsman asks for a response from the investor, who generally has 30 days in which to provide it. Finally, at the request of either party, the Ombudsman may supervise the drafting of the memorandum of understanding and oversee the payment of the agreed compensation. The internal and purely administrative closure of the case is then deferred by the amount of time required for this.

■ In 2019, average and median processing times resulting in an opinion from the Ombudsman were as follows:

- 4 and a half months approximately, on average, between receipt of the complainant's case and when it was complete, with a median of three months. This time includes time spent waiting for responses to the Ombudsman's requests, which sometimes require follow-ups and several exchanges of correspondence. Some financial intermediaries are less responsive than others.
- 5 and a half months approximately, on average, between receipt of the complainant's case and the issuance of the Ombudsman's opinion, with a median of four months.

Results achieved by mediation in 2019

■ When accepted by the parties concerned, a favourable opinion proposal by the Ombudsman may take two forms, depending on the situation:

- either to obtain execution of an instruction (57% of favourable opinions accepted);
- or to obtain compensation of the loss through compensation (43% of favourable opinions accepted). In 2019, the total amount of compensation obtained was €716,992, compared with €903,394 in 2018 and €1,623,224 in 2017. The decrease in the compensation obtained is mainly due to the significant decrease in the number of Forex-related complaints.

■ Out of all cases closed in 2019, 183 favourable recommendations were made, including 81 financial recommendations. For those 81 financial recommendations, goodwill gestures ranged from €15 to €190,000, with an average of €8,852 and a median of €715.

■ Of the Forex cases closed in 2019, 7 favourable recommendations were made, all financial. For those 7 financial recommendations, goodwill gestures ranged from €975 to €190,000, with an average of €38,362 and a median of €10,000.

■ Of the employee savings scheme cases closed in 2019, 71 favourable recommendations were issued, including 20 financial recommendations.

■ For those 20 financial recommendations, goodwill gestures ranged from €22 to €39,346, with an average of €3,898 and a median of €153.



Progress achieved on the two main topics for 2019: PEAs and Employee Savings Schemes



For the record, in 2018, a reform was secured based on a recommendation from the Ombudsman. This reform simplifies the transfer of unlisted securities by eliminating the need to obtain the issuing company's approval for such transfers. This proposal was the subject of a unanimous opinion by the Financial Sector Advisory Committee (CCSF) published on 12 September 2018 (see 2018 Annual Report, page 17). This obstacle was particularly problematic when the unlisted security was held in a PEA, since only one security requiring the issuer's approval was needed to prevent the entire portfolio held within the PEA from being transferred.



2018 Annual Report

PEA issues important for mediation and for the legislator

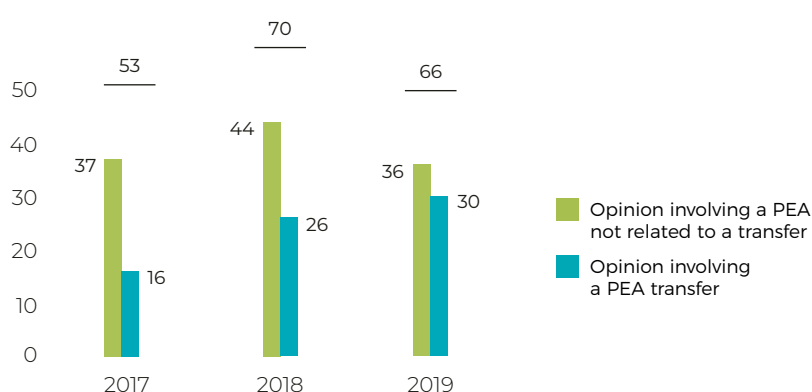
■ The PEA (personal equity savings plan), it is worth remembering, provides an advantageous tax wrapper for French residents (when the PEA is opened) as, after five years, any capital gains on securities held in this plan are tax-exempt. This benefit is provided in exchange for a five-year lock-in on this plan for securities that are eligible for the PEA under certain conditions.

■ This year, it seemed worthwhile to examine the PEA in more detail for three reasons:

- the Ombudsman has observed for several years that it has been difficult to transfer PEAs that include unlisted securities, and this is now easier, for the reasons set out below;
- the PACTE Law, Act No. 2019-486 of 22 May 2019, partly in response to suggestions from the AMF Ombudsman, simplified and relaxed the strict rules that applied to this type of wrapper;
- the number of opinions issued in 2019 relating to PEAs was 66 out of a total of 451 opinions, i.e. around 15%, compared with 13% in 2018 (70 out of 523). This topic is the most frequently dealt with by the Ombudsman, after employee savings schemes.

■ In 2019, as in the previous year, most of the PEA cases involved transfers (30 out of 66 opinions, or 45%).

GRAPH 10.
Change in number of opinions issued involving PEAs and PEA transfers



Changes introduced by the legislator

■ The PACTE Law of 22 May 2019 made the PEA more flexible, in particular the conditions relating to duration and partial withdrawal, in order to make it more attractive. The changes introduced by the legislator are set out in Table 1.

■ The investment cap for the SME-PEA has been increased provided that the combined PEA and SME-PEA cap of €225,000 is not exceeded.

■ The PACTE Law also created the “PEA Jeunes” for young people. Those aged 18 to 25 can now open a PEA with an investment cap of €20,000 while they are still living with their parents in the same tax household (Article L. 221-30 of the Monetary and Financial Code) and without the amounts held in their PEA reducing the cap of each parent’s PEA. The legislator has introduced this plan to encourage young adults to invest in equities.

■ This reform is complementary to the tax rules were relaxed on 1 January 2019: if the PEA is closed before the end of the five-year lock-in, any capital gains are now taxed at a rate of 12.8% and attract social security contributions at 17.2% (a total of 30% instead of 36.2% or even 39.7% previously).

■ Moreover, in order to make PEAs and SME-PEAs more attractive, Decree No. 2020-95 of 5 February 2020 issued pursuant to the PACTE Law, regarding capping the fees associated with equity savings plans and equity savings plans for financing SMEs and intermediate-sized enterprises, which will come into force on 1 July 2020, introduces Article D. 221-111-1 to the Monetary and Financial Code capping the fees that may be charged for the various transactions on these accounts (e.g. opening, account-keeping, plan transfer and trades).

TABLE 1.
**Comparison of the system of caps and withdrawals for PEAs
 and SME-PEAs before and after the entry into force
 of the PACTE Law on 24 May 2019**

	Before the PACTE Law	After the PACTE Law
Combined cap (PEA + SME-PEA)	€225,000	€225,000
PEA only cap	€150,000	€150,000
SME-PEA only cap	€75,000	€225,000 (possible with no standard PEA)
Withdrawal before holding the plan for 5 years	Before 5 years, any withdrawal normally leads to the closure of the plan, with some exceptions (Art. L. 221-32 of the Monetary and Financial Code) and the loss of the PEA tax benefits.	Before 5 years, any withdrawal normally leads to the closure of the plan and the loss of the PEA tax benefits. However, there are more exceptions at closure (new Art. L. 221-32 of the Monetary and Financial Code).
Withdrawal after holding the plan between 5 and 8 years	Closure of the plan, but the tax benefits are retained.	After five years, partial withdrawals are possible, without leading to the closure of the plan, nor an end to the ability to pay into it.
Withdrawal after holding the plan for 8 years	The plan remains in place, but with no option to pay into it.	



Ombudsman's Office legal expert

PACTE Law proposal recommended by the Ombudsman: securities whose issuer is in court-ordered administration can be withdrawn from PEAs without loss to the holder

■ Withdrawing a security from a PEA on the grounds that the issuer is in court-ordered administration no longer results in the plan being closed nor in an end to the ability to continue to pay into it, regardless of how long the PEA has been open.



The withdrawal of worthless securities from a PEA is free of charge, as stated in Article L. 221-32 IV of the Monetary and Financial Code: *“the plan holder may request the withdrawal of these securities from the plan free of charge as soon as the judgement to initiate proceedings has been handed down”*. However, there is still the question of custodial fees and the costs of maintaining the account where the securities will be held pending the outcome of legal proceedings. In this situation, the Ombudsman has noted a good practice among institutions that do not charge fees for the custody of these securities and looks forward to this practice becoming more widespread.

However, the Ombudsman is often required to point out that the holder cannot have securities removed that have become worthless following the opening of a court-ordered administration, even once they have been withdrawn from the PEA. These securities, even if they are worthless, continue to exist until the end of the court-ordered administration procedure, i.e. until the PEA is closed due to insufficient assets, which may take place many years later.

This reform puts an end to the many obstacles that the Ombudsman had observed in cases of attempted transfers of PEAs involving securities whose issuer was in court-ordered administration. This proposal, submitted in 2018 by the Ombudsman and presented to the CCSF at the same time as the proposal on simplifying the transfer of PEAs involving unlisted securities, was also successful, since it was ratified in Article L. 221 32 IV of the Monetary and Financial Code, in force since 24 May 2019.

Persistent difficulties observed by the Ombudsman among PEA holders

Ineligibility of certain securities for the PEA or limits of the account-keeper’s duty to provide information

Securities ineligible for the PEA from the outset:

■ In return for the tax benefits granted to them, subscribers to a PEA are restricted in the choice of securities allowed in their accounts. Subscribers may therefore only choose to invest through their PEA in securities that are eligible under the criteria defined by the regulations.

■ It is the responsibility of the PEA holders, together with the issuer, to find out whether an unlisted security that they wish to acquire and hold within their PEA is eligible. This is what emerged from a case handled this year in which the complainant regretted not being able to acquire a security and hold it within his PEA. This security was listed as eligible on the websites of certain account-keepers, but as ineligible on his bank’s website. His bank informed him that it had no information on the eligibility of this security and was blocking any possibility to acquire it. Since the account keeper had not received any information about the security’s eligibility from the issuer, it was the subscriber’s responsibility to find out whether the security was eligible and to provide the account-keeper with proof of eligibility.

■ If, on the other hand, the account-keeper provides information on the eligibility of securities, this information must be accurate. This is what emerged from a mediation case⁵ in which the institution had published a list of eligible securities on its website, which included securities that a PEA holder had acquired, subsequently realising that they were ineligible. In this case, the Ombudsman was successful in recommending that the institution make a gesture of goodwill to its client, who had to withdraw the securities from his PEA by paying into the plan an amount equal to their value. If he had not paid this amount, the PEA would have had to be closed due to tax irregularities.

Through the Official Tax Bulletin (BOI-RPPM-RCM-40-50-50,40), the tax administration therefore accepts that, under certain conditions, the PEA will not be closed. However, the security that has become ineligible must be sold or removed from the plan in order to avoid its closure provided for in Article 1765 of the General Tax Code.

