

A photograph of three business professionals in a modern office setting. Two men and one woman are seated around a table, engaged in a discussion. One man is looking at a laptop, while the other is looking towards the woman. The scene is brightly lit, suggesting a large window in the background.

OMBUDSMAN'S REPORT 2018

AUTORITÉ
DES MARCHÉS FINANCIERS

AMF

CONTACT THE AMF OMBUDSMAN

**For quicker and easier communication
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on the AMF website:
www.amf-france.org > The Ombudsman

Or by post:

The Ombudsman – Autorité des marchés financiers
17, place de la Bourse
75082 Paris Cedex 02
France



A further increase in claims accompanied by specific changes and developments

After a fall in the number of claims in 2017, the Ombudsman's Office returned to a rising trend in the requests received (+6%, 1,438 compared with 1,361), with an even higher increase in referrals falling within my jurisdiction (+17%, 813 compared with 694).

Computerised blocking of any inadmissible request made via the form on the Ombudsman's website has been in place since spring 2018. This blocking process ensures that requests outside my jurisdiction were excluded, as they were no longer recorded in the statistics of requests received. For the record, these requests fall outside my jurisdiction because they are banking, insurance or tax matters, because they come from retail investors who have already brought an action before another Ombudsman or a court, or because the retail investor indicates that he or she has not made a prior complaint to the firm concerned.

Thanks to this filter, the percentage of lack of jurisdiction requests has decreased from 46% to 27% in just a few months. However, it should be noted that lack of jurisdiction requests on grounds of suspicion of fraud are not being blocked at this stage, as the AMF is legally required to notify them to the Public Prosecutor.

Unfortunately, 70% of applicants requesting assistance from the AMF Ombudsman still do not use the online form and prefer to send their requests by post. There are several reasons for this: the profile of the clients, who are still more attached to paper, the importance and volume of the documents to be attached and the fact that, in the letters of some professional financial service providers, only the postal address of the AMF Ombudsman is provided.

Thanks to this filter, the percentage of lack of jurisdiction requests has decreased from 46% to 27% in just a few months.

Periodically, the AMF Ombudsman's Office reiterates, through all channels, that using the form helps guide retail investors and gives them an additional opportunity to find the "right ombudsman" more quickly.

Other 2018 indicators compared with 2017:

- the number of cases judged on their merits and closed increased by 5% (777 cases compared with 743);
- the number of opinions issued increased by 3% (523 compared with 506);
- the percentage of opinions in favour of applicants (54%) remained at the same level;
- and, an indicator that is also pivotal to me: the follow-up of these opinions – 93% of favourable proposals were followed by the firm (96% in 2017) – and the percentage of challenges when the proposal is unfavourable to the applicant (6% – 14 cases – compared with 3% in 2017).

What about the evolution of the issues addressed in 2018?

What remains stable: the importance of employee savings schemes, which, with 238 cases processed, represent one third of the opinions issued. The pursuit of constructive dialogue with the main account-keepers continues, in order to settle in law, or even equitably, those cases that warrant it (for example, the release of very modest assets nibbled away by expenses, after termination of the employment contract). In the context of the PACTE Bill currently under discussion, based on my more general recommendations, the AMF recommended solutions to recurring problems such as the default choice in PERCO collective employment savings schemes, which leads to too many errors with sometimes serious consequences for retail investors.

What is recurrent: the difficulties of transferring PEAs (Equity Savings Plans) between account-keeping institutions: of the 70 PEA cases, half relate to transfer difficulties. I was compelled to alert the Financial Sector Advisory Committee (CCSF) by proposing a simplification of the rules for the transfer of unlisted securities, which is one of the most intractable difficulties. Under the impetus of its President, Corinne Dromer, and after consultation with financial firms, the CCSF unanimously adopted an opinion in September 2018 to adopt this proposal.

What has changed: the target of the scams, not the ability to play on the naivety of some retail investors. The proactive policies of the national and European financial regulators have led to an even more drastic reduction in the number of Forex-related complaints received in 2018: 51 cases against 98 in 2017 (the notorious currency speculation). The next wave of false diamond investments with a promise of financial returns, which succeeded the Forex wave, was curbed even more quickly thanks to the creation of an a priori legal control that the AMF obtained to authorise platforms to offer them (none to date!). Only 9 complaints were registered in 2018.

