AMF OMBUDSMAN'S **REPORT**

AUTORITÉ
DES MARCHÉS FINANCIERS
AMF

By post

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FULL INTEGRATION CONFIRMED BY THE FIGURES AND BY LAW

I would like to start with the figures. Key indicators in 2015 rose substantially compared with 2014: more cases were referred (1,406 versus 1,001 in 2014, up 40%), more cases were closed (1,284 versus 969, up 33%), and more opinions were issued by the ombudsman (364 versus 276 in 2014, up 32%). There was a higher percentage of opinions in the saver's favour (62% versus 48% in 2014) which continued, in these cases, to be combined with a very high level of compliance by both parties (93% versus 94%). Lastly, the percentage of savers stating that they were dissatisfied with an unfavourable opinion was even lower, falling from 6% to 2% between 2014 and 2015.

It bears repeating that the number of cases received by the ombudsman has risen steadily over the last four years. Requests had increased twofold by the end of this period.

Turning to the law: on 20 August 2015, following the transposition into French law of the "alternative dispute resolution for consumer disputes" directive, the AMF ombudsman's status as public ombudsman was recognised in Article L. 621-19 of the Monetary and Financial Code. Until then, the mediation function had been assigned to the AMF as an institution. The new transposition texts also established the principle in the Consumer Code whereby the AMF ombudsman, as public ombudsman, now has sole jurisdiction to review disputes within his or her professional sector, namely the financial sector. This same text nevertheless specifies that the public ombudsman may agree to share out disputes among other ombudsmen in the sector, including banks' private ombudsmen whose disputes in strictly financial and not banking matters represent a very small share of the mediation cases referred to them (about 4%[1]).

2015

THE AMF OMBUDSMAN'S OFFICE, NOW FULLY INTEGRATED INTO THE FRENCH FINANCIAL LANDSCAPE

To comply with the new texts, the chairman of the AMF, after consulting with the Board, reappointed me to my position on 12 November 2015 for another three years.

On 13 January 2016, I had the honour of opening the hearings before the new *Commission d'évaluation et de contrôle de la médiation de la consommation* (National Commission on the Assessment and Supervision of Consumer Mediation — CECMC). I am pleased that it decided to approve me that same day and that I can now be called a "consumer ombudsman". The European Commission has been notified of this decision.

1. *According to the most recent national statistics published – 2013 report of the Banking Mediation Committee.*

In my capacity as ombudsman entrusted with a public service mission, I have been working with Emmanuel Constans, who was asked by the finance minister to lend his assistance, to ensure that the model agreement to be proposed to bank ombudsmen includes conditions giving consumers the right to expect equivalent services, regardless of the ombudsman he or she selects for financial disputes. Two conditions struck me as particularly important: a guarantee that the ombudsman will have a dedicated team and the ombudsman's commitment to ensure that, once mediation has begun, there are no further direct negotiations between the professional and the saver aiming to resolve that dispute. I believe these conditions have become especially necessary since, in the future, the consumer's choice between bank ombudsman and AMF ombudsman will be final. In other words, once the consumer has chosen the bank ombudsman, for example, he or she will no longer be able to refer that same dispute to the AMF ombudsman at a later date.

These two conditions are also important for a more fundamental reason. Consumer mediation — because that is what the new texts say it should now be called — is different in that it targets relationships that are inherently unequal: those between a financial professional and a saver. As an independent third party, when I believe a saver's claim is justified, it is my job to remedy this inequality, to negotiate for anyone who needs it and, where applicable, to recommend compensation, because the saver generally does not have the same knowledge, experience or power as the professional. However, I am just as concerned with reining in savers and investors who see an opening and would like to take advantage of what could be described as a "windfall effect".

The AMF's entire mediation team dedicated itself to preparing for the transposition of the Mediation Directive, beyond the very significant increase in cases to be examined, even though the AMF ombudsman already met most of the criteria established in these new texts. It seems that, in the future, the new regulation will result in greater use of mediation in French society. It probably bears repeating that all market sectors in all European countries will now have to offer a consumer mediation service. However, the use of out-of-court dispute resolution is still just one option available to French consumers; it is not an obligation. Next, all consumer ombudsmen will have to establish procedures that meet strict qualitative requirements. These provisions are detailed in the annual report. Lastly, all consumer ombudsmen will have to be approved and controlled periodically by a national public authority.

In France, this task falls to the CECMC, which was established for that purpose. In 2013, at the time this directive was adopted, I wrote an article entitled *"Why do we need a new European mediation directive?"*, which was published in a financial journal[2]. In it, I wrote: *"Lawmakers must seize this opportunity to set strict independence conditions for corporate mediation and to designate competent authorities to periodically assess whether all ombudsmen meet the quality requirements by providing the information required to that end. The public authorities will thus have to develop strict, credible and transparent procedures. That is what it will take to continue to increase individuals' confidence in this out-of-court settlement process".*

The stature of the individuals on this commission, chaired by senior judge Claude Nocquet and for which the DGCCRF (General Directorate for Competition Policy, Consumer Affairs and Fraud Control) performs secretariat duties, demonstrates this clear determination on the part of the public authorities to give mediation in France every chance of success.

Looking back at the AMF's mediation work over the last year, I would like to draw attention to the three key objectives I set for myself and my team, brilliantly led by my deputy, François Denis du Péage.

2. *Editorial, Bulletin Joly Bourse, December 2013.*

The ombudsman's first objective is, therefore, if the claim appears justified, to obtain compensation out of court and, conversely, if no deficiency is found, to give the saver the clearest and most comprehensive explanations possible.

From that standpoint, the 2015 statistics on compliance with the opinions issued confirmed an even higher degree of acceptance of AMF mediation. This is excellent news and benefits both parties, who have successfully settled their dispute.

The two sectors that saw the largest growth in 2015 were once again speculation on the foreign exchange market intended for the general public (forex) and employee savings plans.

I will start with forex which, I would venture to say, continues to flourish with mediation requests quadrupling in four years (228 cases received versus 141 in 2014, 88 in 2013 and 58 in 2012).

We obtained very good results with authorised companies (non-authorised companies must be reported to the Public Prosecutor, since this concerns a specific criminal offence) but I am far from satisfied. I would like to stress the AMF's determination and commitment to ensuring that false claims such as the notorious advertising slogan "Devenez trader en 30 minutes" (Learn to trade in 30 minutes) will never be made again and cause tens of thousands of vulnerable and unsuspecting consumers to watch as their entire savings, and sometimes even their children's, go up in smoke in just a few clicks.

I turn next to a very different subject, employee savings plans: the continued increase in the number of cases received is even more disturbing, with 271 cases received versus 117 in 2014, 42 in 2013 and 19 in 2012. I am pleased with the results obtained through mediation and with the relationships we have developed with account keepers, as discussed below. The annual report also describes my key concerns relating to employee savings plans in 2015. For example, how many employee-savers can distinguish between "transfers" and "switches" if the account keeper does not clearly and visibly explain, on-screen on the website, how they differ when these savers are trying to make their investment decisions? This is critical information at a time when PERCOs (collective retirement savings plans) are on the rise. With these plans, savings are locked up, not for five years as with PEEs (company savings plans), but until retirement. Nor, for example, does the termination of an employment contract permit the release of these savings, unlike the PEE. It is possible to support lawmakers' preference for long-term savings but still believe that employee-savers must give their informed consent.

At the same time, consumers continue to submit recurring disputes in other areas. To illustrate the benefits of mediation, I decided to highlight in the 2015 activity report a number of problems relating to securities accounts, particularly those that arise in estate matters. For example, I examine the question of the powers granted to the beneficial owner *(usufruitier)*.

If the deficiency observed is not due to human error, but to a flaw in an internal process, the ombudsman's second objective is to convince the financial professional's compliance officer to seize this confidential opportunity to improve the company's behaviour. A French ombudsman, as we know, can only propose, not dispose. He or she cannot issue a ruling, unlike a judge or an arbitrator. Because of the constructive relationships I have developed with certain leading professionals, it has been easier to convince them of the benefits of targeting certain areas for improvement. They may, for example, need to improve how savers receive alerts or information about employee savings plans, or the specific alert that an account keeper must issue when an investor purchases a security admitted to listing on Alternext through a private placement.

I often quite simply say to professionals during negotiations: *"What information did you provide to your clients so they could assess the risks they*

were taking?", and *"Send me the MiFID questionnaire you used to evaluate your client's knowledge, experience and objectives"*. More than 35% of cases received for mediation concerned situations where the client considered the information, alert or advice to be inadequate or insufficient.

I am pleased to see that the number of people who discovered my Online Diary, available on the AMF website, doubled on average in 2015 compared with 2014. This is where, once a month, I describe — anonymized, of course — a mediation case and the lesson learned. The heads of compliance at several banks have told me that they distribute it within their institution. Additionally, since the last quarter of 2015 I have also done a monthly live segment on the BFM Business TV channel, where I discuss a mediation case I handled and, first and foremost, the lesson learned.

The third objective, both more infrequent and more ambitious, is to have the opportunity to propose changes to the law when recurring disputes indicate the need to improve the general texts. This scenario occurred in 2015 in connection with the Macron Act, in the section on employee savings plans. The government had created an agency responsible for making proposals, and my suggestion to improve the information provided to employees about the fees they would have to bear on termination of their employment contract resulted in a special amendment.

Since the AMF ombudsman is now recognised as having public ombudsman status, I would like to say a few words on the significant benefits, in my view, of the decision to affiliate my office with the regulator. As the financial regulator is the guardian of the general interest through its obligation to ensure orderly markets, my independence vis-à-vis the two parties to a dispute is clear and unambiguous. While anonymity from AMF staff is preserved when a mediation dispute is submitted, this affiliation is naturally not without its uses in terms of bargaining power but also, and most importantly, it offers valuable expertise. It is no secret that finance has become extremely complex and that manufacturers are continually inventing new structured products.

The start of 2016 marks a milestone for mediation in France in every sector of the economy. We should remember that, in our country, a culture of compromise is not really in our fellow citizens' DNA. They tend to rely on the judiciary, so we are witnessing the beginnings of a small, silent "Copernican revolution". And the AMF's public ombudsman service has every intention of playing a significant role.

Paris, 16 February 2016

Marielle Cohen-Branche
AMF Ombudsman

Who is the AMF ombudsman?

The AMF ombudsman is Marielle Cohen-Branche. She was first named AMF ombudsman on 16 November 2011 and has since then been reappointed. To fully comply with the new regulations, her term was extended for three years on 12 November 2015.