Securities that have become ineligible for the PEA while held within a PEA:

■ **Following a decision by the issuer**

Assuming constant tax regulations, a security may become ineligible as a result of a decision made by the issuer that is beyond the control of the plan holder, for example:

- the company issuing the securities has transferred its registered office to a State outside the European Economic Area (EEA), which can also happen as a result of a merger of two companies.⁶ With regard to Brexit, the AMF has already stated that there will be no regulatory impact for investors before the end of 2020. As of 1 January 2021, however, securities of UK companies will no longer be eligible for PEAs;⁷
- the issuing company has changed its tax regime and is no longer subject to corporation tax (or an equivalent tax);
- the issuing collective investment undertaking (CIU) no longer complies with the investment quota of at least 75% of its assets in eligible securities (this condition must be complied with at all times).



5 - See the February 2015 Case of the Month: <https://www.amf-france.org/blogs/blog-mediateur/Investissement-dans-cadre-d-un-Plan-d-Epargne-en-actions-PEA-classique-d-un-titre-ineligible-qui-est-responsable>.

6 - For example, following the merger in 2015 of Lafarge and Holcim, which is now headquartered in Switzerland. Lafarge's headquarters were previously in France.

7 - Unless a new agreement is reached in 2020, securities impacted by Brexit will have to be taken out of PEAs as of 1 January 2021 (see AMF News from 31 January 2020: <https://www.amf-france.org/Epargne-Info-Service/Actualites-EIS/Brexit-quoi-de-neuf-pour-votre-epargne-?xtor=RSS-11>).

■ **Following a change in management for UCITS**

In the case of an Undertaking for Collective Investment in Transferable Securities (UCITS), ineligibility may result, during the life of the PEA, from a decision by the investment management company that changes the essential characteristics of a fund that it manages. As the Ombudsman pointed out in a case referred to her, Article 8 of AMF Instruction 2011-19 states that the withdrawal of a fund's eligibility to benefit from tax measures, such as the SME-PEA, requires only specific information to be provided to the fund's investors.

Once informed, the subscriber could not take action against the account-keeper that advised him to invest in this fund two years earlier, since the account-keeper had no way of anticipating such a decision by the management company, nor against the management company, since it had made this change in accordance with the regulations and had complied with its duty to provide information to the subscriber. After informing his account-keeper of this change, the subscriber must therefore sell his securities or withdraw them from his SME-PEA by paying into his PEA the amount corresponding to the value of the securities withdrawn.

Persistent difficulties encountered when buying or selling unlisted securities within a PEA

■ The Ombudsman is repeatedly required to point out, in cases received relating to the buying or selling of any securities within a PEA, that any purchase of securities must be made within the PEA wrapper for the securities to be held within the PEA. Similarly, the proceeds from any sale of securities held in a PEA must be deposited to the PEA cash account. Otherwise, the sale will be considered a withdrawal from the PEA.

■ Extra caution is required by the PEA holder when selling unlisted securities held in a PEA. In such cases, it is the PEA holder who is responsible for informing the transferee that the entire proceeds of the sale must be deposited, within two months of the sale, to his PEA cash account, the IBAN for which the PEA holder must also provide, as specified in the Official Tax Bulletin (BOI RPPM-RCM-40-50-50-20120912).

Failing this, the holder's PEA will be considered a tax irregularity.

■ The transferee may pay by instalments. In this event, in order to avoid the closure of the plan, the holder must, within two months after the sale, make a payment to his PEA cash account equivalent to the deferred portion of the sale price.

■ This specific feature must be clearly stated by the account-keeper in a regulatory commitment letter (BOI-RPPM-RCM-40-50-60, 30) when the PEA holder acquires unlisted securities within the plan. According to the Official Tax Bulletin, this letter must specify that the investor undertakes, when selling the unlisted securities, to notify the account-keeper and to transfer the proceeds to the PEA cash account within two months following the sale.

■ In one case dealt with this year, the Ombudsman had to remind the account-keeper of the need for clarity on this point in the commitment letter. In this case, the PEA holder had sold his unlisted securities and agreed to payment by instalments. However, his commitment letter could be interpreted as implying that he should pay the proceeds of the sale immediately upon receipt and not within two months of the sale. The Ombudsman therefore recommended that the irregularity in the PEA be rectified, with due compensation, which was accepted by the account-keeper and the investor.

Specific feature of an estate with a PEA

■ The death of the PEA holder is one case in which closure of the plan is mandatory. In the case of an estate that includes a PEA, the PEA will be closed as soon as the account-keeper is informed of the death of the PEA holder. The closure of the PEA does not, however, require the simultaneous sales of the securities, which will be held in an estate securities account pending instructions from the notary regarding their transfer or sale.

Continuing relevance of employee savings schemes for the AMF Ombudsman's Office

■ More than a third of the mediation requests handled in 2019 were disputes relating to employee savings schemes, once again making it the primary area of intervention for the Ombudsman's Office.

■ Once again, the failure to take into account investors' choices regarding the allocation of their discretionary and/or compulsory profit-sharing bonuses was the main issue on which the Ombudsman made the most recommendations.

■ In these cases, the Ombudsman is most often called upon to ensure that financial institutions act with fairness so that they take into consideration, when justified, the applicant's difficult financial circumstances, the fact that there may be no employee savings scheme available in the applicant's new circumstances, the modest amount of the assets invested relative to the annual fees, and the theoretical duration of the investment compared with the possible young age of the investor, particularly in the case of assets placed in the PERCO, and thus proceed with the release of the assets allocated by default to an employee savings scheme. Where appropriate and on a case-by-case basis, the Ombudsman may resort to contacting the French General Labour Directorate so that an exceptional release can be considered.

■ This year, alongside processing mediation cases, the Ombudsman contributed to work on drafting the PACTE Law, recommending two flagship measures put forward by the AMF. The Ombudsman also contributed to the project to overhaul the General Labour Directorate's Employee Savings Guide, with some of the Ombudsman's general recommendations being included in the guide.

The two flagship measures of the PACTE Law

■ The Ombudsman welcomes the adoption of two employee savings measures provided for in the PACTE Law, namely the right to liquidate the collective company retirement savings plan (PERCOL) and the cap on PERCO fees.

■ Right to liquidate the Group Retirement Savings Plan (PERCOL)

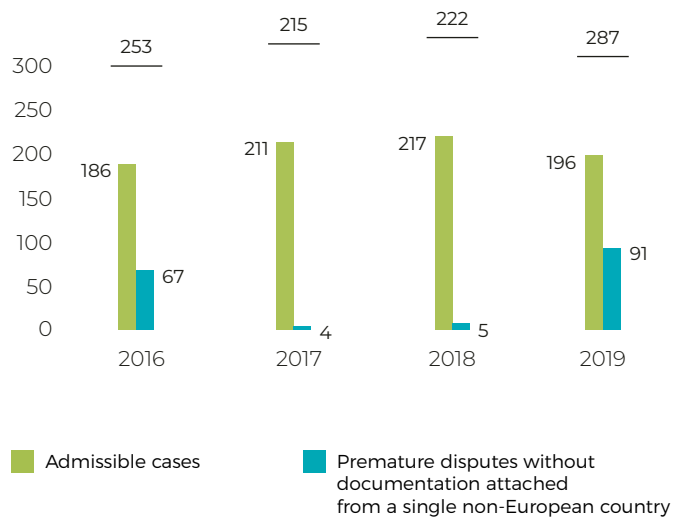
■ The PACTE Law introduced, from 1 October 2019, the retirement savings plan (PER), which is divided into three products: an individual product and two company products, one by category (the former Article 83) and one collective, the collective company retirement savings plan (PERCOL). It is for the PERCOL (which replaces the PERCO and will no longer be available from 1 October 2020) that the legislator has provided for a right to early liquidation within one month following notification of this investment in favour of investors where their premium is allocated by default to this scheme.

■ Accordingly, the sums arising from the profit-sharing bonus allocated to a PERCOL, through the default investment, can now be liquidated within the month following notification to the investors of the allocation of their sums to the employee savings scheme. This measure was recommended by the Ombudsman and was supported by the AMF.

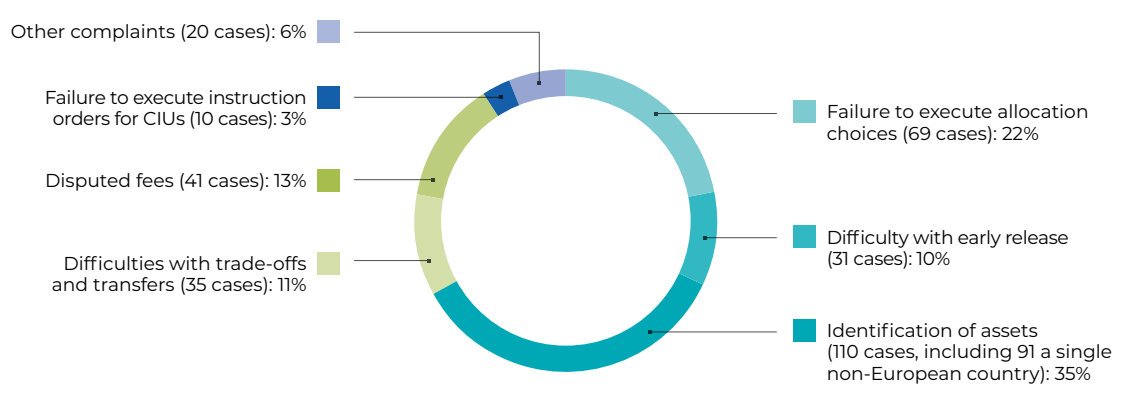
■ Although it is regrettable for the Ombudsman that this new right is limited to the assets allocated by default to new PERCOLs, without this measure being extended to schemes already in place, particularly the PERCO, it should be noted that this right to liquidation has been enshrined in law and that, in the interests of fairness, if the conditions seem to be met, the Ombudsman may refer to it on a case-by-case basis.

■ The precise format for informing investors of this new right has yet to be determined, by decree, for example. At the time of writing, the Ombudsman would like the decree being considered for this purpose to expressly state that the information about the right of liquidation available to the account-keeper's investors must be provided on the transaction notice, since the one-month period provided for by law to liquidate this default investment in the PERCOL starts to run from receipt of this notification.

GRAPH 11.
Change in number of employee savings scheme cases received in 2019



GRAPH 12.
Problems encountered in employee savings scheme cases closed in 2019 (316 cases)



■ In most cases referred to her Office, the Ombudsman found that the default allocation of premiums to a savings scheme is made known to the investor on receipt of the transaction notice. It is therefore the most appropriate document to inform investors of their option to request the liquidation of the sums invested by default in the PERCOL.

■ Moreover, the Ombudsman notes that in disputes concerning the default allocation of part of the profit-sharing bonus, the most frequently proposed solution consists of transferring the locked-in assets from the PERCO to the PEE (company savings plan). However, if the assets remain locked in, the duration of the lock-in is more palatable to the investor since it is only five years, whereas the assets frozen in the PERCO are frozen until the employee retires, which, depending on the circumstances, may involve a particularly long lock-in period. Based on this observation, the Ombudsman proposes, as stated to the AMF departments involved in this project, that the solution that emerged from the mediation cases be incorporated into a decree, thereby providing a broader liquidation right that would not be limited to the liquidation of assets but would also allow investors to request that their transfer be made to another scheme such as a PEE.