Incidentally, the AMF Chairman believed that the time had come, with regard to miscellaneous assets, to publish "white" lists of authorised sites. However, we have seen a real change in these misleading practices in Bitcoin: requests for mediation related to these "miracle" investments with the promise of high financial returns increased suddenly in 2018. We were able to create a standard profile of the thirty-five unfortunate "investors" who contacted me and who had seen, in just a few weeks, their savings – sometimes their life savings – disappear forever. The unit amounts involved are significant (almost 25,000 on average). The affected populations are retired people, mainly from non-managerial backgrounds, all using the Internet and generally living in very small towns. Obviously, the lack of benchmarks persists: too many retail investors are trapped by manipulative rhetoric and still think that double-digit (monthly!) interest on an investment is compatible with a capital guarantee.

Unlike Forex, we are not dealing with approved platforms in Europe with which negotiations are sometimes possible. For Bitcoin investments in respect of miscellaneous assets, we have to deal with ghost sites. I then find myself redirecting these investors to criminal complaints without any real hope that they will get their savings back. This is why the AMF and its Retail Investor Relations Directorate, led by Claire Castanet, are to be commended for supporting draft legislation extending the concept of direct marketing in an attempt to stem this new scourge further upstream. It should be secured in 2019 as part of the PACTE Bill.

Another development: the sensitive extension of my jurisdiction when a dispute involves a financial investment advisor (FIA), now supported by past decisions handed down by the AMF's Enforcement Committee. As long as it does not fall under any other specific regulation (life insurance, for example), I can informally examine the conditions under which the FIA has suitably advised his or her client, providing an asset management advice service, even if it does not concern a particular financial instrument. This year, I thought it would be useful to present, in the annual report, a more complete study of the obligations of FIAs and the results obtained in mediation.

Finally, 2018 was marked by continued growth in the readership of my Online Diary: readers increased by 20%, a tripling of visits since its creation in 2014. These mediation cases, which are analysed anonymously each month, clearly illustrate the variety of problems encountered by investors¹ and the more general lessons that can be learned from them for other firms or other retail investors. As we know, beyond the satisfaction of being able to settle a dispute amicably, it is important that firms be encouraged to improve their procedures if it appears that the problem is not the result of human error; which they do in most cases. Furthermore, I have learned that a number of firms are repeating this message in their departments.

As for the French mediation landscape, it has not become any easier in 2018, far from it: a new "2018-2022 Programming and Justice Reform" Bill has just been adopted. It deals with such sensitive issues as the supervision of online mediation sites or the raising of thresholds for attempting mediation (mandatory mediation) before the judge is notified. The appendix contains a list of new or draft legislation relating to mediation more generally.

It cannot be stressed enough that consumer Ombudsmen are currently the only out-of-court mediators in France to be regulated and free of charge for the consumer.

I do not want to conclude this brief introduction to 2018 without acknowledging the importance of the mission accomplished at the end of her three-year term by Senior Judge Claude Nocquet as President of the CECMC, the French regulatory and supervision authority for consumer ombudsmen, which is the cornerstone of the entire consumer mediation process. Under her authority, the CECMC has authorised (registered, under the terms of the law), at the end of October 2018, 86 consumer Ombudsmen, thus covering 90% of market services, ensuring that the quality of consumer mediation is strictly verified.

As for me, since my appointment was renewed on 12 November 2018, on the proposal of the AMF Chairman after consulting the Board, I have the honour and pleasure of continuing this important public service mission for the next three years, together with my team of experienced legal experts led by my deputy, François Denis du Péage.

Paris, 4 March 2019

Marielle Cohen-Branche

¹ - For the first time, the summary of cases classified by theme since the beginning of the Mediation service in May 2014 will be attached to this report.

WHO IS THE AMF OMBUDSMAN?

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

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

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

- a member of the AMF Enforcement Committee;
- a member of the Banking Mediation Committee, chaired by the Governor of the Banque de France, responsible for supervising the independence of 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).

She is an Officier de la Légion d'Honneur and an Officier de l'Ordre National du Mérite.