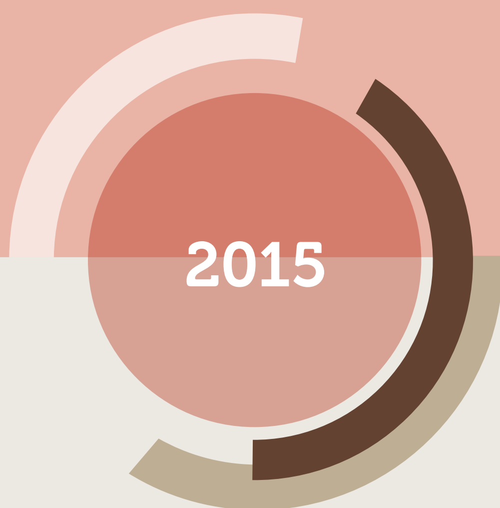
Ms Cohen-Branche previously spent eight years as a judge on special assignment to the Court of Cassation with responsibility for banking and financial law (2003-2011). At the same time, she was also:

- 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 bank 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 (renewable five-year term).

As ombudsman, she relies on a team of 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 Directorate.



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Ombudsman's report

1. TRANSPOSITION OF THE MEDIATION DIRECTIVE IN 2015: NEW REQUIREMENTS BRING NEW IMPETUS

It has now been nearly three years since the European directive (2013/11/EU) on alternative dispute resolution for consumer disputes (ADR) was adopted on 21 May 2013. It was transposed into French law just after the 9 July 2015 deadline. Order no. 1033-2015 of 20 August 2015 was published in the Official Journal of the French Republic on 21 August 2015 and Implementing Decree no. 2015-1382 of the *Conseil d'État* was published in the Official Journal on 30 October 2015. Professionals had until 1 January 2016 to comply. Links to the text of the order and the decree, which resulted in the addition of Title V to Book I of the consumer code, are included in the annexes to this report.

A. New requirements for professionals

This new code expands the implementation of free mediation schemes for consumers to all economic sectors. Excluding non-trade services in the public interest, all market professionals must offer an out-of-court mediation service free of charge to attempt to resolve disputes with their clients.

They must now disclose on their website, in a clear, comprehensible and easily accessible way, and, where applicable, in their general terms and conditions of sale, the contact information for their competent ombudsman(men). They must at the same time provide this information when the dispute could not be resolved as part of a previous complaint (Article L. 156-1 of the Consumer Code).

For financial disputes, this last requirement has existed since Instruction 2012-07, pursuant to Article 313-8 of the AMF General Regulation and Autorité de Contrôle Prudentiel et de Résolution recommendation no. 2011-05, updated in 2015. This requirement for professionals in the event of a dispute is now rooted in law. The decree expands the professional's disclosure requirement to its website. Failure to comply with these provisions is now punishable by an administrative fine of EUR 3,000 for individuals and EUR 15,000 for corporate entities (L. 156-3 of the Consumer Code).

B. New requirements for consumer ombudsmen

1. New status

Three types of status coexist in France: public ombudsmen, sector ombudsmen and corporate ombudsmen.

All consumer ombudsmen are subject to seven major shared requirements to better ensure their independence, impartiality and effectiveness:

- create a dedicated website;
- allow cases to be submitted online;
- prepare an annual activity report;
- have mediation skills and sound legal knowledge, particularly in the area of consumer law;
- be appointed for at least three years;
- be compensated regardless of the outcome of the mediation;
- be approved by a national authority which will assess them and periodically control them.

Additional conditions have been established for corporate ombudsmen (employed or paid exclusively by the professional who is party to the dispute). They must be

appointed by a board composed of equal numbers of professionals and representatives of authorised consumer associations, must have no direct reporting or functional relationship with said professional, and must have a separate and adequate budget to carry out their duties. Lastly, at the end of their term, they may not work for the professional or for the federation to which this professional belongs for three years.

Public ombudsmen, where they exist and which is currently the status of the AMF and energy ombudsmen, now have exclusive competence within their jurisdiction, unless they sign agreements to share out cases with the corporate ombudsman, which allows consumers to choose between the two ombudsmen. In finance, this decision is final.

2. A more regulated case handling process

The texts detail the requirements consumer ombudsmen will have to comply with in their case handling process.

The law and the decree set out a number of situations that require the ombudsman to report the case as inadmissible (currently or previously referred to another ombudsman, more than one year since the consumer has filed the claim) and, for admissible cases, to investigate them within a timeframe of 90 days starting when the ombudsman has received the documents on which the request is based, i.e. as stated in whereas clause 40 of the Directive itself, all the documents necessary to carry out the procedure; this timeframe may be extended if the case is particularly complex.

C. Impact of the directive on the AMF ombudsman

The ombudsman herself is now responsible for the mediation duties previously assigned to the institution. The AMF therefore decided it was necessary to amend the relevant legislation. The procedure, applied since 2011, whereby the ombudsman is appointed by the chairman, after consulting with the Board, for a renewable three-year term was thus formalised in Article L. 621-19 of the Monetary and Financial Code. The ombudsman's compensation, set forth by a decree of the Conseil d'État, is determined under the same conditions (Article R. 621-12 of the Monetary and Financial Code).

Although a charter is no longer required once legislation has been passed, the AMF ombudsman believed it still had value and chose to update it. The charter is intended for anyone who requests mediation and for the professionals who agree to it. While not exhaustive, it provides a plain language overview of the main rights and obligations of the parties and the ombudsman.

The website of the AMF ombudsman has been updated to meet the requirements of the Mediation Directive: the procedures for appointing the ombudsman have been added and it is now easier to submit a request online. Since 15 February 2016, the European Commission has enabled links to the interactive European platform for the online resolution of consumer disputes resulting from the online purchase of goods or services (regulation 524/2013, "ODR").

Lastly, content has also been added to certain documents to meet the new requirements. For example, there is now a reminder that the parties may withdraw from the mediation process at any time, and the ombudsman's opinion contains language stating that it may be different from the decision a judge might render. There is also an additional document stating that the duration of the mediation may be extended when the complexity of the case so requires.

A standard model agreement that can be signed between the AMF ombudsman and corporate ombudsmen able to intervene in financial matters (a possibility provided for in Article L. 152-5 of the Consumer Code) was negotiated, within the deadline, at the end of 2015.

To ensure that the quality of service is fully equivalent to that provided by the financial regulator, the agreement sets two criteria:

- it guarantees that the corporate ombudsman will have a dedicated team;
- it guarantees that the corporate ombudsman will ensure that, once a case has been duly referred, there will be no further direct negotiations between the professional and the client regarding this dispute.

Emmanuel Constans, chairman of the *Comité Consultatif du Secteur Financier* (Advisory Committee on the Financial Sector — CCSF) played a critical role in drafting this model agreement. He had been tasked by the finance minister to help in its development, in

consultation with the other parties. It was officially presented at the CCSF plenary meeting on 1 February 2016, attended by trade and consumer associations.

The Commission d'évaluation et de contrôle de la médiation de la consommation (National Commission on the Assessment and Supervision of Consumer Mediation — CECMC) is notified whenever an agreement is signed[1].

D. National Commission created to monitor the quality of the new mediation schemes

The directive requires that a national assessment authority authorise all consumer ombudsmen and monitor them every two years.

This task has been assigned to the CECMC, chaired by a senior judge, Ms Claude Nocquet, judge emeritus at the Court of Cassation. Ms Martine Jodeau, a Councillor of State, serves as vice-chair. The CECMC is also composed of eight members and eight alternates appointed by ministerial decree on 15 December: qualified individuals and representatives of authorised consumer associations and trade organisations. Its secretariat is provided by the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* (General Directorate for Competition Policy, Consumer Affairs and Fraud Control — DGCCRF).

The AMF ombudsman, as a consumer ombudsman, applied for inclusion on the list of ombudsmen who meet the requirements of the Consumer Code and of whom the European Commission is notified. The regulations (Articles L. 153-1 and R. 154-1 to R. 154-3 of the Consumer Code) outline the information and supporting documents the ombudsman must provide to be included on this list (structure, financing, budget, remuneration, organisation, mediation process, website content).

The AMF ombudsman, who was interviewed as part of the application process on 13 January 2016, was approved at the first meeting of the CECMC for inclusion on the European list.

There is no doubt that the more widespread use of mediation and the public structure selected to monitor its quality will increase consumers' confidence in their relationships with professionals and remedy that inequality without the onerous, lengthy and expensive constraint of court proceedings.

1. *The website of the Commission d'évaluation et de contrôle de la médiation de la consommation (http://www.economie.gouv.fr/mediation-conso) was launched on 15 February 2016.*

How mediation works

While the AMF has offered mediation for many years and this service has been significantly expanded since 2011, the AMF ombudsman is now expressly included in the law by means of the order of 30 August 2015 amending Article L. 621-19 of the Monetary and Financial Code. Mediation is a free public service that provides for the out-of-court settlement of financial disputes. It targets savers and investors, both individuals and corporate entities (a retirement fund or an association, for example). The range of disputes eligible for mediation corresponds to the AMF's jurisdiction, i.e. disputes with an investment services provider (a bank, a management company, etc.), a financial investment adviser or a listed company. The ombudsman also has jurisdiction over crowdfunding investment advisers. On the other hand, it has no jurisdiction in the areas of taxation, life insurance or banking.

In concrete terms, you can contact the AMF ombudsman if you are a saver, whether you are an individual or a corporate entity, and if you believe that your institution or financial adviser has engaged in misconduct regarding a financial service or product and that this misconduct has caused you financial harm.

Before requesting mediation, you must have filed an unsuccessful written claim with the professional with which the dispute arose. The ombudsman is therefore only contacted if the professional has not been able to resolve the saver's problem.

The mediation process is governed by a charter (see Annex 3 to this report).

Through her position as a legally recognised public ombudsman, signifying that she is an independent third party, and drawing on her own experience and the technical expertise of her dedicated AMF team, the AMF ombudsman will, once the claim has been investigated and appears justified, propose an out-of-court solution to the financial disputes submitted to her. She does this in accordance with law and equity and as efficiently as possible.

If the ombudsman's recommendation, which is strictly confidential, finds in favour of the saver, the recommendation, once accepted by both parties to the dispute, takes the form of a total or partial payment or compensation for the loss suffered. It does not imply acknowledgement of any kind of liability on the part of the professional.

Since July 2013, all applicants have received a confidential code which allows them to track the status of their case step by step on the Ombudsman's page on the AMF website.

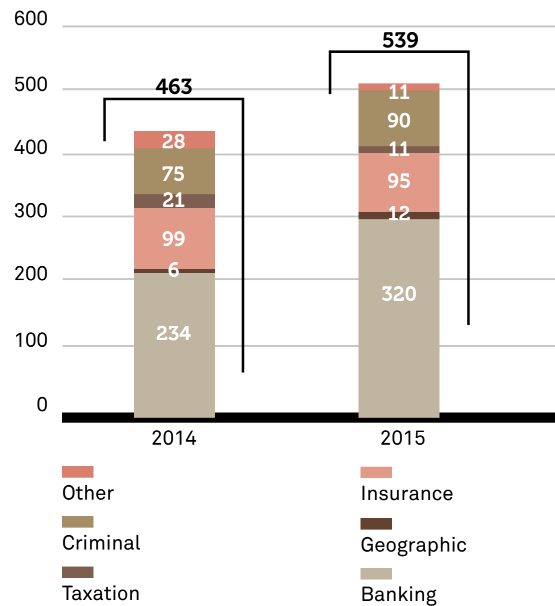
2. 2015: A VERY SHARP INCREASE IN ACTIVITY

The increase in the number of mediation requests accelerated significantly in 2015. This steady growth represents a near doubling of the number of requests in four years, from 747 to 1,406.