■ Finally, the Ombudsman considers that, in order to standardise the rules applicable to retirement savings schemes, this right to liquidation should be extended to PERCOs. The legislator has stated that PERCOs set up before 1 October 2020 will continue to exist (Executive Order of 24 July 2019, Articles 8-II and III, 9-II, Decree of 30 July 2019, Article 9-III), that new beneficiaries may join them and that payments may be made into them. Moreover, the number of mediation cases involving the default allocation of a premium to PERCOs is increasing. For the sake of consistency, the Ombudsman considers that investors whose premiums have been allocated by default to PERCOs should have the same right to liquidation.

Cap on management fees for former employees in the PERCO

■ As noted in previous annual reports, the Ombudsman regularly receives requests for mediation concerning fees. In 2019, 15% of mediation cases related to fees. In most of these cases, former employees are disputing the fees charged and deducted directly from their assets after they have left the company. While the solution for PEEs is fairly simple and involves requesting the release of the assets on termination of the employment contract to avoid paying any further fees, the situation for PERCOs is much more complex.

■ Under a PERCO, former employees are not entitled to release their assets at the time they leave the company; they are therefore obliged to pay account maintenance fees, which are deducted directly from their PERCO. As a result, the value of their assets decreases gradually over time.

■ The Ombudsman had already raised this issue previously, which the legislator had taken into account in the Macron Law,⁸ which required the employer to provide information on fees to employees when they leave the company.

■ The Ombudsman is pleased that, with the introduction of the PACTE Law, the legislator decided once again to consider this scenario, frequently flagged in the mediation cases processed, most often in terms of fairness, and that it has adopted measures to protect the investor.

■ As a result, the new Article L. 3334-7, the outline of which has yet to be defined, imposes a cap on management fees where these fees are borne by employees who have left the company where the PERCO was set up. This cap will ensure that these fees do not nibble away excessively at employees' savings, which are unavailable to them until they retire.

8 - Law No. 2015-990 of 6 August 2015 on economic growth, activity and equal opportunities, known as the "Macron Law".

■ The Decree of 20 August 2019, with new Article D. 3334-3-3 of the Labour Code, specifically established this double cap:

- in the general case, the amount of fees will be a maximum of €20;
- in the case of PERCOs with assets of less than €400, these fees may not exceed 5% of the savings.

■ The Ombudsman warmly welcomes these two new measures. Nevertheless, it is disappointing that the proposal put forward by the AMF's Retail Investor Relations and Protection Directorate during the preparatory work on the PACTE Law, which provided for a new exceptional release for small PERCOs with assets of less than €2,000, was not ultimately adopted.

■ Finally, at the end of 2018, the Ombudsman was consulted as part of a working group set up at the request of the French General Labour Directorate to clarify the provisions of the PACTE Bill concerning the annual statement of employee savings accounts and the information to be included in them (see Ombudsman's 2018 Annual Report, page 23). The provisions of the PACTE Law were intended, in particular, to harmonise the presentation of the annual statements of account drawn up by account-keepers and sent to employees. Decree No. 2019-862 of 20 August 2019 (new Articles L. 3332-7-1 and D. 3332-16-1 of the Labour Code), which came into force on 1 January

2020, was added to the text of the PACTE Law by drawing up a list of mandatory information to be included in the annual statement, specifically: identification of the company and the beneficiary;

- the total amount of the rights and assets entered in the beneficiary's account, estimated as at 31 December of the previous year;
- the amount of the beneficiary's rights and assets by management vehicle, with the availability dates, together with the management procedures, either provided for by default in the plan's regulations or chosen by the beneficiary;
- a summary of the sums invested in the plan during the past year, presented by type of payment in accordance with the provisions of Article L. 3332-11, and the sums disinvested from the plan over the same period, clearly identifying those resulting from an early release;
- a summary of the fees charged to the employee during the previous year, in accordance with the provisions of the plan.

■ In addition to its involvement in the preparatory work for the PACTE Law, this year the Ombudsman's Office also contributed, at the request of the French General Labour Directorate, to updating the Employee Savings Guide and more specifically its "early release" section, which should be published in 2020.



Ombudsman's Office legal expert

Update to the Employee Savings Guide published by the French General Labour Directorate

■ This year, the Ombudsman proposed including in this update of the reference guide, in the section on early release, the general recommendations on employee savings that her Office had published in 2017.

■ The Ombudsman therefore proposed taking into account the specific cases of investors who marry outside France, in which the time taken to obtain an authentic marriage certificate can be extremely long. For requests for early release on the grounds of marriage outside France, the Ombudsman recommended postponing the starting point of the six-month period during which the investor is entitled to request the release of his or her assets from the date of the marriage to the date of obtaining the transcript (or sworn translation) of the marriage certificate issued by the foreign country.

■ In cases relating to early release for acquiring one's main residence, the Ombudsman was able to clarify that while acquiring a residence via a French non-trading real estate company (*société civile immobilière* (SCI)) does not qualify for early release, early release is permitted in cases where a residence is acquired via a French non-trading real estate company formed to erect a building to be divided among its members (*société civile immobilière d'attribution de construction* (SCIA)) insofar as it ultimately confers on the member a right of ownership over their home.

■ In addition, the Ombudsman wanted to ensure that the Employee Savings Guide included mention that requests for early release for extending the main residence by developing the attic space may be admissible, despite the fact that the prior statement of work does not indicate any increase in floor area. In the case of attic conversions, the floor area being developed is already an integral part of the existing building but creates additional living space as defined by planning regulations.

■ Lastly, the Ombudsman proposed broadening the type of supporting documents that can be provided to enable the account-keeper to establish when the retail investor's entitlement to unemployment insurance

expired. This situation may therefore be established either by a certificate issued by the Pôle Emploi (French employment agency) at which the person concerned is registered, certifying that all entitlement to unemployment insurance has expired, or, failing this, by any other document certifying that the employee is in a similar situation.

■ More generally, the Ombudsman notes that the guide takes care to specify that the supporting documents to be provided in the event of early release, set out in the table in the Employee Savings Guide, are provided for information purposes only. These documents requested from the employee are therefore indicated *ad probationem* and not *ad validitatem*. Put simply, evidence can be provided by any means.

■ The Director General of Labour, in a letter sent to the Ombudsman on 12 November 2019, agreed with this position and considers that the Employee Savings Guide should not be interpreted by firms in an excessively formal way. He also felt that such a guide should be interpreted primarily with regard to its purpose and not just in terms of its wording. He therefore endorses the Ombudsman's position that supporting documents are required only for information purposes and not on a mandatory basis.

■ The Ombudsman hopes that these updates will result in more flexibility around the rules, which are sometimes seen as being too strict.

The emergence of disputes as a result of legislative changes: MiFID 2 and anti-money laundering legislation

2019 saw the first cases related to the stricter provisions of MiFID 2

■ MiFID 2, which entered into force two years ago,⁹ has strengthened investor protection and introduced a new legal framework that more strictly regulates trading activities on financial markets.

■ The AMF Ombudsman has now received the first cases relating to the new provisions, which are outlined below.

Trade reporting

■ MiFID 2 strengthened the trade reporting obligations on financial institutions by requiring more substantive information, particularly with regard to client identification. Trade reports must now identify natural persons through the use of a national code or identifier. For natural persons, the identifier used depends on the person's nationality. The specific characteristics of a tax identifier (code structure, syntax, etc.) are determined by each country's national government. A standard tax code, and specifically that for French clients, identifies the country, last name, first name and date of birth.¹⁰ However, other countries have opted for their own specific identifier, which may, for example, also be the person's social security number.¹¹

■ However, several clients have informed the Ombudsman of difficulties in obtaining their tax identifier, without which they were no longer able to transmit orders to the market.

■ This was the case for a client of Italian nationality, tax resident in France and subject to the French Social Security system, who was, consequently, unable to provide his tax identifier (*codice fiscale in Italian*) due to a lack of documentation required for this purpose. Since he could not provide a tax identifier, his access to placing orders online was blocked, which resulted in a lost opportunity for him to sell a line of securities in his portfolio. After a lengthy investigation, the Ombudsman concluded that there was a shared responsibility in this case and recommended partial compensation for the loss suffered by the applicant.



Ombudsman's Office legal expert

9 - Entered into force on 3 January 2018.

10 - Code known as CONCAT, made up of the country code + date of birth + first 5 letters of the first name + first 5 letters of the last name.

11 - This is the case for Italy, Iceland and Estonia, for example.

■ However, it should be noted that since this type of dispute is cyclical, it is unlikely that new cases relating to this issue will be referred to the Ombudsman in the future.

Product governance

■ Product governance requirements are one of the important changes introduced by MiFID 2 in terms of investor protection. Investment services providers must now pay attention to the rules governing the distribution of products, from their design to their marketing to end clients. Since 3 January 2018, distributors have had to consider many criteria when deciding which range of products to offer or recommend to their clients.¹²

■ A mediation case submitted to the Ombudsman this year provided an opportunity to reiterate these principles. The applicant had contacted the Ombudsman after his financial intermediary refused to market units in a UCITS to him because the product was not included in the range of products it offered.

■ In this case, the Ombudsman, after reminding the applicant of the rules mentioned above, added that the ESMA guidelines on product governance requirements under MiFID 2, with which the AMF has declared compliance, stated that: *"In any case, where on the basis of all information and data that may be at the distributors' disposal and gathered through investment or ancillary services or through other sources, including the information obtained from manufacturers, the distributor assesses that a certain product will never be compatible with the needs and characteristics of its existing or prospective clients, it should refrain from including the product in its product assortment [...]"*.

■ Although the Ombudsman understood this client's disappointment, the client was reminded that it was not her place to interfere in the distribution policies of financial institutions, since each institution has its own analysis grid and is free to choose the range of products it offers.

Fee transparency

■ Another new requirement arising from MiFID 2 is increased transparency on fees for financial products and services. Financial institutions are now required to provide their clients with information prior to any transaction (ex ante information) and annual summary and personalised information on all fees charged (ex post information).

■ Accordingly, at the time investment advice is provided and prior to each transaction, financial intermediaries must inform their clients in greater detail about the fees related to the products and services that will be provided to them. The total cost of these fees and their impact on the performance of the recommended investment must be presented in euros and as a percentage.

■ In mediation, these new provisions – which are designed to promote clearer and more accessible information – have had an effect that may be less expected: the increased transparency and level of detail regarding the cumulative effect of the various fees has been accompanied by greater investor awareness of the burden of these fees and have raised questions and even disputes.

■ Applicants who referred the matter to the Ombudsman had the impression that there had been a proliferation of fees and therefore an increase in the fees being paid overall. In these cases, it is therefore necessary to educate applicants and explain to them, where appropriate, that they are not actually paying more fees than contractually agreed but that the fees are more detailed: the breakdown of the agreed fees and their impact on returns gives clients a clearer picture of the existing fees and their distribution, and thus makes them aware of the real cost of their investment.

¹² - Article 313-18, paragraph 1 of the AMF General Regulation: *"The distributor, when deciding the range of financial instruments manufactured by itself or other persons and services it intends to offer or recommend to clients, shall comply, in a way that is appropriate and proportionate, with the requirements laid down in Articles 313-19 to 313-27, taking into account the nature of the financial instrument, the investment service and the target market for the financial instrument."*

Emergence of cases related to anti-money laundering and combating the financing of terrorism (AML/CFT)¹³

■ Today it has become a priority, but the subject is not new. The first anti-money laundering directive was issued on 28 June 1991. Subsequent regulations have been expanded and have become increasingly strict. The fourth directive, which entered into force in June 2017, embodies the pragmatic and realistic approach to anti-money laundering. The fifth directive, adopted in May 2018 and transposed into French law by Executive Order No. 2020-115 of 12 February 2020, aims to go even further.

■ The objective of the AML/CFT regulations is to combat not only money laundering but also tax fraud (since 2009) through using an increasing number of financial professionals (including asset management companies (AMCs), financial investment advisers (FIAs), crowdfunding investment advisers (CIAs) and digital asset service providers (DASPs) to provide services for the public authorities and by making them true auxiliaries.¹⁴

■ The regulations require firms to put in place due diligence mechanisms appropriate to the nature of the service offered to identify clients and provide updated risk assessments for clients, whether they are occasional clients or the beneficial owners of “legal entity” clients.

■ The same applies to politically exposed persons (PEPs),¹⁵ who are subject to specific due diligence measures (see the December 2019 Case of the Month).

■ The fourth directive has also allowed firms to vary the level of due diligence carried out according to a risk mapping (low, medium or high). However, if the client

(or prospect) refuses to answer questions relating to AML/CFT regulations, the firm must necessarily refuse to open or close a securities account.

■ This duty of care applies throughout the entire business relationship in respect of the various transactions carried out by the client.

■ This was the situation in the December 2019 Case of the Month, where the application of the AML/CFT provisions slowed down the client’s instructions. In this case, the firm had to postpone opening the securities account because the non-trading real estate company’s legal representative appeared to be a politically exposed person (PEP) as defined by Article L. 561-10 of the Monetary and Financial Code. The bank therefore had to carry out additional checks before it concluded that the name was a homonym. It was then able to execute the investment instructions given to it by its client.

■ This due diligence obligation is accompanied by an obligation to report and disclose to the TRACFIN department if the conditions are met.

■ Finally, failure by institutions to comply with these AML/CFT obligations, which are a matter of public policy, may be punished by fines or even imprisonment.

■ The implementation of the AML/CFT obligations by digital asset service providers (DASPs) tends to further broaden the AMF’s, and hence the Ombudsman’s, jurisdiction. These firms must register with the AMF and set up an AML/CFT system suitable for services involving digital asset trading against legal tender and digital asset custody on behalf of third parties.

13 - *Online Diary* – Case of the Month, December 2019.

14 - Article L. 561-36 of the Monetary and Financial Code, entities regulated by the AMF. See also AMF Position-Recommendation DOC-2019-16: Guidelines on due diligence obligations with respect to clients and their beneficial owners.

15 - See Article L. 561-10 2° of the Monetary and Financial Code: Natural persons that occupy or have occupied important public functions, not necessarily political. See also AMF Recommendation DOC-2019-17: Guidelines on the concept of Politically Exposed Persons.



Changing scams: from Forex to Bitcoin

Forex-related cases continued to fall in 2019

■ For the fourth consecutive year, the Ombudsman is pleased to note the sharp decline in the number of Forex-related cases received and in those received relating to binary options and contracts for difference (CFDs), including foreign exchange (Forex) contracts. The number of cases received fell from 51 to 14, a decrease of more than 72%.

Cases involving unauthorised companies

■ Cases relating to companies that are not authorised by one of the European Union regulators are outside the Ombudsman's jurisdiction. Such cases must therefore be forwarded to the Public Prosecutor as criminal offences.

■ The Ombudsman received 6 such cases in 2019 compared with 11 in 2018 (a decrease of 45%). However, this figure needs to be put into perspective insofar as:

- firstly, the Ombudsman observed that scammers switch to investments in other products: from diamonds in 2017, then to crypto-assets in 2018, and to multi-product platforms and impersonating existing companies in 2019;
- secondly, mediation cannot be considered since the company incurs criminal sanctions relating to the illegal exercise of the activity of an investment service provider. Retail investors contacting the AMF via its *Épargne Info Service* are therefore logically not referred to mediation.

■ When a case of this type is referred to the Ombudsman, in accordance with Article 621-20-1 of the Monetary and Financial Code, it is immediately forwarded to the specialised departments at the AMF, which, in the context of cooperation with the judicial authorities, inform the Public Prosecutor.

Cases involving authorised companies

■ For cases relating to companies authorised in the European Union, the mediation process may be initiated.

■ The Ombudsman received 10 such cases in 2019 compared with 40 in 2018 (a decrease of 75%). This decrease, which began in 2016, is mainly due to measures taken over the years by the AMF and then ESMA.



Ombudsman's Office legal expert



The Ombudsman commends the efforts of the AMF and ESMA, which have worked tirelessly in recent years to protect retail investors from the scourge of speculative trading.

The AMF, alarmed by the number of complaints received from clients attracted by CFD and Forex trading who have ended up losing large sums of money, has been taking action for several years. The AMF has carried out mystery visits and published an edifying study¹⁶ in 2014 and a special report entitled “Forex Binary Options: A Market to Avoid” in 2017.

In 2016, the AMF banned a company authorised under Article L. 532-21 of the Monetary and Financial Code that did not comply with its obligations (acting honestly in the interests of clients, providing non-misleading information, etc.).¹⁷

In October 2016, ESMA published a series of questions and answers (Q&As)¹⁸ on the supply of CFDs and other speculative products under MiFID. These Q&As led the Cypriot regulator to ban the practice of bonuses.

The Sapin 2 Law, which came into force in December 2016, prohibited the advertising (via websites, emails, social networks, television, sponsorship, etc.) of binary options and CFDs including contracts with a currency (Forex) as the underlying asset.¹⁹

In 2018, in order to protect retail investors, ESMA, based on Article 42 of the MiFID Regulation (MiFIR), decided to take action (however, its powers are only temporary, which the AMF regrets). The “product intervention” measures introduced as a result consisted of:

- banning the marketing, distribution and sale of binary options to retail investors from 2 July 2018 for three months. This ban was renewed until July 2019;
- restricting the marketing, distribution and sale of CFDs to retail investors from 1 August 2018 to 1 August 2019. These restrictions included: limiting the use of leverage; closing open positions when the initial margin exceeded a certain level; making it impossible to display negative balances on accounts; banning incentives for retail clients to invest in these products; and standardising warnings on the risks attached to these products.

The AMF decided in July and August 2019 to adopt the measures taken by ESMA under Article 40 of the MiFID Regulation (Article L. 621-12-7 I of the Monetary and Financial Code). Most European Union Member States did likewise.

In December 2019, ESMA specified in its Q&As on investor protection under MiFID 2 (directive and regulation) that investment services providers must not only comply with the intervention measures taken by the Member State that authorised them, but also with the intervention measures taken by the Member State in which their client is located.²⁰

The Ombudsman welcomes this clarification from ESMA, which will ensure that retail investors are better protected against the resurgence of disparate legislation.

16 - The AMF had launched a quantified study to determine the performance of these financial instrument among a large sample of retail investors. Over a four-year observation period, it emerged that nearly 9 out of 10 clients suffered losses.

17 - Article 62 of MiFID 2, transposed into Article L. 532-21 of the Monetary and Financial Code, allows national regulators that believe that an investment services provider is not complying with legal and regulatory obligations to take appropriate measures to prevent or sanction, and if necessary ban, that provider from continuing to provide services on their territory.

18 - Questions and Answers relating to the provision of CFDs and other speculative products to retail investors under MiFID, 11 October 2016.

19 - Article 72 of the law on transparency, anti-corruption and economic modernisation (known as the “Sapin 2 Law”) inserted Article L. 533-12-7 into the Monetary and Financial Code. Article 75 of the Sapin 2 Law inserted Article L. 222-16-1 into the Consumer Code.

20 - Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics, updated December 2019.

2019 observations

■ As they do every year, advisers are always promising investors spectacular gains and persuading them to invest all their savings. Those investors who follow account managers' instructions or trading signals to the letter end up losing their entire savings.

■ Since the Ombudsman has no investigative or coercive powers, the outcome of the mediation process is therefore based primarily on the evidence that investors have been able to gather.

■ The main regulatory breaches identified by the Ombudsman this year are:

- Companies providing a service for which they are not authorised: retail investors often report that they have received investment advice from companies that are only authorised to provide order receipt, transmission and execution services;
- The mismatch between the profile of retail investors and speculative trading is obvious: retail investors are often novices and laymen in financial matters, whereas CFDs are complex products that are extremely risky. The Ombudsman also noted that "account managers", who often offer trading training, flatter investors, leading them to believe that they have sufficient knowledge to trade;
- There is still an imbalance between information on the risks of speculative trading and information on its returns. The Ombudsman notes that warnings now appear (in small print) on trading platforms and in emails received by retail investors. However, according to accounts from retail investors (and sometimes even telephone recordings), the language used by telephone advisers is quite different and continues to be misleading, in particular by promising investors spectacular gains ("trading is the goose that lays the golden egg", etc.);
- Abusive practices persist. The Ombudsman found once again that advisers were not acting honestly, fairly and professionally in the client's interest and were encouraging them to invest recklessly: "*if you invest again I will help you recoup your losses*", "*you can't stop now, think of your children*", "*if you have no money left, go to your bank, it'll be worth it*", etc.);