The years 2012 and 2013 had been marked by a sizeable number of cases submitted in the context of class actions, which could explain the increase in requests. This was less true in 2014 and 2015, with 16 and 55 cases of this type, respectively.

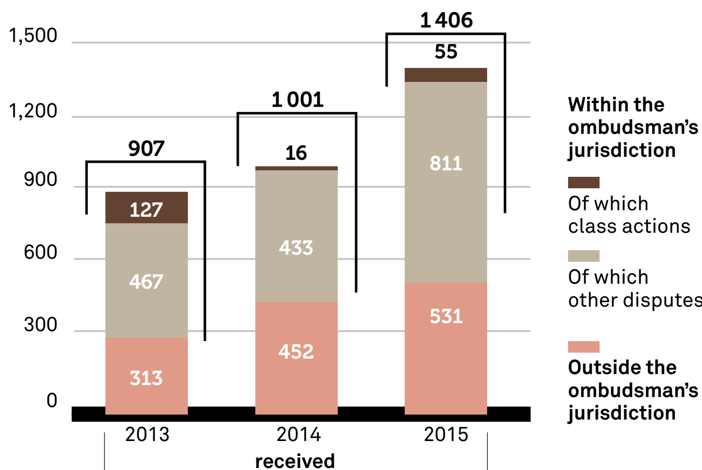
As savers are finding it quite difficult to understand the respective scope of bank, insurance and financial mediation, a large number of requests involve disputes outside the AMF's jurisdiction. The sharp rise in these requests also offers a partial explanation for the higher volumes. These numbered 45% of total cases received in 2014 and 35% in 2013. In 2015, this relative weight began to shrink as the number of disputes outside the AMF's jurisdiction dropped back down to 38%.

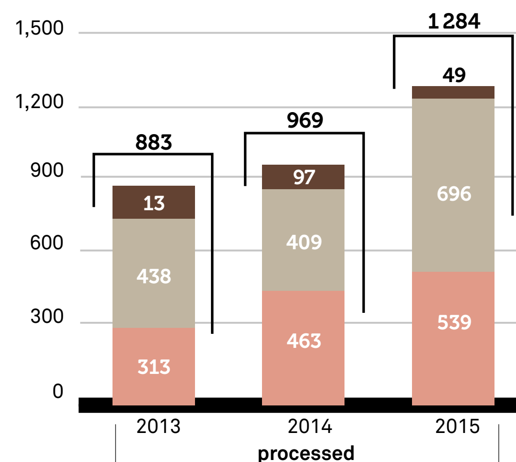
CASES PROCESSED IN 2015 OUTSIDE THE OMBUDSMAN'S JURISDICTION



In 2015, 22% of applicants contacted the ombudsman using the electronic form available on the AMF website compared with 28% in 2014. The vast majority of applicants therefore continue to prefer to submit their requests by post.

NUMBER OF CASES RECEIVED AND PROCESSED





REASONS FOR CLOSING THE 1,284 CASES PROCESSED IN 2015 COMPARED WITH 2014

1,284 cases processed
versus 969 in 2014

+33%

539 cases processed outside the ombudsman's jurisdiction
320 in banking
95 in life insurance
90 sent to the Public Prosecutor
34 other

745 versus 506 in 2014
cases processed within the ombudsman's jurisdiction

+47%

286 cases not processed on the merits
231 premature requests
9 cases previously referred to another ombudsman or the subject of legal proceedings
16 requests reclassified as alerts
20 requests reclassified as consultations
10 non-processable and other

459 versus 402 in 2014
mediation initiated

+14%

95 cases suspended
81 cases abandoned (or **18%** of mediation cases initiated)
14 cases in which the professional refused mediation (or **3%** of mediation cases initiated)

364 versus 275 in 2014
opinions issued

+32%

In 2015, the number of cases processed and closed rose by a sharp 32% to 1,284. Smaller increases were observed in the previous three years.

Cases received outside the ombudsman's jurisdiction are quickly redirected to the appropriate ombudsman. They are even sent directly when they concern the ombudsman's lack of jurisdiction in the banking sector. Of the 539 cases closed in 2015 that were outside the ombudsman's jurisdiction, 320 concerned the banking sector (nearly 60% of these cases). This might have involved, for example, people having financial difficulties, means of payment issues or bank loan renegotiations.

Referrals outside the ombudsman's jurisdiction also concern cases in which the dispute is criminal and cannot be mediated. The case is then sent to the Public Prosecutor (90 cases in 2015 and 69 in 2014).
If we deduct the 539 cases that are outside the ombudsman's jurisdiction from the 1,284 cases processed, we arrive at a total of 745 cases processed:

- 5 cases were closed as they were non-processable and 11 because they were the subject of legal proceedings and thus incompatible with mediation, which is an out-of-court process, or because they had simultaneously been referred to another ombudsman;
- 231 cases were closed because they were referred prematurely since the saver provided no proof that a prior claim had been rejected or left unresolved for at least two months;
- 81 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 saver did not provide the evidence necessary to continue with a review of the case;
- 16 cases had to be reclassified as alerts, as they sought to expose a practice without being able to prove any harm. Once reclassified as alerts, these cases are forwarded to the relevant AMF staff for monitoring;
- 20 cases had to be reclassified as consultations, as they involved questions for the ombudsman but no dispute was referred;
- 14 cases involved professionals who rejected mediation, as is their right;
- in total, 364 cases therefore qualified to receive an opinion in 2015 and did in fact result in an opinion by the ombudsman. This represents an increase from 276 in 2014.

In 62% of cases, the ombudsman concluded in favour of the applicant. Her opinion was unfavourable 38% of the time. This proportion indicates an increase in favourable opinions relative to 2014, stemming from the growing number of favourable opinions issued in employee savings plans and forex disputes.

Compliance with mediation is high as 93% of the ombudsman's recommendations in favour of the applicant were accepted by the parties to the dispute in 2015, and in only 2% of cases did the applicant challenge recommendations that were not in his or her favour.

It is important to remain vigilant as to the implications of the high levels of volumes processed with no change in staffing levels for several years: in addition to a longer mediation process, an increase in cases pending was observed for the first time. This figure was 351 cases at 31 December 2015 versus about 220 in previous years.

Duration of AMF mediation in 2015

The AMF's mediation process takes place in several stages.

A file is created as soon as the complainant contacts the ombudsman's office. 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 request clarifications or additional information from the complainant.

The ombudsman must, in accordance with Articles R. 152-2 and R. 152-5 of the decree transposing the Directive, investigate admissible cases within a timeframe of 90 days. This period begins when the ombudsman has received the documents on which the request is based, i.e. as stated in whereas clause 40 of the Directive, all the documents necessary to carry out the procedure.

The charter of the AMF ombudsman states that once the ombudsman has received all the relevant information from all parties, she has 90 days in which to issue her opinion. This same decree and charter specify that this timeframe may be extended at any time by the ombudsman when the complexity of the dispute so requires.

Generally, when she finds in favour of the complainant, the ombudsman states that the parties have 30 days in which to accept or reject the opinion. In addition, the ombudsman may, at the parties' request, supervise the drafting of the memorandum of understanding and oversee the payment of the agreed compensation. The administrative closing of the file is then deferred by the same amount of time.

Average processing times resulting in an opinion from the ombudsman were as follows in 2015:

- approximately 4.5 months: that was the average time in 2015 between receipt of the complainant's file and when it was complete, with a median of 3.5 months. This timeframe included time spent waiting for responses to the ombudsman's requests, which sometimes require follow-ups and several back-and-forths;
- 6 months: that was the average time between receipt of the complainant's file and the issuance of the ombudsman's opinion, with a median of 4.5 months;
- 1 month: that was the average timeframe between completion of the file and issuance of the ombudsman's opinion. AMF mediation is therefore well within the timeframe imposed by regulation, which must be less than 90 days.

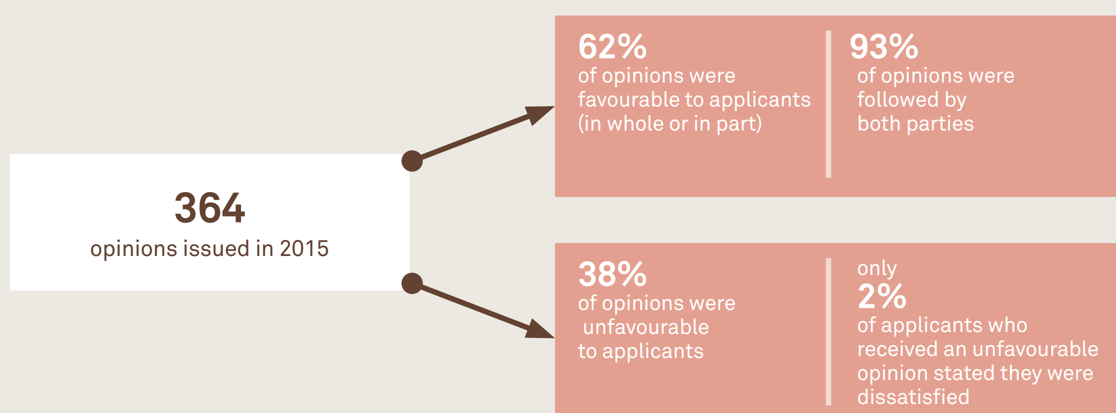
Instructions carried out or compensation awarded through mediation in 2015

A favourable opinion from the ombudsman, when followed by the parties concerned, may take two forms, depending on the situation:

- an instruction is carried out (12% of favourable opinions followed); or
- the harm is remedied through compensation (88% of favourable opinions followed). The total amount of compensation obtained in 2015 was EUR 851,653.

Out of all cases closed in 2015, 224 favourable recommendations were made, including 197 financial recommendations. For these 197 financial recommendations, goodwill gestures ranged from EUR 8 to EUR 60,000, with an average of EUR 4,323 and a median of EUR 916.
Of the forex cases closed in 2015, 43 favourable recommendations were made, including 42 financial recommendations.
For these 42 financial recommendations, goodwill gestures ranged from EUR 200 to EUR 52,700, with an average of EUR 9,029 and a median of EUR 3,750.
Of the employee savings plan cases closed in 2015, 62 favourable recommendations were made, including 51 financial recommendations.
For these 51 financial recommendations, goodwill gestures ranged from EUR 8 to EUR 34,134, with an average of EUR 2,081 and a median of EUR 374.