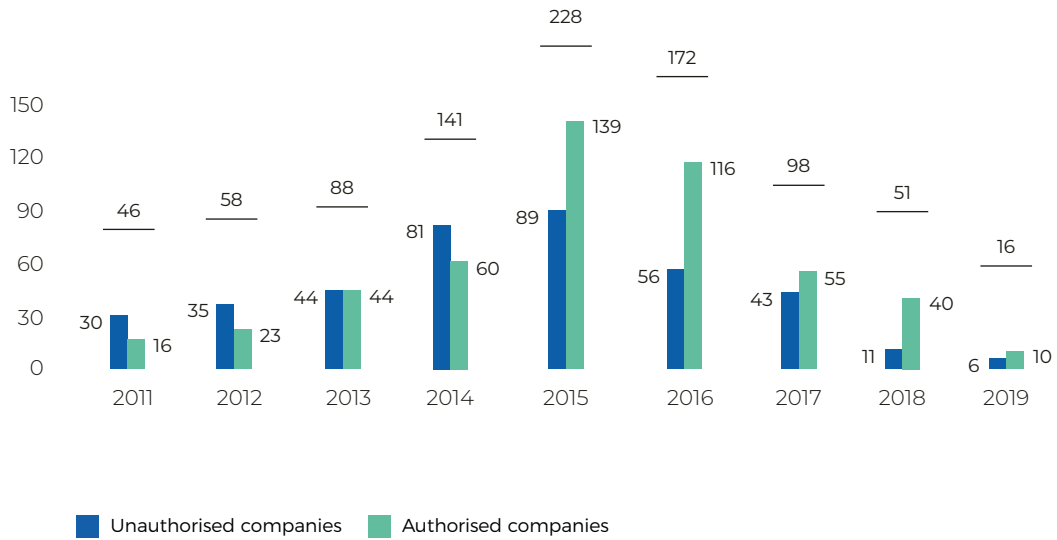
SHEDDING LIGHT ON A JUDGEMENT DELIVERED BY THE ECJ (CASE C-208/18)

On 3 October 2019, the European Court of Justice delivered a judgement in the case of **Jana Petruchová** concerning whether a natural person who, under a financial contract entered into with a trading company, carried out transactions on the international foreign exchange (Forex) market is to be regarded as a consumer. The main contribution of this judgement is that the Court of Justice has a "finalist" and non-textual interpretation of the concept of consumer. Factors such as the value of the trades or the knowledge the investor has are of no consequence as regards whether they are regarded as a consumer or not. The Court stresses the need to examine only whether the investor has in fact acted outside and independently of any professional activity.

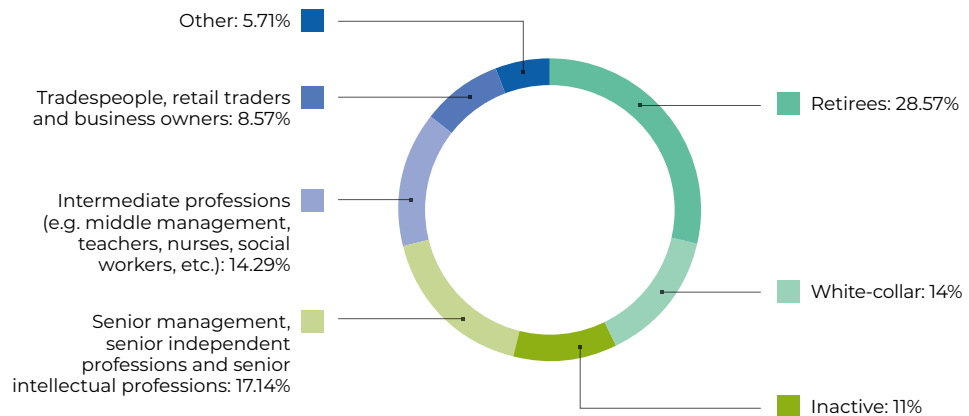
- The new development this year are the attempts to circumvent the "product intervention" measures by encouraging retail investors to switch to being professional investors. The Ombudsman found that some "account managers" were encouraging retail investors to switch to professional investor status by emphasising the advantages of this type of account (free withdrawals and transaction fees, etc.), without informing them of the consequences.

■ Fortunately, a recent ruling by the ECJ has clarified the concept of consumer.

GRAPH 13.
Change in number of CFD/Forex/Binary Options cases received



GRAPH 14.
Socio-professional categories of scam victims



The scams

■ It is important to remember that the Ombudsman cannot initiate a mediation process in the event of an offence or suspected offence and is required by law²¹ to inform the Public Prosecutor. Consequently, the investigation of this type of case is limited to:

- identifying the likely criminal nature of the dispute, that is:
 - checking on REGAFI to find out whether the pseudo-company is registered and what services it is entitled to offer;
 - checking whether alerts have been issued by the AMF or its counterparts (checking in particular any blacklists);
 - identifying the snare tactics traditionally used by scammers (manipulative techniques, promises of astronomical gains, absolute guarantees, etc.);
- sending a letter to retail investors to alert them to the fraudulent nature of the investment they have made (and dissuade them from keeping in contact with the scammers);
- forwarding the case to the specialised department at the AMF, which, in accordance with Article 621-20-1 of the Monetary and Financial Code and in the context of cooperation with the judicial authorities, alerts the Public Prosecutor.

■ In 2019, the Ombudsman received 35 cases in which there was clear evidence of a scam. Around half of these involved crypto-assets and six involved speculative trading. The Ombudsman observed that scammers, who are not lacking in imagination, now offer investors the option of signing “discretionary mandates” or opening “passbooks” without clearly specifying the product in which their savings will allegedly be invested (a list is often provided: commodities, foreign currencies, stock market indices, crypto-assets, etc.). Once their money has been invested and misappropriated, investors have limited or even impossible recourse against the scammers because of the location of the bank accounts they use, usually abroad.



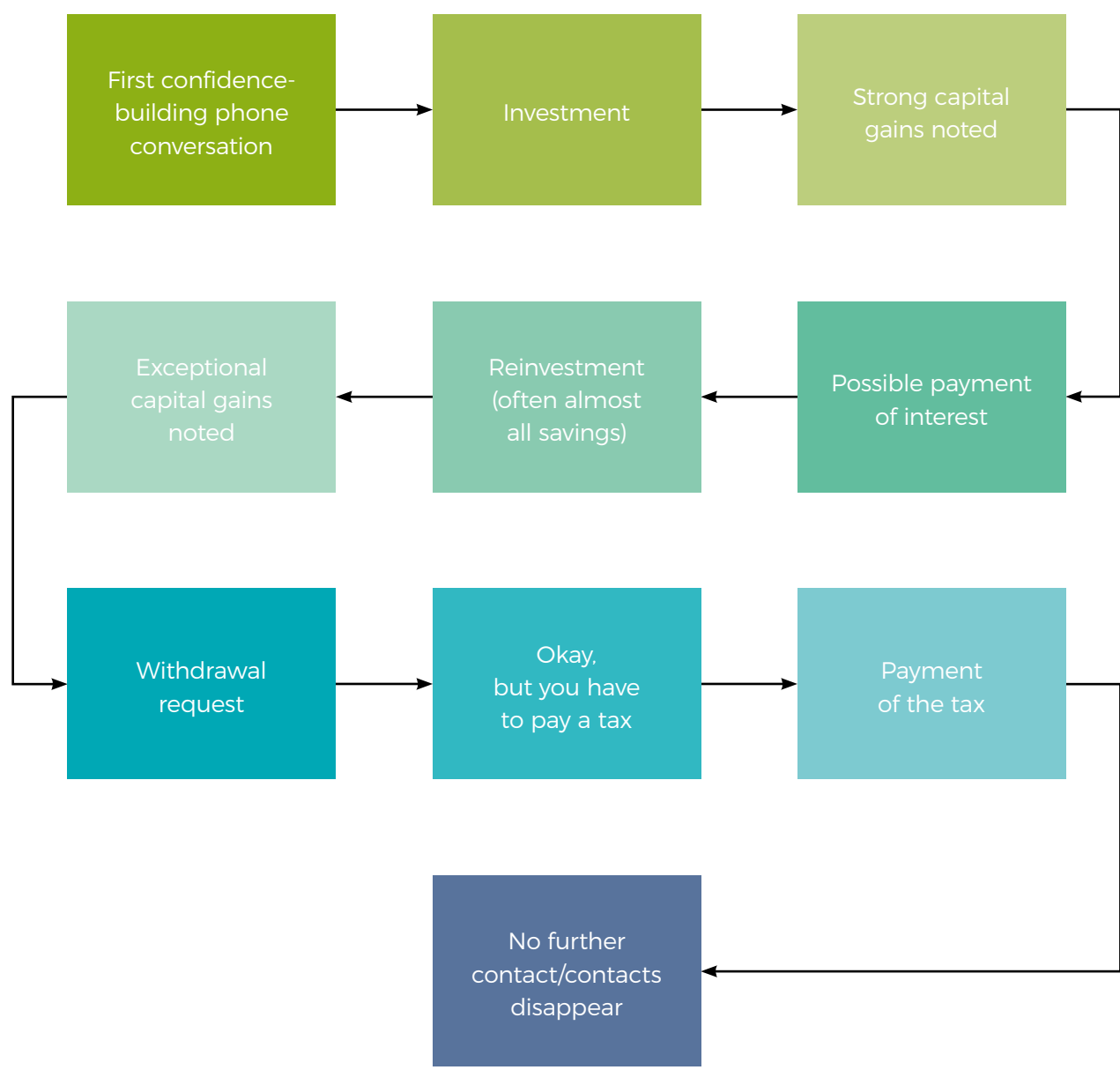
IS THERE A TYPICAL PROFILE FOR A SCAM VICTIM?

The profiling of scam victims, based on the 35 mediation cases received in 2019, confirms the observations from the previous year:

- investors are aged between 29 and 98 years old (average age: 54 years);
- they live mainly in small towns;
- they belong to different socio-professional classes but are mainly retired;
- their losses range between €250 and €260,000 (average loss: €42,961).

21 - Article L. 621-20-1 of the Monetary and Financial Code stipulates that: “If, in the course of its duties, the AMF becomes aware of a crime or offence, it is required to notify the Public Prosecutor without delay and forward to that judge all information, reports and documents relating thereto [...]”.

GRAPH 15.
How retail investors fall into the trap



■ Recent requests for mediation from victims of fraudulent websites reveal a change in the subterfuges used:

- Fraudulent schemes are significantly more sophisticated. Scammers have no hesitation in asking investors what their objectives are. Contracts are comprehensive (up to 100 pages) and include the General Data Protection Regulation (GDPR), the Foreign Account Tax Compliance Act (FATCA), etc.;
- The use of identity theft techniques has become much more frequent:
 - The use of references to major international banks that are often presented as pseudo-guarantors. Scammers use the reputation of these institutions to reassure investors;
 - Frequent use of public authority logos: the logo of the French Prudential Supervision and Resolution Authority (ACPR) sometimes appears on certain contracts. The same is true for the British Financial Conduct Authority (FCA). The French deposit insurance mechanism, the Fonds de Garantie des Dépôts et de Résolution (FGDR), is also mentioned to attest to the total guarantee of the investments offered. The scammers sometimes even go as far as to refer to the AMF website!
 - Impersonating small companies now seems to be the new modus operandi, although this scam is more difficult to detect. Scammers mislead the public by using the names of authorised companies, thereby giving the impression to retail investors that they have the necessary authorisations and approvals to provide the investment services they are offering. In these cases, if a search on REGAFI is carried out (unless a modified letter or hyphen is detected, for example), the company will appear as existing and properly registered.



WHAT TO KEEP IN MIND BEFORE RESPONDING TO A SOLICITATION

- The AMF's blacklists cannot be exhaustive. When the company does not appear on these blacklists, this is in no way a guarantee of the company's trustworthiness.
- The appearance of a company on REGAFI is necessary but is not sufficient: the information presented in the register (company name, trading name, address and authorisation number, website, etc.) must be strictly identical to that of the institution being investigated. In the case of institutions registered in other European Union Member State or other States party to the European Economic Area agreement (which are authorised to offer their services in France through a branch or under the freedom to provide services regime), the Ombudsman strongly recommends consulting the register kept by the authority of the company's home country.
- There is no such thing as a miracle investment. A "Guaranteed High Return" is a guaranteed scam.
- In general, the Ombudsman stresses the need to be extremely wary of financial products or services offered either on websites or through unsolicited emails (spam) or unsolicited phone calls.



The Ombudsman's national and international activities

Actions at a national level

Since 2007, the AMF Ombudsman has been a member of the Club of Public Service Ombudsmen, chaired by Jean-Pierre Teyssier, the Tourism and Travel Ombudsman. The AMF Ombudsman became one of the Club's vice-chairmen this year. The Club is headed by its Secretary General, Xavier Barat.

Around thirty ombudsmen from various sectors and with a wide variety of statuses (public ombudsmen, institutional ombudsmen, sectoral ombudsmen, company ombudsmen, etc.) are members of the Club. They meet several times a year to discuss their practices and any difficulties they may have encountered.

In November, the AMF Ombudsman hosted the Club's plenary meeting at which, after a welcome address by AMF Chairman Robert Ophèle, Carole Aubert de Vincelles, Professor of Private Law, spoke about the growing influence of European Union (ECJ) case law in ensuring effective protection of consumer rights in Europe.

In addition, as every year, the Club met in June 2019 for an internal seminar day. Club members enjoyed a presentation by Alexandre Biard, a researcher at the Universities of Rotterdam and Leuven, on the results and challenges of consumer mediation.



From bottom to top and left to right: Bénédicte Gendry, EDF Ombudsman; Marielle Cohen-Branche, AMF Ombudsman; Betty Chappe, RATP Ombudsman; Anne Guillaumat de Bignières, Caisse des Dépôts Group Ombudsman; Monique Sassier, former National Education Ombudsman; Marie-Christine Caffet, FBF Ombudsman; Jean-Pierre Teyssier, Tourism and Travel Ombudsman and President of the Club of Public Service Ombudsmen; Philippe Baillot, Insurance Ombudsman; Jean-Pierre Hervé, ENGIE Ombudsman; Gilles Maindrault, La Poste Group and Banque Postale Ombudsman; Jean-Claude Brethes, Technical and Higher Agricultural Education Ombudsman; Dominique Braye, Water Ombudsman; Yves Gérard, Chairman of the Circle of Banking Ombudsmen; Roland Baud, Agricultural Social Mutual Fund Ombudsman; Jean-Pierre Hoss, Ombudsman for the Île-de-France region; Xavier Barat, Secretary General of the Club of Public Service Ombudsmen.

■ In November 2019, under the aegis of the Club, Marielle Cohen-Branche once again jointly organised a training day on mediation from a legal perspective, with Amaury Lenoir, French Council of State Officer and Mediation Policy Officer at the General Secretariat of the Council of State. During this sixth edition of the event, the participants examined in greater depth the new developments arising from the law known as "J21" of 18 November 2016 with the trialling of mandatory administrative mediation and from the 2018-2022 Programming Act of 22 March 2019, which amends certain rules of civil procedure that have consequences for consumer mediation.

■ In addition, the AMF Ombudsman also attends meetings of the Retail Investors Consultative Commission, set up within the AMF, whose main role is to inform decisions by the AMF Board likely to have an impact on the protection of retail investors' interests. At these meetings, the Ombudsman presents the mediation case published monthly in her Online Diary.

Actions at a European level

■ The AMF Ombudsman is a member of the European Network of Financial Ombudsmen (FIN-NET), which has 60 members from 27 countries and meets twice a year. These meetings are an opportunity to discuss their approach to alternative dispute resolution for consumer disputes as introduced by the 2013 directive on consumer mediation. In 2019, the Ombudsman attended the two annual meetings held in Brussels in April and November.

■ Furthermore, in March 2019, the Ombudsman welcomed a delegation of officials from the Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia as part of the European Union's project to strengthen consumer protection in Serbia. They enjoyed a presentation from her about the AMF Ombudsman's Office and the advantages associated with the status of national public ombudsman.

■ Lastly, Costanza Alessi, an expert in the Banking and Financial Mediation Coordination Division of the Bank of Italy, also visited the AMF Ombudsman. The meeting provided an opportunity for them to discuss best practices in financial mediation and share their technical expertise.

Actions at an international level

■ Since January 2013, the AMF Ombudsman has been a member of INFO (International Network of Financial Services Ombudsman), a group of financial Ombudsmen (banking, finance and insurance) from around the world. This network provides the AMF Ombudsman with the opportunity to discuss the respective mediation practices that differ widely from one country to another.

■ In addition, in March 2019, the Ombudsman attended the annual seminar on Consumer Protection, Inclusion and Financial Education, organised by the Banque de France for representatives of central banks from various countries, to present the processes and results of the AMF Ombudsman's Office.

The Ombudsman's communications initiatives

Educational initiatives

The Online Diary

Once again in 2019, the success of the *Ombudsman's Online Diary* continued unabated: almost 38,000 visits were recorded, an average of 3,166 visits per month. This is an increase of 8% compared with 2018 (2,932 visits per month).

Since the end of February 2020 and the launch of the AMF's new website, a new feature has been added to the *Online Diary*. Users can now select cases by publication date and, more importantly, by theme, providing them with more targeted information.

The issues addressed, based on specific, real-life cases and reproduced anonymously of course, are still as varied as ever and are also presented in the annual report on a summary page, classified by theme: employee savings, securities transactions, stock market orders, PEAs, etc. (see Appendix 4).

Lastly, professionals are increasingly letting the Ombudsman know that they are distributing her *Online Diary* within their own department. Some major financial institutions even recognise it as a corpus of policy. At the same time, consumer magazines and mainstream newspapers are fully covering or reporting on the lessons learned that were highlighted in the practical cases featured. Occasionally, consumer associations have reported using the *Online Diary* to convince the firm directly, and successfully, in cases where the circumstances are the same (which is not always the case).

In 2019, Marielle Cohen-Branche also continued her live monthly digest on the *Intégrale Placements* TV show on BFM Business, where she discusses, this time verbally, cases previously covered in the *Online Diary*.

Training provided by the Ombudsman

The educational role of the Ombudsman can also be illustrated by the numerous training courses her Office organises each year for Compliance Officers for Investment Services (RCSIs) and Compliance and Internal Control Officers (RCCIs), Ombudsmen (training of the Public Management and Economic Development Institute (IGPDE), training of the Ombudsmen's Club) and also for the National School for Magistrates (ENM) and, more generally, in the context of several university curricula (University of Paris-Dauphine and École des Mines).

The Ombudsman's involvement

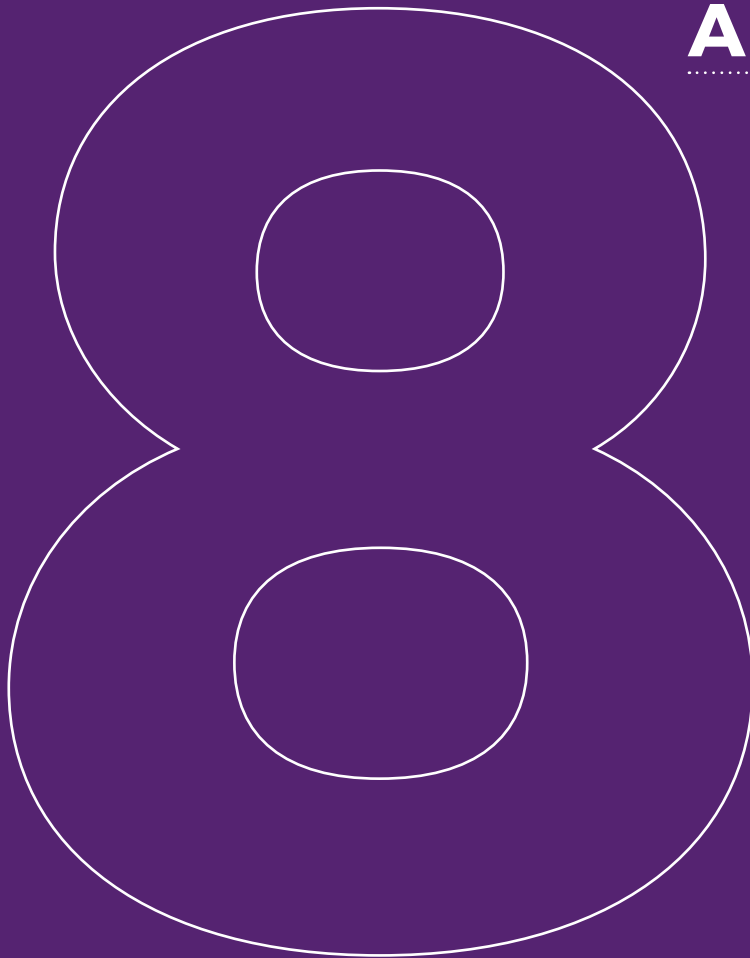
In addition to the monthly digest on BFM Business, the AMF Ombudsman appears in the media and takes part in many seminars and conferences throughout the year.

For instance, on 13 May 2019, at the invitation of Marie-Christine Caffet, Ombudsman of the French Banking Federation (FBF), Marielle Cohen-Branche spoke at the annual meeting of members of the FBF's Mediation Department and presented some situations encountered in mediation before engaging in discussion with the participants.

In addition to this involvement, Marielle Cohen-Branche regularly publishes articles or studies in specialised publications. For example, in 2019, two interviews were published:

- "The AMF Ombudsman's Office is more widely known, but I'd like it to be even more widely known" – *Bulletin Joly Bourse* Interview (May-June 2019);
- "AMF Ombudsman's Office: Between amicable dispute settlement and fact-finding missions" – *Revue Banque* (September 2019).

APPENDICES



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Appendix

Article L. 621-19 of the Monetary and Financial Code Amended by order no. 2015-1033 of 20 august 2015 - art. 2

I. – The Ombudsman of the Autorité des Marchés Financiers shall be appointed by the chairman of the Autorité des Marchés Financiers, after consultation with the Board, for a three-year renewable term.

▣ The Ombudsman is authorised to deal with claims from any interested party relating to matters within the competence of the Autorité des Marchés Financiers and to resolve them appropriately.

▣ The Ombudsman carries out his consumer mediation duties under the conditions provided for in Title V of Book I of the Consumer Code.