BREAKDOWN OF AND COMPLIANCE WITH OPINIONS ISSUED IN 2015



3. MEDIATION TOPICS

A. Poor execution and inadequate information: key mediation topics

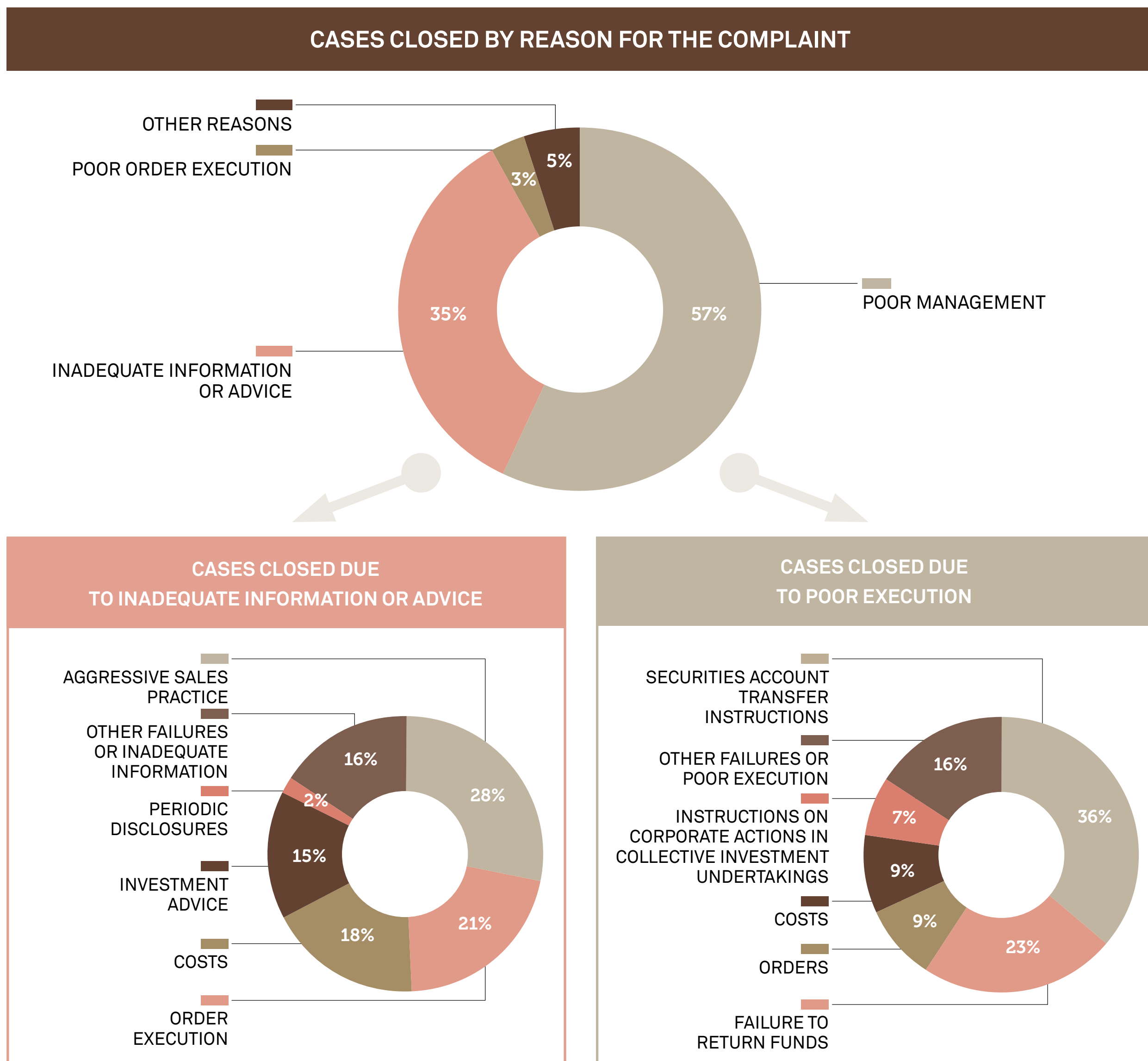
A topic-based classification system was developed according to the type of grievance:

- poor order execution;
- inadequate information or advice;
- poor management.

The first two grievances represented 92% of mediation cases processed. Poor management accounted for only 3%.

Each year, the topics addressed differ widely, as illustrated by the Ombudsman Online Diary, which is published monthly on the AMF website (see page 28).

In addition to recurring disputes, in 2015 the ombudsman noted an intensification of the two strong trends observed in 2014 and 2013 in two completely different sectors: complaints relating to employee savings plans and those linked to speculation on forex, the foreign exchange market open to the general public (see page 19).



B. Problems relating to securities accounts

1. Risk of confusion between undivided ownership and divided ownership in estate matters: the specific powers of the beneficial owner to switch securities in a portfolio

The ombudsman regularly receives mediation requests relating to the distribution of powers among holders of securities portfolios in estate matters.

Within these requests, a distinction must be made between problems relating to securities accounts held in undivided ownership and those relating to securities accounts held in divided ownership.

When the deceased has several heirs, their legal status can be that of undivided ownership upon and because of the death. They thus become joint undivided owners, i.e. co-owners. This inheritance-related undivided ownership may last for a number of years.

The rights attaching to the securities held in undivided ownership may then be exercised only jointly by the joint undivided owners. However, since law no. 2006-728 of 23 June 2006 took effect on 1 January 2007, management of assets held in undivided ownership has been relaxed. If the purpose of the actions is to generate a return on the asset or to hold on to it, if they are administrative in nature or involve the sale of movable property held in undivided ownership to pay off undivided ownership debts and expenses, a two-thirds majority of the joint undivided owners is now sufficient (Article 815-3 of the Civil Code). However, unanimity among the undivided owners is still required for more important actions, such as traditional disposals, sales, gifts or pledges.

Due to the practical difficulties associated with this status, the joint undivided owners also have the option of appointing a joint agent. Until the liquidation of the estate, this is typically but not exclusively the notaire.

The ombudsman has, in several mediation cases, had to remind heirs with this undivided ownership status that securities may be sold or a securities account closed only when the financial institution has received instructions to that end, either from all the heirs and legatees, or from an agent duly authorised for these transactions by all the heirs.

A beneficial owner *(usufruitier)*, with reference to securities, has the right to use the asset, i.e. to receive the revenue derived therefrom (share dividends, bond coupons, etc.) while the bare owner *(nu-propriétaire)* has the right to dispose of the asset held in divided ownership, i.e. to give away or transfer the bare ownership of the asset. The disposal of the full ownership of the portfolio requires the consent of the beneficial owner and the bare owner. In addition to reminders about this principle, in December 2015, the ombudsman had an opportunity to remind a credit institution about the right established by Court of Cassation case law, based on a judgment handed down on 12 November 1998 (Court of Cassation, 1st Civil Division, 12 November 1998, no. 96-18.041), of the beneficial owner to switch the securities in this portfolio. Simply put, this means that he or she has the right to buy or sell securities without seeking authorisation from the bare owner, but only insofar as the proceeds from this sale are reinvested in the same portfolio and only if the bare owners are kept informed. The Court of Cassation clarified that the beneficial owner was responsible for preserving the substance of the portfolio taken as a whole. For a traditional disposal, meaning for full ownership of the security, the account requires either the joint signature of the beneficial owner and the bare owner or the signature of their agent. In the specific mediation case cited above, the surviving beneficial-owner spouse was able, after the ombudsman's intervention, to trade in the securities account of her deceased husband.

In 2015, the ombudsman received several requests for mediation relating to the operation of a securities account held in divided ownership and more specifically arising from a dispute concerning the powers of the parties with an interest in this account.

Generally speaking, savers, and sometimes even financial institutions, confuse securities accounts held in divided ownership with securities accounts held in undivided ownership. Once an estate has been settled, some heirs become beneficial owners (often the surviving spouse) and others become bare owners (often the children). In that case, we call it a securities account held in divided ownership, as the bare-ownership accounts here are held in undivided ownership.

2. Change of address for the securities account holder in estate matters: adoption of best practices

This issue affects a number of savers and arises when the credit institution has received no instructions about a change in mailing address.

There are consequences to changing a mailing address. For example, the ombudsman was contacted by the heir to a securities account who did not receive the corporate action notice about a capital increase. As the notice had been sent to the deceased's address, his heir was not able to request the sale of his pre-emptive rights for several thousand euros.

While the bank had not, as it stressed, been notified of the change of address by the *notaire*, the ombudsman reminded it that, in accordance with financial centre best practices, when an estate account is opened, financial institutions should send correspondence directly to the estate agent, i.e. most frequently the *notaire* for the estate, in the interest of the estate.

On the ombudsman's recommendation, the financial institution agreed to remedy the harm resulting from the heir's lost opportunity to request the sale of the pre-emptive rights as he did not receive the corporate action notice before the end of the capital increase. According to case law, the harm of the lost opportunity can be remedied only to the extent that the expected event is likely to occur.

3. Joint securities accounts: autonomy of each co-owner vis-à-vis the bank

The ombudsman also had the opportunity to consider the issue of the capabilities and powers of co-owners of a joint securities account. She told the saver that the bank was not liable for carrying out an instruction from just one of the co-owners.

Unlike undivided ownership, in the case of a joint account, pursuant to the rules governing joint and several creditors defined in Articles 1197 et seq. of the Civil Code, each owner of said account has the capabilities and power to operate the account with his or her signature alone. This rule also applies to the specific case of a joint securities account.

Consequently, if one of the co-owners of a joint securities account transfers all the securities from the joint securities account to his or her personal securities account, the bank cannot be held liable. That is the rule the ombudsman had to explain to a saver who was the co-owner of a securities account. He had complained that his common-law spouse transferred all of the securities in the portfolio to her individual securities account without his consent.

4. Introduction of fees for keeping inactive securities accounts: the issue is well within the ombudsman's jurisdiction and outside the scope of the institution's rate policy

Another issue came to the ombudsman's attention this year. A number of savers complained that they were not notified that a bank had instituted new fees to keep securities accounts. These fees applied when no stock-market buy orders or UCITS subscription orders had been placed for the account during the year, i.e. when the account was inactive.

While it is not the ombudsman's responsibility to assess the financial institution's rate policy, the introduction of fees and changes to existing fees do fall within its jurisdiction, notably in light of the professional's disclosure requirements. The client must be informed before any changes are made to the contractual conditions applicable to the account relationship.

In these cases, the ombudsman endeavoured to verify, first, whether the institution had properly met its disclosure requirement and, second, if this disclosure was precise enough to consider that the client had been properly informed. Disclosing information to clients only in a magazine was not considered sufficient by the ombudsman. In addition to agreeing to reimburse said amount, the institution announced its intention to establish a formal policy for providing information to all its securities clients, an initiative welcomed by the ombudsman.