▣ A referral to the AMF Ombudsman shall suspend limitation of any civil or administrative action as from the day on which the referral to the Ombudsman is made, pursuant to Article 2238 of the Civil Code. Said limitation shall resume for a period that cannot be less than six months when the AMF Ombudsman announces the close of the mediation procedure.

▣ The AMF Ombudsman cooperates with its foreign counterparts to facilitate extrajudicial settlement of cross-border disputes.

▣ The Ombudsman publishes an annual report on his activity.

II. – The Autorité des Marchés Financiers may formulate proposals for amendments to the laws and regulations concerning the information provided to the holders of financial instruments and to the public, the markets in financial instruments, in units referred to in Article L. 229-7 of the Environmental Code and in assets referred to in paragraph II of Article L. 421- 1 herein, and the status of the investment service providers.

▣ Each year, it draws up a report to the President of the Republic and to Parliament which is published in the Official Journal of the French Republic. Said report presents, in particular, the changes to the regulatory framework of the European Union applicable to the financial markets and reviews the cooperation with the regulatory authorities of the European Union and of the other Member States.

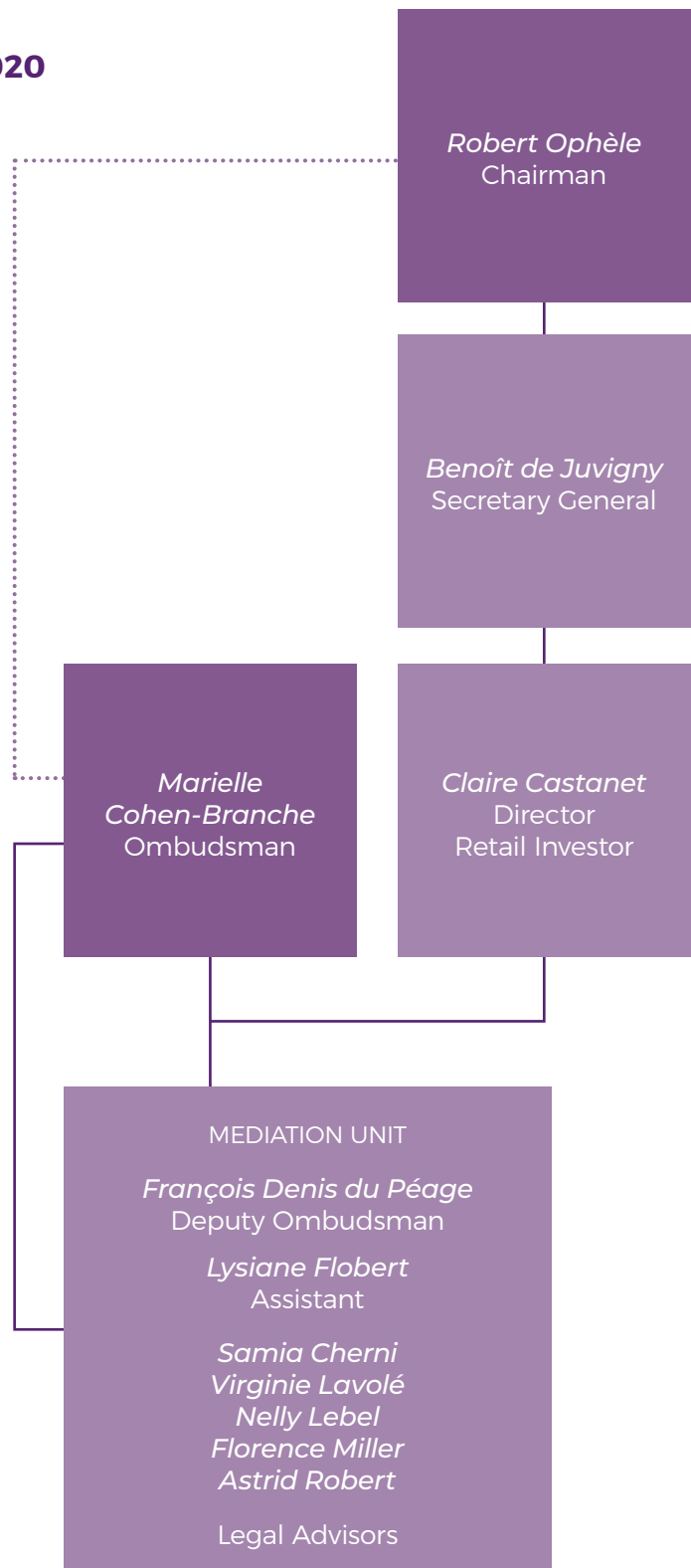
Appendix



Mediation chart as of January 1st, 2020



The Ombudsman and her team as of January 1st, 2020



Appendix



Mediation charter

Article 1 – Purpose of the charter

■ This charter is intended for any person who refers a case to the Ombudsman. Its provisions, to which the parties are subject, govern the mediation process.

Article 2 – The Ombudsman

■ Pursuant to Article L. 621-19 of the Monetary and Financial Code, the Ombudsman of the Autorité des Marchés Financiers (AMF), a public consumer Ombudsman for financial matters, shall be appointed by the chairman of the AMF, after consultation with the Board, for a three-year renewable term. The Ombudsman carries out his consumer mediation duties under the conditions provided for in Title V of Book I of the Consumer Code.

Article 3 – Jurisdiction

■ Any individual or legal entity is entitled to contact the Ombudsman with regard to a financial dispute of an individual nature falling within the jurisdiction of the AMF. However, the Ombudsman has no jurisdiction in the areas of banking, taxation and insurance.

Pursuant to Article L.152-2 of the Consumer Code, the Ombudsman is not authorised to intervene when:

- the consumer has no proof that he or she first attempted to resolve the dispute directly with the professional via a written claim;
- the dispute has been heard by another Ombudsman or by a court;
- the consumer submitted his or her request to the Ombudsman more than one year after filing a written claim with the professional.

Article 4 – Applicable principles

■ **Independence:** As part of the AMF, an independent public body, the Ombudsman has sufficient resources and a team dedicated to carrying out his duties. He also has his own budget.

■ **Impartiality:** The Ombudsman examines cases with regard to the parties' respective positions in a strictly neutral manner. He receives no direction on how to deal with the individual cases for which he is responsible.

■ **Voluntary:** Both parties should willingly enter into mediation, and they can withdraw from the mediation process at any time.

■ **Confidentiality:** The Ombudsman, his team and the parties to the proceedings are bound to observe strict confidentiality. Communications that have taken place during the mediation process may not be submitted or referred to in court.

■ **Free of charge:** No fees or expenses are charged to the parties to the dispute.

■ **Suspension of the limitation period:** Referral to the Ombudsman suspends limitation of any civil or administrative action as from the day the Ombudsman is contacted. Said limitation shall resume for a period that may not be less than six months when the Ombudsman announces the close of the mediation procedure.

■ **Transparency:** The Ombudsman presents an annual report reviewing his activities to the AMF Board. This report is published.

Article 5 – Mediation process

■ **Examination:** The Ombudsman analyses and compares the parties' arguments. The examination is carried out in writing, but the Ombudsman may decide to hear the parties separately or together.

The parties may contact the Ombudsman without using an attorney. However, they may be represented or assisted by a third party of their choosing at any stage during the mediation process.

■ **Duration:** The Ombudsman renders an opinion within 90 days of receiving all necessary information from all the parties. This timeframe may be extended by the Ombudsman if the case is particularly complex.

■ **Ombudsman's opinion and agreement of the parties:** At the end of the process, the Ombudsman issues an opinion grounded in law and in equity. The mediation procedure ends with the delivery of this opinion or the withdrawal of one of the parties.

The parties may refuse or agree to follow the opinion of the Ombudsman who, where applicable, ensures the agreement is enforced.

Appendix



Classification by theme of the AMF Ombudsman's cases of the month since launch (May 2014 to December 2019)

THEME	TITLE	DATE
<i>Employee savings</i>	Employee savings can lead to unpleasant surprises after leaving the company	03/11/2014
	Employee investment undertakings: it's useful to be fully informed of the special conditions for an early release when buying a main residence	02/06/2015
	The treatment of profit-sharing invested after leaving the company	04/11/2015
	Employee savings and acquisition of the principal residence: supporting documents are not interchangeable	01/03/2016
	Employee savings: note that only written documents are taken into consideration when making your allocation choices within the deadline	02/05/2016
	Employee savings: be aware of the confusion between a transfer and a switch!	01/07/2016
	Employee savings: note that the termination of an employment contract does not constitute an early release from the PERCO	02/02/2017
	Employee savings: the risk of absorbing an employee's modest retirement savings in the event of the absence of a PERCO at his/her new employer	02/06/2017
	Please note, early employee savings plan release to purchase or extend a main home owned via an SCI is not permitted	02/07/2018
	Employee savings: even in the event of retirement, the liquidation of assets does not result in the closure of the company savings scheme	06/11/2018
	What is fairness in mediation? A concrete example in a case where assets held in a PERCO are locked in as the result of a default choice	04/03/2019
	Employee shareholder investment undertakings: why is there a possible periodic readjustment of the number of units?	04/06/2019
	When an employee investor thinks that the allocation decision has been finalised	04/11/2019

THEME	TITLE	DATE
<i>Stock market order</i>	A stock market order and an abnormally long execution time.	21/05/2014
	Execution of stock market orders at the end of the year: beware of the tax implications!	01/12/2014
	The detachment of a dividend may have consequences on your stock market orders.	06/01/2015
	Note that one stock exchange order may hide another: what about the priority order execution rules?	04/05/2015
	Poor execution of a stock exchange order: when the actual harm to the complainant is not what he considers...	02/10/2015
	"Best execution" of orders or the primacy of the total cost paid by the client.	02/12/2016
	<i>"Penny stock" and "market" orders: note the possible price lag when placing an order on shares with a very low value.</i>	03/05/2017
	Stock market order executed at an "aberrant price": Euronext may cancel the transaction in exceptional cases.	03/10/2017
<i>Forex and binary options</i>	The risks of believing in the tempting promises of online Forex trading.	13/10/2014
	Evidence kept by the client helps the Ombudsman obtain compensation for binary options and Forex, if the company is authorised.	01/04/2015
	Virtual gains but real losses: if extraordinarily the Forex trading reveals gains, when it comes to withdrawing them from the account everything gets complicated...	02/09/2015
	Binary options and training in telephone trading: how you can lose all your savings.	03/11/2016
<i>Obligation to inform</i>	Subscription to a formula fund when the commercial brochure of a product is not sufficiently clear.	28/08/2014
	US taxpayer "US Person" status: what are the respective obligations of the bank and the client related to the extraterritoriality of US tax regulations?	02/03/2015
	The bank must be able to prove that it has provided the prospectus to its client before he/she subscribes to a UCITS.	02/12/2015
	The account-keeping institution is not required to provide the agent holding a general power of attorney with the information or alerts intended for the account holder, unless stipulated in a specific clause.	08/03/2018
	The KIID: a document that must be provided and read before any subscription	03/05/2019