5. Acquisition of securities on Alternext: many institutions have improved their web alerts on this market

A class action was brought in 2013 relating to the acquisition of securities introduced on Alternext through private placement. Investors complained that they were not warned of the risks in this market when placing their stock exchange orders online.

In 2015, the ombudsman received 53 new cases involving this same type of complaint about other securities introduced on Alternext through private placement.

In 2013, the ombudsman had analysed the information that was provided to clients by each institution on the risks relating to an investment in the securities introduced on Alternext through private placement. More specifically, this involved determining whether the alert received by clients when placing securities orders enabled them, in accordance with Article L. 533-12 II of the Monetary and Financial Code, to understand the risks associated with the type of financial instrument they were buying so that they could make their investment decisions in full knowledge of the facts.

Second, where the ombudsman believed that the alert was insufficient, it was essential to analyse the client's profile. As such, the ombudsman therefore recommended compensation in the form of a goodwill gesture only when clients, based on their profile and experience, could not be considered sophisticated.

To the ombudsman's great satisfaction, between 2013 and 2015, it seems that the majority of the financial institutions implicated in 2013 and involved in this second wave of complaints sufficiently improved the accessibility and understandability of their online alert system by highlighting the two-fold risk: not only that this market is not regulated, but also that no AMF-approved prospectus is prepared for the securities introduced on this market through private placement.

6. Various problems relating to equity savings plans (PEAs)

Each year the ombudsman has an opportunity to address the topic of PEAs, which bring with them a diverse array of problems. This year was no exception.

a. The question of regulatory constraints for securities held in direct registered form *(au nominatif pur)* in a PEA

One investor contacted the ombudsman to understand why his PEA account had been closed. In this instance, the account keeper noticed that, for several years, the investor had been putting the dividends from securities held in direct registered form in his PEA into an account with another bank. It then discovered that some of the dividends, the subject of the dispute, had been reinvested in new shares and that the investor had therefore used these dividends to participate in capital increases. This made it impossible to make an adjustment to the account. Although the ombudsman found no procedural errors in the decision to close the PEA, she did however attempt to verify whether the investor had been duly informed by the account keeper that he had specific obligations relating to the direct registered form of the securities and, more specifically, that regulations require that dividends from securities held in registered form in a PEA be paid into a PEA-linked cash account. As the institution could not prove it had provided such information to its client, the ombudsman recommended that a payment be made as a goodwill gesture and both parties agreed to this solution.

b. Problems relating to the ineligibility of certain securities for a PEA

The ombudsman also had to address another PEA-related issue, namely the ineligibility of securities for this tax wrapper due specifically to the various changes made to the tax system. Cases were therefore received after an initial tax change in 2012, making securities of real estate companies ineligible for this vehicle, and after the prohibition on including warrants in the PEA wrapper in January 2014. Under Article 322-12 II of the AMF General Regulation, for operations in financial securities which give rise to a modification to the assets recorded on the client's account, the account keeper is required to send each securities account holder this information as soon as possible. In the specific scenario of a mandatory exchange transaction in which the new security is not PEA-eligible, as was the case with the Silic securities exchanged for Icade shares, which are both real estate companies, the ombudsman made sure that information was provided to all holders of PEAs that had Silic shares in their portfolio. It therefore appears that the account keeper was in full compliance with its disclosure requirement.

C. Cases involving forex and binary options continue to surge

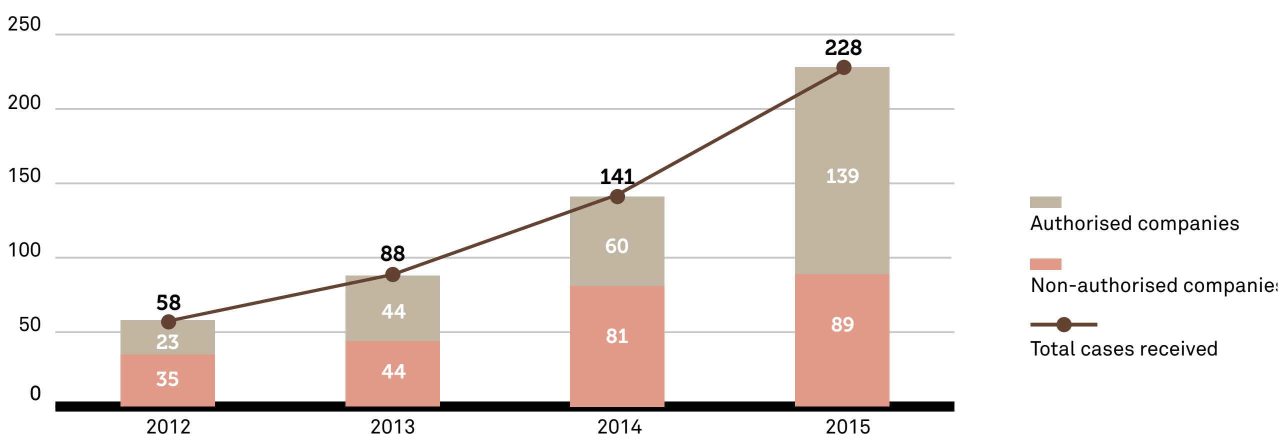
Each year, the number of disputes related to forex (speculation on the foreign exchange market available to the general public) continues to rise.

This year, the ombudsman received 228 cases on this topic, or a 62% rise relative to 2014 and a five-fold increase over the last five years. Unfortunately, 2015 was no exception.

Most striking this year was the even sharper increase in cases involving authorised companies, i.e. those that are authorised by a European regulator to offer financial services in France. When the company is not authorised, which is a criminal offence, the ombudsman must recuse herself and forward the case to the Public Prosecutor (Article L. 621-20-1 of the Monetary and Financial Code).

However, about 85% of admissible mediation requests concerned companies authorised by the regulator of Cyprus, an EU member state. Because of the European passport rule, these companies can sell their services throughout Europe, but can be punished only by the regulator of their home country, in this case the CYSEC.

NUMBER OF FOREX-RELATED CASES RECEIVED EVERY YEAR



Key figures

Within forex/binary option cases closed in 2015, 43 favourable recommendations were made, including 42 financial recommendations (24 favourable recommendations in 2014).
Amounts recovered ranged from EUR 200 to EUR 52,700, with an average of EUR 9,029 and a median of EUR 3,750.
Total compensation was EUR 379,209 (EUR 214,057 in 2014) and represented 86% of amounts lost.

While in 2014, 60 cases involved a company authorised in a European country, this year that was true for 139 cases, representing a 131% increase. This can be attributed in part to the ease with which these companies are able to obtain authorisation in certain European countries, such as Cyprus. Furthermore, these companies, which are automatically excluded from the AMF's and ACPR's blacklists as they only target non-authorised companies, tout this authorisation to give the client a sense of security and dependability. But this authorisation they promote is often misleading, as the troubling practices complainants have reported combine harassment with psychological manipulation. The ombudsman identified some of these practices during her review of the files based on the evidence and emails kept by clients: they are oddly similar to those of non-authorised companies.

Also new in 2015 was the profile of the forex complainants, which was much broader than several years ago: it is no longer only those who are the most vulnerable economically that have fallen victim to this trap. It now affects all socio-professional categories of savers.

At a time when interest rates on investments are at an all-time low, forex and binary option companies promote high returns while minimising — if not deliberately concealing — the associated risks. They do not hesitate to present themselves as an alternative to risk-free investments such as the livret A passbook.

When clients rise to the bait, they are contacted, usually by phone, by an "adviser" who at first is highly personable and wants to train them on how to trade or manage their investments. Risks are not discussed, and bonuses are offered with no explanation of the stringent conditions that mean there is virtually no chance they will be paid. The message is honed to gain clients' trust and make them believe they will easily achieve steady gains.

Clients then enter a downward spiral where they experience a series of gains and losses and where the "adviser" is instrumental in the manipulation. This person will then incessantly encourage clients to put more and more money in so they can recoup their losses, while promising that this time they will win big. In one case, the ombudsman obtained certain emails in which the "adviser", who had in fact siphoned off all the client's savings, went so far as to encourage him to take out a personal loan by providing a list of institutions likely to grant him one.

Clients have virtually no hope of recovering their money, whether this means their initial investment or their life savings (in the cases received, losses ranged from EUR 200 to EUR 52,700). In most cases, the original "adviser" becomes completely unreachable and no one responds to their complaints.

In certain cases, however, when the complainant has kept as much proof and evidence as possible to support the facts (email exchanges, screenshots or copies of instant messaging chats, etc.), the ombudsman can intervene and, often after lengthy negotiations, obtain good results.

In 2015, she made 47 recommendations, including 43 favourable recommendations, which were all followed in whole or in part. Complainants thus recovered a total of EUR 379,209 (EUR 214,057 in 2014) representing 86% of their losses.

The ombudsman's affiliation with the regulator had a positive impact here and helped her obtain these strong results. This is not enough, however, and, at the time of writing, she is pleased to see that the public authorities have taken notice of the AMF's commitment to fighting this scourge. They have agreed to her plan to prohibit electronic advertising for this type of product and it is to be included in a bill introduced by the Finance Minister in the spring of 2016.

Forex: even if by some miracle you win, you may well lose!

In the unlikely event that you look like a winner, your gains could evaporate before you can get them out...

In rare cases, the client may wind up with a trading account balance that is greater than the amount deposited due to winning trading positions. If at that very moment he stops taking positions and resists his "adviser's" strong push to put more money in, any number of excuses will be made to reduce the amount available for withdrawal.

First, the "bonus" that had been offered will be cancelled, as the client will learn that he has not reached the required trading volume.

Next, the client will be billed for various items he was never told about (inactivity fees, withdrawal fees, etc.) and which will be deducted from the available balance. Lastly, trading positions that had allegedly not been closed will now be shut down, and this will generate losses.

Ultimately, the balance of the account will literally have evaporated and the amount actually recouped in the client's personal bank account will be far below the amounts paid to the forex company.

The virtual gain will have been skilfully turned into an actual loss.

The sharp rise in the Swiss franc against the euro: several complainants contacted the ombudsman after the mini-crash on 15 January 2015

After the Swiss National Bank announced on 15 January 2015 that it was eliminating the Swiss franc's (CHF) floor, that currency appreciated by more than 30% in just a few seconds. Then followed a period of several minutes of high volatility and the virtual absence of liquidity.

Subsequent to these extraordinary market conditions, the ombudsman received several requests from complainants who suffered heavy losses, sometimes as high as 10 times the amount invested. They accused their financial intermediary of providing inadequate information on the risks of currency trading, of deficiencies in the protection orders (stop loss) and of a subsequent change in execution prices.

When examining these cases, including some that were still arriving at the time of writing, the ombudsman was able to assess this situation, in particular the harmful consequences for clients.

In several cases, a financial intermediary refused to execute orders at the quoted price, pleading low market liquidity at the time. The prices were changed several hours later, significantly increasing the client's loss. Nevertheless, the ombudsman had to consider that, in that instance, as the institution did not dispute having acted as a market maker, it should have honoured the prices proposed to its clients and should itself have borne the illiquidity risk.

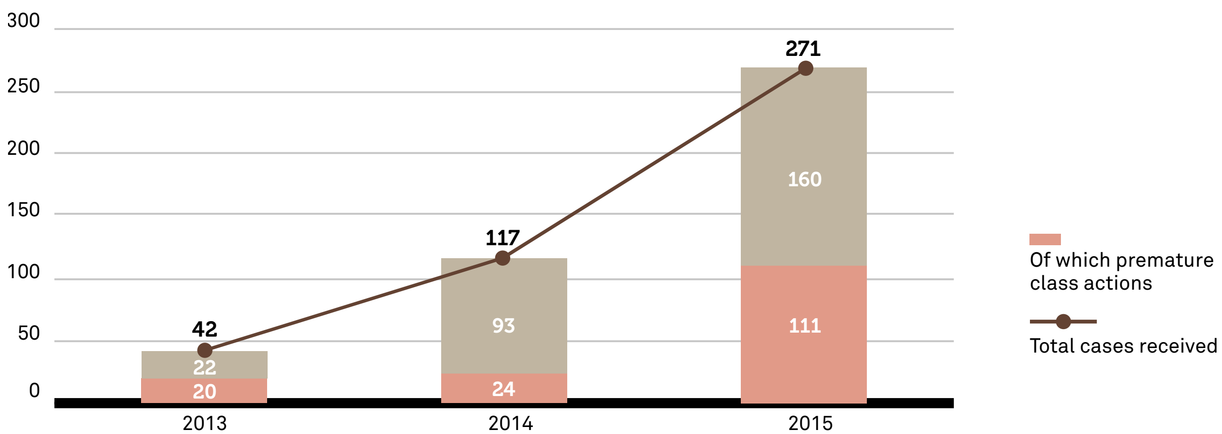
The ombudsman considered, in these specific cases, that the client should receive compensation corresponding to the difference between the initially confirmed execution price and the execution price as subsequently changed by the institution.

D. Employee savings plan cases continue to increase

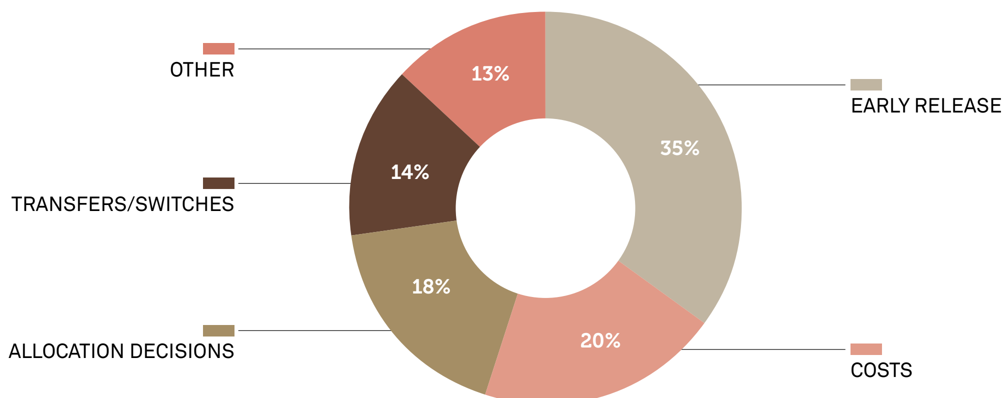
The trend in prior years strengthened further in 2015. There was a very sharp increase in the number of cases received this year, at 271 versus 117 in 2014, i.e. up 129%. This significant rise can be attributed in part to the receipt, starting at end-2014, of a number of cases involving the same problem: requests for reimbursement of employee savings plan assets with no additional details and no prior request made to the account keeper, a precondition for mediation. These cases (111), which were at that time not eligible for the mediation procedure, significantly increased the number of cases received in 2015.

Other issues raised in 2015 concerned account-keeping fees, the early release of assets, transfers and switches, and the allocation of discretionary or compulsory profit-sharing.

CHANGE IN NUMBER OF EMPLOYEE SAVINGS PLAN CASES RECEIVED



EMPLOYEE SAVINGS PLAN ISSUES IN 2015



1. Account-keeping fees

The issue of fees is, like last year, a recurring topic. After leaving the company, sometimes years later, employees discover that annual fees of about EUR 30 have been legally, but quietly, deducted directly from their account assets (per unit or even per thousandths of units). For savers with little in the way of employee savings, these fees — which are perfectly legal — can, depending on the circumstances, eat away at their entire savings year after year. It would clearly be in these savers' interest to request the release of their assets as soon as their employment contract ends.

As account-keeping fees are covered in full by the employer before the employee leaves the company, the ombudsman understands that savers do not automatically think to consult the rate schedule applicable to their PEE (company savings plan) or PERCO (collective retirement savings plan), available on the account-keeper's website. In these cases, the ombudsman recommends, as a matter of equity and when the level of savings is very low, that the fees — closing fees in particular — be reimbursed.

The ombudsman has often expressed concern that information about fees charged is not provided when employees leave the company, a key juncture when savers can decide, in light of these fees, whether or not to keep their savings in their account. She had the opportunity to present, as part of Copiesas[2], her proposals for regulatory changes (see 2014 Ombudsman's Report, page 19).

Lawmakers included the AMF ombudsman's recommendation in the provisions of the Macron Act of 6 August 2015. Since 8 August 2015, employers have thus been required to indicate, in the summary statement provided to employees when they leave the company, that they themselves will be responsible for any account-keeping fees, which will be deducted directly from their assets.

2. Requests for early release

The ombudsman regularly intervenes in cases concerning the information provided to savers by account-keeping institutions regarding the conditions for early release and the importance of selecting the right documents to attach to the release request.

a. Conditions for early release

Lawmakers sought, by imposing restrictions, to very closely regulate the circumstances under which employee savings may be released.

The ombudsman intervened in several mediation cases after consulting, in certain instances, with her liaison in the Ministry of Labour, in order to suggest to the account keeper a more flexible interpretation of the rules on release to account for specific scenarios that the lawmakers may not have expressly considered.

For example, the ombudsman noted that, with a request for release to build a primary residence, questions could arise as to the interpretation of the start of the six-month time limit if the construction contract in question contains conditions precedent. Applicable regulations specify that a request for release on these grounds is time barred six months after the construction contract has been signed. The tricky question then arises of the start of the six-month period when a construction contract exists, if this contract includes conditions precedent.

2. Copiesas is the advisory board for company savings plans and employee share ownership. It is a think tank for employee savings that brings together social partner representatives, parliamentarians and qualified individuals, and was tasked with preparing the overall reform of profit-sharing, employee savings plans and employee share ownership.

The ombudsman thus contacted the Ministry of Labour to explain her interpretation of this regulation when a construction contract contains conditions precedent and it is not known, at the time of signature, whether they will be fulfilled. In this scenario, the contract is indeed formed, given the rules of the Civil Code, since consent has been given in the event that the uncertain event occurs. But the effectiveness of the instrument is inhibited and the condition precedent thus keeps it from taking effect. The Ministry of Labour's response to the ombudsman was that a flexible interpretation of the texts is desirable in this specific case.

An interpretation was therefore allowed whereby, if a contract includes a condition precedent, the six months can start on the date on which the condition precedent is lifted.

Based on this opinion, the ombudsman recommended that the account keeper, which had relied on applicable regulations to consider the employee's request time-barred, revisit its position and release the assets for "construction of primary residence" reasons, which it agreed to do.

The ombudsman also continued to receive a large number of cases involving not the feasibility of releasing assets but the amounts released.

b. Supporting documents attached to the early release request

Many mediation requests concern the amount of the assets released. A saver considers undertaking a project (purchasing or expanding a primary residence), prepares a budget and requests the release of his employee savings. Then, at the time of payment, he finds that the amount released does not match the estimated amount, sometimes putting his real estate project at risk.

This can happen when the saver provides the preliminary sale agreement in support of a release request to "purchase a primary residence" rather than the official deed of sale.

When examining these cases, the ombudsman noted that the information provided by certain account-keeping institutions did not always allow savers to understand how producing different supporting documents could have different effects. The regulation forces savers who wish to obtain the full amounts recognised before the signature of the official deed of sale to wait until that document is signed and thus, where applicable, to take out a loan. However, when the document produced is the preliminary sale agreement, which is sometimes entered into several months before the official deed of sale is signed, assets invested after the preliminary agreement but before the official deed will not be released.

In some of these cases, the ombudsman recommended that account-keeping institutions amend their documentation to more clearly explain the different legal impacts of producing these two documents on the amount that can be released.

The problem is fairly similar for the financing plan submitted by the saver to support a request for release to "purchase a primary residence".

To make sure that the saver was not over-financing the purchase of a primary residence, the account-keeping institution asked him, when he requested a release for that reason, to include the amount of employee savings that could be released on the form where he outlined his financing plan. Yet, on the date of the initial request, the amount of the compulsory profit-sharing was not yet known.

Account keepers are right to be vigilant, but they should not make it impossible for employees to exercise their acknowledged right to request an additional release of their profit-sharing entitlement for the last financial year, which was neither known nor individualised on the date of their initial release request.

The ombudsman recommended that this institution implement the practice adopted by other account keepers, namely to take the position, so as to ensure that the saver does not over-finance, that the total amount released should not be greater than the amount of the individual contribution referenced in the financing plan. The institution agreed to follow this recommendation (for more details on this mediation case, see the ombudsman's blog post published on the AMF website on 2 June 2015).

c. Disputes concerning the default allocation of discretionary or compulsory profit-sharing

Every year, employee savers are informed, when they receive their option form, of the amounts allocated under compulsory and/or discretionary profit-sharing and are asked to make their allocation decisions within

a specified period of time. They can ask to have these sums paid directly to them or they can save them by investing in a PEE (five-year lock-up) or PERCO (locked up until retirement). Employees can communicate their instructions by sending back the completed option form or by confirming their choices in the customised section on the account keeper's website.

When the account keeper has not received the employee's decisions before the response deadline, it makes the default choice which, in accordance with regulations applicable until 31 December 2015, is to invest the compulsory profit-sharing (generally 50% in a PEE and 50% in a PERCO) and pay all of the discretionary profit-sharing into the employee's bank account. The employee is subsequently informed via a transaction notice.

The ombudsman is regularly contacted for mediation requests from employees who thought they had transmitted their instructions, most often for payment into their account, but learn on receipt of the transaction notice that their instructions have not been executed. In these cases, a distinction must be made between instructions sent by mail and those posted via the website.