THEME	TITLE	DATE
<i>Collective Investments</i>	The older a dispute is, the more difficult it is to obtain compensation: the media example of a formula fund.	30/06/2014
	On what basis should a delayed redemption of SICAV shares be regularised?	06/07/2015
	Deadline for centralising orders on UCITS: beware of confusion!	02/02/2016
	Why is the request to redeem mutual fund units on the basis of "known price" unfounded?	04/07/2017
	Failure by a firm to update the address of its clients can be costly	01/09/2017
	Note that in the event of a merger of mutual funds, the fee-free exit is the only right available to unitholders.	01/12/2017
	The Ombudsman's monthly case - Attention: the possible lockup period for your assets placed in an FCPI	04/05/2018
<i>PEAs</i>	Investing an ineligible security in a "traditional" Equity Savings Scheme (PEA) - who is responsible?	02/02/2015
	Disposal of unlisted securities held in a PEA: do not forget to pay the proceeds from the disposal into the cash account of your plan and inform your bank!	04/04/2016
	The transfer of an Equity Savings Scheme (PEA) to another bank: still an obstacle course.	08/11/2017
	Transfer from a bank PEA to an insurance PEA: note the special conditions.	03/09/2018
	A specific point worth knowing when selling unlisted securities in an equity savings plan: what to do in the case of a deferred payment?	01/07/2019
	Can an account-keeping institution be held liable for the ineligibility of securities held in a PEA after subscription?	07/10/2019
<i>Securities Accounts</i>	Estates: What are the rights of the beneficial owner of a securities portfolio?	01/06/2016
	Ordinary securities account: when the transfer is hindered by holding securities of companies placed into court-ordered administration.	31/03/2017
	Note that while investors have the right to possess deposit accounts, this is not the case for securities accounts	04/02/2019
	Opening a securities account: what are the bank's anti-money laundering obligations?	02/12/2019

THEME	TITLE	DATE
<i>Investment Advice</i>	Be aware of certain financial arrangements, clearly not consistent with client needs.	02/09/2016
	If the client does not provide the information in the MiFID questionnaire, the bank must refrain from providing an investment advisory service.	01/02/2018
	The challenge of recommending a suitable financial product for the client's specific situation	02/09/2019
<i>Securities Transactions</i>	Ordinary securities account: when the transfer is hindered by holding securities of companies placed into court-ordered administration.	03/10/2016
	Preferential subscription rights (PSRs): note the shortening of the subscription period.	03/03/2017
	On what date is the status of shareholder assessed in order for him/her to benefit from the associated right to a dividend?	03/04/2018
	Beware of the five-year limitation period for dividends.	01/06/2018
	The need to use the AMF Ombudsman's Office properly: neither too early nor too late...	01/10/2018
	Capital Increase: Note that a share subscription on a "reducible" basis is only possible if the shareholder has previously subscribed to them on an "irreducible" basis.	05/12/2018
	Regarding bond purchases and redemptions: what exactly does "par" mean?	01/04/2019

Appendix



Some guidance on the French mediation legislative landscape – how did it change in 2019?

1. In 2019, the trialling of administrative mediation prior to referral to the administrative court,²² which began on 1 April 2019 (Decree No. 2018-101 of 16 February 2018 and Orders of 1, 2 and 3 March 2018), continued. This trial, applicable to certain disputes (labour disputes and civil service disputes) is free of charge in such a case since it is mandatory.

■ According to the Vice-President of the Conseil d'État (French Council of State), this very promising trial in 42 management centres has resulted in almost 1,400 completed mediations during the first year of implementation, 82% of which resulted in an agreement with the administration or a waiver of appeal after acceptance of the decision. It is worth noting that there was indeed a fall in the number of appeals lodged before the administrative courts in the territories taking part in the trial. This trial was due to end on 18 November 2020 but is expected to be extended until 31 December 2021²³ and could even be extended beyond that date. A trial evaluation report will be prepared by the Minister of Justice and submitted to Parliament and the Joint Public Service Council (CCFP) no later than 18 May 2020.

2. The 2018-2022 Programming and Justice Reform Act (No. 2019-222), which includes provisions on mediation, including online mediation, of 23 March 2019 was published in the Official Journal of the French Republic on 24 March 2019. After two successive readings in each chamber, in December 2018 and January 2019 (necessitated by the lack of a compromise deemed possible by the Joint Commission of Senators and Deputies), Articles 3

and 4 on mediation were adopted. These Articles amend in particular Articles 4-3 and 4-7 of Law No. 2016-1547 of 18 November 2016.

■ The following provisions are therefore adopted:

- Article 3: A broadening of the possibility for a judge to order the parties to meet with an ombudsman to provide them with information about and encourage them to make use of mediation, at any stage of the proceedings, including in summary proceedings, where the judge considers that an amicable resolution is possible. An increase in the thresholds, below which the absence of an attempt at prior mediation by the parties will be liable to be automatically sanctioned by the inadmissibility of the claim in court, was set by decree of the Council of State no. 2019-1333 on 11 December 2019 at €5,000 instead of €4,000. This new threshold applies to cases brought on or after 1 January 2020. The conditions and exceptions to this requirement are set out in Article 750-1 of the Code of Civil Procedure. Moreover, Article 4-4° of Law 2016-1547 of 18 November 2016 removes this same requirement for disputes falling under Article L. 314-26 of the Consumer Code, meaning, in practice, consumer credit for movable and immovable property.
- Article 4: A framework for online mediation and arbitration services with optional certification,²⁴ which will not be provided by the Chancellery, but by an accredited third-party body. The conditions under which the list of online conciliation, mediation or arbitration services shall be publicised have been clarified by decree of the Council of State no. 2019-1089 of 25 October 2019. However, these online mediation services cannot be based solely on the algorithmic or

22 - The law of 18 November 2016 introduced mediation for disputes relating to administrative law. Its procedures are set out in the Administrative Code.

23 - According to Law No. 2019-222 of 23 March 2019 on 2018-2022 programming and justice reform.

24 - This certification will be granted to the online service that requests it, after verification of compliance with the requirements mentioned in Articles 4-1 to 4-6. However, this certification will be granted as of right, in particular to registered judicial conciliators and consumer Ombudsmen.

automated processing of personal data. Furthermore, when this service is offered using such processing, the parties must be informed by an explicit statement and must expressly consent to it.

- The merger of the regional and district courts is the flagship measure of the law of 23 March 2019, which took effect on 1 January 2020. This law provides that:
 - district and regional courts located in the same municipality will merge on 1 January 2020 to form the judicial court;
 - a district court located in a different municipality to the regional court becomes a local chamber of this judicial court, known as the local court.

3. Concerning coordination of jurisdiction for financial products between the AMF Ombudsman and banking Ombudsmen: new agreement signed in 2019.

■ For the record, as a public Ombudsman, since 1 January 2016, the AMF Ombudsman has had a monopoly in her jurisdiction. However, at the same time, the law has given her the ability to sign agreements with banking Ombudsmen that again allow consumers, in the event of a financial dispute with their institution, to choose between the company's Ombudsman and the public Ombudsman, provided that they are clearly informed that their choice is final.

■ January 2019 saw the signing of a new agreement with Jean-Louis Guillot, banking Ombudsman for HSBC France and HSBC Épargne Entreprise and approved by the CECMC. This brings to five the number of Ombudsmen with whom a similar agreement has been signed (the Ombudsmen of La Poste, Crédit Mutuel, the French Banking Federation, and Société Générale (and its Crédit du Nord subsidiary)).

4. Senator Delattre's bill to establish a territorial Ombudsman in certain local authorities incorporated in Article 81 of Law No. 2019-1461 of 27 December 2019 on involvement in local life and proximity to public policy.

■ This bill was based on the observation that in many countries, at many levels and using a variety of formulas (defender of rights for disputes within the public authorities, ombudsmen in public or private companies, etc.), mediation had proved its usefulness and effectiveness. At the local level, too, the practice seems to be gaining ground, with several mayors having set up municipal ombudsmen with jurisdiction to settle disputes between the users of public services in their municipality and the municipal administration. Similar developments have taken place with the introduction of departmental ombudsmen and, more recently, of a regional ombudsman by two regional councils (such as the one in Île-de-France).²⁵ These experiences have demonstrated the usefulness of such institutions. It has therefore been proposed to extend this practice by proposing to establish a territorial ombudsman with jurisdiction over matters falling within the scope of the local authority concerned, as long as disputes are not pending before the courts. Initially, Senator Delattre wanted establishing territorial ombudsmen to be compulsory. The Government, however, preferred that it be optional.

■ Article 81 provides for the insertion in the General Local Authorities Code of an Article L. 1112-24 specifying that this new mechanism will apply without prejudice to existing mediation mechanisms. The new provisions will apply as of 1 January 2021.

■ It should also be noted that the legislation provides that the territorial ombudsmen may not be an "agent of the local authority", which raises the issue of their status and remuneration.

25 - Whose current Ombudsman is Laurent Batsch, who replaced Jean-Pierre Hoss, whose non-renewable six-year term of office ended in November 2019.

Appendix



For further information on mediation

- ▣ FIN NET (Network of European Financial Ombudsmen) website:
https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net_en
- ▣ INFO (International Network of Financial Services Ombudsman) website:
<http://www.networkfso.org/>
- ▣ Club of Public Services Mediators: <https://clubdesmediateurs.fr/en>
- ▣ European Directive 2013/11/EU on the alternative resolution of consumer disputes: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0011>
- ▣ European Regulation No. 524/2013 on the online resolution of consumer disputes: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0524>
- ▣ Executive Order No. 2015-1033 of 20 August 2015 on the alternative resolution of consumer disputes (in French only): <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031070940&fastPos=1&fastReqId=679142069&categorieLien=cid&oldAction=rechTexte>
- ▣ Decree No. 2015-1382 of 30 October 2015 on the mediation of consumer disputes (in French only): <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031400977&fastPos=1&fastReqId=225702787&categorieLien=cid&oldAction=rechTexte>
- ▣ Consumer Code, legislative part, Book VI, "Dispute Resolution", Title I, Mediation:
<https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000032224815&idSectionTA=LEGISCTA000032224817&cidTexte=LEGITEXT000006069565&dateTexte=20200706>

CONTACTING THE AMF OBSMDSMAM

For quicker, easier communication, use the online form available on the AMF website:
www.amf-france.org > The Ombudsman

In writing: The Ombudsman – Autorité des marchés financiers – 17 place de la Bourse 75082 Paris Cedex 02

Good to know: If you are unable to attach the supporting documents to the online form, you can always send them separately by post to the AMF Ombudsman.



17 place de la Bourse – 75082 Paris Cedex 02
Tél. : +33 (0)1 52 45 60 00
www.amf-france.org