For instructions provided by mail, the ombudsman gathers proof of the date the letter was sent (photocopy of the stamped envelope) and/or the date the institution received the form (time stamp on the option form) to determine whether the option form was sent within the deadline and, where applicable, to intervene in favour of the saver.

PEE and PERCO: two very different employee savings plans

Employers generally offer their employees two employee savings plans to allow them to build up their savings in the form of a securities portfolio: the company savings plan (*plan d'épargne entreprise* — PEE) and the collective retirement savings plan (*plan d'épargne pour la retraite collectif* — PERCO). Contributions to these plans can be from discretionary profit-sharing, compulsory profit-sharing and/or employee or employer payments.

The PEE enables employees to build up medium-term savings that are locked up for at least five years. The employee's assets may nevertheless be released in nine cases provided for by lawmakers: termination of the employment contract; purchase/expansion/construction of a primary residence or reconstruction following a natural disaster; marriage or civil union; arrival of a third child; divorce or separation with custody of at least one child; disability; death; excessive debt; or the founding or takeover of a company.

The PERCO enables a company's employees to build up savings accessible on retirement, as either an annuity or a lump sum when provided for in the collective agreement. This plan is restrictive as the sums invested in the PERCO are locked up until retirement, and the conditions for early withdrawal are very strict and limited. There are only five scenarios in which funds can be released: disability, excessive debt, end of eligibility for unemployment benefits, purchase of a primary residence or reconstruction following a natural disaster. This release is not automatic; it occurs only at the employee saver's request.

NB: Employees must not forget to inform the employee savings account keeper of any change of address

Employees who leave their company are informed by their former employer that they will have to notify the company or the employee savings account keeper of any change of address. Employees should not take this requirement lightly, particularly if they would like to be advised of the amounts that will be allocated under discretionary and/or compulsory profit-sharing for the coming year. If employees cannot be contacted at their last known address, the company makes the amounts owed under discretionary profit-sharing available to them for a one-year period from the payment deadline. These amounts are subsequently paid to the Caisse des dépôts et consignations, from which former employees may reclaim the sums in question for a period of 30 years. On 1 January 2016, this period was reduced from 30 years to 20.

For instructions sent over the website, the ombudsman verifies that the information provided to savers when transmitting their instructions and, in particular, when confirming them, is complete and exhaustive: did the saver understand that the transaction had to be confirmed? Was the alert sufficient?

The Macron Act, which aims to promote savings, changed the default allocation of discretionary profit-sharing as from 2016.

From now on, if the saver does not make a choice, the amounts owed for discretionary profit-sharing will no longer be paid into a bank account but allocated in full to the company savings plan (PEE), and will therefore be locked up for at least five years.

The new regulation could drastically alter employees' behaviour as they typically view discretionary profit-sharing as additional income rather than as unavailable savings.

So, as a transitional measure, for profit-sharing entitlements granted between 1 January 2016 and 31 December 2017, savers whose profit-sharing has been subject to the default mechanism, will, by law, have a right of "withdrawal" for a three-month period as from notification of the allocation to the company savings plan; the corresponding entitlements are calculated based on the net asset value applicable on the date the withdrawal process is initiated.

d. Transfers/switches between employee savings plans

The ombudsman is regularly contacted about mediation cases where savers, if for example they want to increase the percentage of their holdings in an equity fund or bond fund within their PEE, mistakenly transfer their assets to another plan (PEE, PEG (group savings plan), PERCO) instead of just making a switch. This processing error is not without consequences when the transfer is from a PEE to a PERCO which locks up the transferred assets until retirement, except in the five very restrictive early release scenarios provided for by regulation (instead of the nine allowed for a PEE including, for example, termination of an employment contract). Additionally, once confirmed it cannot be reversed. Savers cannot cancel a transaction made in error. That is why it is important to take the time to read the alert messages when entering the transaction.

In these cases, the ombudsman carefully considers all the information provided by the account keeper when the transaction is entered, including alert messages warning the saver of the consequences of the transfer transaction: are they sufficiently clear and do they highlight the consequences of this transfer transaction? As the ombudsman has noted, it is possible to support lawmakers' preference for long-term savings but still believe that employee-savers must give their informed consent.

4. “OMBUDSMAN ONLINE DIARY”: THE CASE OF THE MONTH

The *Ombudsman Online Diary* was launched in May 2014 with the aim of providing a better understanding of her role, approach and the benefits of mediation. Once a month, the Online Diary highlights a mediation case, analysed in complete confidentiality, which illustrates the task that the ombudsman and her team of legal experts tackle on a daily basis. It can be accessed on the AMF website (www.amf-france.org – Ombudsman page).

This *Online Diary* has enjoyed continued and growing success: it attracts a larger readership each and every month. In 2015, nearly 17,300 hits were recorded (i.e. 1,439 hits per month in 2015 compared with 814 per month in 2014) and nearly 600 readers have signed up to receive a notification every month.

In 2015, the ombudsman found a new way to communicate with the public: in addition to the case of the month, she can now be seen in person once a month. Since September, Ms Cohen-Branche has appeared monthly on the TV programme *Intégrale Placements* on BFM Business. Every fourth Monday, live at 10:20 a.m., she takes five minutes to present a real mediation case as analysed in the *Online Diary*.

5. THE OMBUDSMAN’S OTHER COMMUNICATION ACTIVITIES

To improve the visibility and knowledge of mediation, the ombudsman participates in a number of events organised for professionals and the general public.

In 2015, she presented at about 15 seminars and/or forums for professionals or academic institutions. In particular, the ombudsman met with several financial investments adviser professional associations to present the Mediation Directive and advance the discussion on how the consumer mediation scheme applies to their profession.

The ombudsman also led six training sessions and spoke about her experience and her vision of mediation in France and Europe to various professional audiences.

Her educational role also involves writing articles for the trade press, and sometimes for media that reach a broader audience.

Two examples of articles published in 2015 are:

- *Let’s talk about double jeopardy... for forex* – Bulletin Joly Bourse - June 2015
- *The astonishing diversity of financial mediation confidentiality regimes across Europe,* Revue de droit bancaire et financier, Lexisnexis No. 5, September-October 2015

6. THE OMBUDSMAN’S NATIONAL AND INTERNATIONAL ACTIONS

Domestically, since 2007, the AMF ombudsman has belonged to the Club of Public Service Ombudsmen. Since February 2014 she has been a member of the Club’s board which meets once a month, in addition to the monthly plenary meeting. This year, club members’ discussions focused primarily on the transposition of the Mediation Directive.

On 12 October 2015, the AMF ombudsman hosted, along with the Finance Ministry’s deputy ombudsman, Serge Arnal, a day of training on “Mediation: a legal perspective”, organised under the club’s auspices. The AMF ombudsman presented the overall legal environment, but also mediation-specific concepts in light of the new directive, as well as the legal tools ombudsmen can use in their negotiations.

At the European level, the AMF ombudsman, who is a member of the FIN-NET network created by the European Commission, attended the meetings of financial ombudsman, as she does every year. This network consists of 57 ombudsmen members who have all been accredited by their respective governments, and who are bound by a memorandum of understanding.

At each of the meetings, held in Brussels in June and December 2015, the transposition of the Mediation Directive was the main topic of discussion among European financial ombudsmen. A report on the status of the transposition of the directive in the different member states was prepared, as was an update on the ODR regulation, and a mock-up of a potential online dispute resolution site was presented.

CASES AND GENERAL RECOMMENDATIONS PUBLISHED IN THE "OMBUDSMAN ONLINE DIARY" IN 2015

- **An ex-dividend date may have consequences on your stock market orders** – January 2015
  A share event, such as an ex-date, has an impact on market price, since the financial value changes at that time, and, as such, on the limit orders on the market. Investors need to keep this in mind if they want to sell their shares during this period!

- **Investing in an ineligible security within the context of a "classic" *Plan d'Epargne en Actions* (PEA): who is responsible?** – February 2015
  It is indeed the responsibility of investors to check that the securities they wish to buy for their "classic" PEA are eligible for this tax wrapper. The financial institution is also responsible for ensuring that the information provided on this issue is correct. In addition, one would hope that financial institutions, as a best practice, would systematically block computer access to securities that are ineligible for a "classic" PEA to prevent clients from making these errors.

- **The status of the American taxpayer known as a 'US Person': what are the respective obligations of the bank and the customer related to the extraterritoriality of the American tax regulations?** – March 2015
  Investors must remember to respond to requests for information from their bank, especially when it comes to taxation! While the bank is indeed required to inform their clients of their potential status as a US Person and of the associated formalities, clients are responsible for providing the information required by the American regulation or risk having heavy penalties withheld at source.

- **Information kept by the customer helps the Ombudsman to receive compensation in relation to binary options and Forex, if the company is licensed** – April 2015
  In 50% of cases received, the company is not licensed, therefore the Ombudsman cannot initiate a mediation procedure and she is obliged to send the case to the Public Prosecutor. For those companies that are licensed, keeping material proof can be decisive in enabling her to recommend and obtain compensation. Investors should never forget that trading on binary options and Forex sites is extremely risky and almost always ends in failure.

- **Beware! One market order can hide another: what are the rules on the priority of execution of orders?** – May 2015
  Investors should be careful when selecting a type of order. Depending on their choice, they can favour speed of execution, quantity or price. For example, a limit order controls the execution price but may be split up, or not executed in whole or in part, which was effectively the case for the buy order of 100 X shares recorded in the order book after Mr L's order. However, a market order, which takes priority over all types of orders, guarantees the quantity but not the execution price.
  Furthermore, when investors want to find out if the stock that they would like to buy or sell is quoted continuously or at the fixing – which is not always explicitly stated on the stock market sites – all they have to do is look at its data sheet and its characteristics on the Euronext website (www.euronext.com). This company manages the allocation of these securities to one of these quotation methods depending on their liquidity (number of transactions measured on an annual basis).
  Finally, investors should remember to verify if the free platforms that they use to check their orders disseminate the information in real time or with a time delay.

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- **Employee investment undertakings: it's useful to be fully informed of the special conditions for an early release when buying a main residence** – June 2015

  The early release of an employee savings account before five years is only possible if justified by exceptional limited circumstances provided for by the law. To prevent abuse, the circular put safeguards in place such as the one-time release rule, the six-month period from the trigger event in which to make the release request, and the ban on over-financing. Account keepers are therefore right to be vigilant, but they should not make it impossible for employees to exercise their acknowledged right to request an additional release of their profit-sharing entitlement for the last financial year, which was neither known nor individualised on the date of their initial release request.

  It is fortunate that best practices are becoming widespread within the same industry. The ombudsman further observed that this account keeper's release request form has been changed to reflect this understanding.

- **On what basis should a late-executed share redemption for a SICAV be settled?** – July 2015

  Investors should remember that subscriptions and redemptions of UCITS units are always carried out on a forward-pricing basis, in other words, based on the next net asset value, in order to avoid certain questionable practices.

  They should check the prospectus of the UCITS in which they own units. The conditions for subscribing and redeeming units are always specified, notably the cut-off time for placing orders if they are to be executed based on the next net asset value.

- **Virtual gains but real losses. Although you might actually generate forex trading gains in rare instances, getting the money out of your account may not prove straightforward...** – September 2015

  Yielding to the temptation to play at being a trader with binary options or forex instruments is a risky game that ends up in the loss of the investment in the vast majority of cases. Any gains made on a trading account remain virtual until they are taken out. But there are often many obstacles to withdrawing funds. The ombudsman can intervene only if the company is authorised and especially if the maximum possible amount of material evidence has been kept. Regrettably, in most cases, customers do not keep a record of their exchanges. But the money paid to these companies is all too real.

  The AMF has shown its determination to fight these practices. In early 2015, it asked France's authorities to regulate or even ban online advertising of this type of unacceptable practice.

- **Improper execution of trade orders: when a complainant is mistaken about his actual loss** – October 2015

  It is sometimes hard for investors or savers to be objective about the type of loss they believe they have incurred or the amount of damages due to them. The ombudsman's role in such cases is to clarify this delicate issue and explain the underlying reasons. In the case in point, there are two lessons to be learned.

  First, as case law regularly demonstrates, the distinctive feature of civil liability is that it restores the balance as precisely as possible and puts the victim – here, the client – in the situation he or she would have been in had the prejudicial act not occurred (in this case, order execution). In this case, Ms S ought to have remained in possession of her shares unless the minimum price she had specified was reached. This is what the financial institution offered to do, at its own expense.

  The second lesson is that it is necessary to set a deadline when placing trade orders; if not, an order is usually valid only for the trading day on which it is placed. Be that as it may, some financial institutions provide for a longer period in their account agreements. Investors should therefore check this point.

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- **What happens to incentive compensation invested after the employee has left the company? – November 2015**

  Note: Incentive compensation awarded before 1 January 2016 and voluntarily invested by the employee after leaving the company cannot be released for this reason.
  With the provisions introduced by the Macron Act, this rule is set to change for incentive compensation awarded on or after 1 January 2016. From that date onwards, by default, i.e. unless the employee indicates a choice, incentive compensation will no longer be paid into a deposit account but invested and so tied up automatically. Accordingly, it will no longer be treated as a voluntary payment. Lawmakers have included a two-year transition period during which employees may ask for funds to be released early within three months of being notified about the incentive compensation.

- **Banks must be able to prove they gave a client a prospectus prior to investing in a collective investment scheme – December 2015**

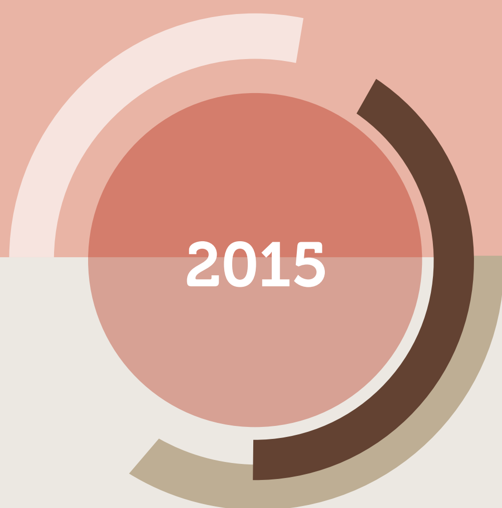
  This case highlights the advantages of independent mediation, where each party has to prove that they fulfilled their obligations.
  In Mr X's case, it could be considered that the bank was right to agree to pay compensation, as advised by the ombudsman. Even if the bank had given its client the prospectus before he invested, as it originally claimed, it was unable to provide proof. However, in accordance with regulations and consistent case-law, the bank was required to prove that it had duly informed the client by giving him the prospectus and had done so before he invested. Since it was unable to produce the investment form signed by the client, the bank could not prove it had fulfilled its prior notification requirement.
  The first lesson to be learned is that investment services providers must always retain proof of having notified their clients in advance.
  The second lesson is for clients: investing in a financial product is a decision they have to make for themselves, not to please their banker.

Ms Cohen-Branche also undertook a study of the wide variety of confidentiality regimes adopted by financial ombudsmen across Europe based on a questionnaire sent to all her European colleagues. The European Commission's FIN-NET network continued and formalised this study, which targeted 54 ombudsmen across Europe, and was able to obtain additional responses at the meeting on 10 December 2015. Seventeen bank or insurance-company financial ombudsmen (out of the 24 who answered this question) from 13 European countries stated that they have the right or are required to inform their regulator when grave practices are observed.

Lastly, internationally, the ombudsman has been a member of the International Network of Financial Services Ombudsman Schemes (INFO) since January 2013. This network brings together financial ombudsmen (banking, finance, insurance) from around the world. The AMF ombudsman is therefore in contact with network members and publishes articles in INFO's monthly newsletter.

In September 2015, the AMF ombudsman attended the network's annual conference in Helsinki, Finland.

This annual gathering of financial ombudsmen (banking, finance, insurance) from around the world is an opportunity for members to share their mediation experience and develop their out-of-court dispute resolution skills. These three days were filled with discussions on members' respective mediation practices and interspersed with a number of roundtables. This year, the AMF ombudsman also chaired a roundtable on trends in dispute resolution during which her counterparts, including from South Africa and Germany, shared their current concerns. Ms Cohen-Branche focused on the forex issue, a hot-button issue that has compelled the AMF and its ombudsman to act.



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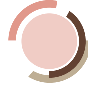


Annex 1

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.

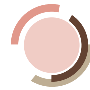
The ombudsman is authorised to deal with claims from any interested party relating to matters within the competence of the Autorité des Marchés Financiers and to resolve them appropriately.

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.

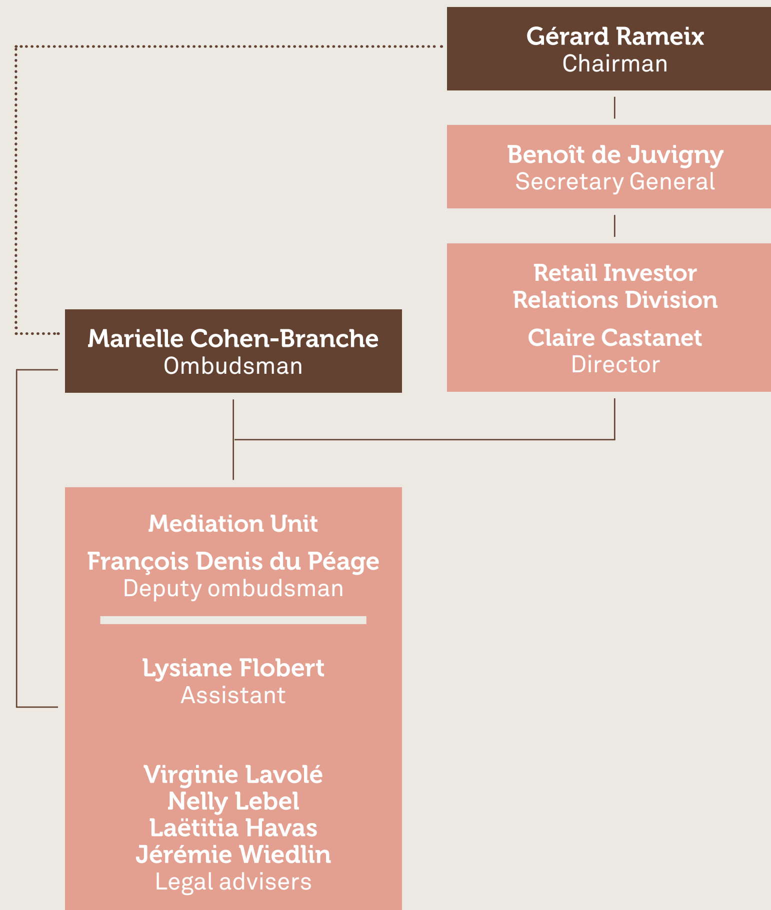
The AMF ombudsman cooperates with its foreign counterparts to facilitate extrajudicial settlement of cross-border disputes.

The ombudsman publishes an annual report on his activity.



Annex 2

MEDIATION CHART



Mediation team (2016)

Annex 3

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.

Annex 4

FIND OUT ABOUT MEDIATION

- **FIN-NET website**
  European financial ombudsmen network
  http://ec.europa.eu/internal_market/fin-net/index_en.htm
- **INFO website**
  International Network of Financial Services Ombudsman Schemes
  http://www.networkfso.org/
- **Ombudsmen Club website**
  http://clubdesmediateurs.fr/
- **European Directive 2013/11/EU**
  On alternative dispute resolution for consumer disputes
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:FR:PDF
- **Regulation 524/2013**
  On online dispute resolution for consumer disputes
  http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:JOL_2013_165_R_0001_01&from=EN
- **Order no. 2015-1033 of 20 August 2015**
  On alternative dispute resolution for consumer disputes
  https//www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031070940&categorieLien=id
- **Decree no. 2015-1382 of 30 October 2015**
  On consumer dispute mediation
  https://www.legifrance.gouv.fr/eli/decret/2015/10/30/EINC1517228D/jo

Advantages of the mediation procedure

The mediation procedure offered by the AMF is:

FREE

No fees are charged for the procedure, either when a case is opened or when it is closed.

NON-BINDING

The ombudsman makes a recommendation but the parties are free to reject it.

CONFIDENTIAL

The information exchanged during the mediation procedure, the names of the parties involved and the ombudsman's recommendation may not be disclosed.

QUICK

In principle, mediation lasts three months from the time the parties supply the ombudsman with all relevant evidence.

INDEPENDENT

The ombudsman acts entirely independently. She receives no direction on how to deal with the cases for which she is responsible. The ombudsman has sufficient resources to carry out her duties neutrally and impartially.

FAIR

Mediation is conducted in a fair, egalitarian and equitable manner in accordance with law and equity.

HANDLED WITH SKILL

In using the AMF's mediation service, investors can be assured that the ombudsman and her team of legal specialists will handle their disputes with a high degree of expertise in banking and financial law.

EFFECTIVE

It is easy to contact the ombudsman: requests can be submitted either by post or using the online form on the AMF website.

TRANSPARENT

The rules governing mediation and the mediation charter are available to the public on the AMF website. The ombudsman publishes an annual report on her activities.

LEGAL

The use of mediation suspends the limitation period.
Should mediation prove unsuccessful, the law grants the complainant extra time to bring the matter before the courts.

CONTACT THE AMF OMBUDSMAN

By post
Ms Marielle Cohen-Branche
Ombudsman
Autorité des Marchés Financiers
17, place de la Bourse
75082 PARIS CEDEX 02, FRANCE

Or using the online form
available on the AMF website
www. amf-france.org > The Ombudsman

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