As Ombudsman, she relies on a team of 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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- Importance of employee savings schemes
- From Forex to crypto-assets (Bitcoin) = how predators have adapted



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- What are the obligations of financial investment advisers (FIAs)? What are the outcomes of mediation?
- Collective investments in real estate investment firms (SCPIs, also known as “Malraux Law” investments) and in retail venture funds (FCPIs)



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A new Ombudsman referral form was introduced in mid-March 2018 with a series of questions to allow requests that do not follow the correct channels of appeal to be rejected.

+17%

Increase in requests received within the Ombudsman's jurisdiction compared with 2017.

After a decrease in claims in 2017, the Ombudsman's Office returned to a rising trend in the number of requests received in 2018, with a total of 1,438 requests compared to 1,361 in 2017 (+6%). This increase is even greater for requests received within the Ombudsman's jurisdiction, up 17% to 813 from 694 requests in 2017.

A new Ombudsman referral form was introduced on the AMF website in mid-March 2018, which includes filters with a series of questions to allow requests that do not follow the correct channels of appeal to be rejected. Since the introduction of this new form, the number of cases outside the AMF Ombudsman's jurisdiction received through this channel has fallen from 46% to 27%. The questions asked of retail investors as part of the form, supported by specific examples, are as follows: what is the nature of your dispute (banking, life insurance, tax, credit or financial)? Has your dispute been reviewed by another ombudsman? By a court? Have you filed a complaint? Have you submitted a prior written complaint to the relevant institution? On which date?

Unfortunately, the vast majority of retail investors continue to refer cases to the Ombudsman's Office by post (71%) rather than via the referral form available on the AMF website (29%), and these percentages do not change significantly over the years.

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

— The introduction of this new form explains why the percentage of cases received outside the Ombudsman's jurisdiction decreased, representing only 44% of cases received in 2018, against 49% in 2017. In practice, most of these cases come from the banking sector (non-payment, loan renegotiations, payment fraud, bank fees, etc.) and to a lesser extent from insurance (life insurance). Also included in this category are financial cases with lack of jurisdiction on geographical grounds, i.e. when none of the parties is resident in France, or with lack of jurisdiction in criminal cases, i.e. when professional practice is qualified as a criminal offence, or lack of jurisdiction in tax cases, with the distinction to be drawn between lack of jurisdiction in cases involving a tax-related complaint and cases that are inadmissible because the complaint is financial and only the loss is tax-related.

— As a result of this relative decline in cases received outside the Ombudsman's jurisdiction, those received within the Ombudsman's jurisdiction therefore increased more steeply, by 17%.

— The admissibility of cases is examined as soon as they arrive. They can then be closed for various reasons: absence of prior complaint, late requests (complaint made more than a year ago), referred to another Ombudsman, legal proceedings, request that is a consultation or an alert and not a mediation request, and requests that cannot be processed.

— In total, the number of cases processed and closed in 2018 was 1,408, compared with 1,406 in 2017. Each year, the difference between the number of cases received and the number of cases processed and closed is reflected in the change in the backlog of open cases at the beginning and end of the year. As at 31 December 2018, the backlog of open cases was 323 compared with 293 a year earlier.



A "CONSOMAG"² VIDEO EXPLAINING THE AMF OMBUDSMAN'S OFFICE

"In which cases do I have recourse to the AMF Ombudsman?"

When you invest in a financial product, there may be a disagreement between you and the professional: the bank, the financial advisor or a listed company.

You can then contact the AMF Ombudsman if you believe, for example, that you were misadvised or misinformed when you subscribed to this financial product or if your stock market order or the transfer of your PEA is executed poorly, or in the event of a dispute related to your employee savings scheme.

Important note: The AMF Ombudsman has no jurisdiction if the dispute concerns purely banking (credit cards, loans or interest rates), insurance or tax matters. Otherwise, for financial products, the Ombudsman is there to help you resolve this dispute amicably.

An essential preliminary step: you must of course, as soon as the disagreement arises, write directly to the professional in question.

And it is only when he/she has given you an answer that you are not satisfied with, or has not replied to you within two months, that you may refer the matter to the Ombudsman.

Most importantly, please use the form on the AMF website! It will guide you through the process better.

As you can see, **the AMF Ombudsman's Office is a free, confidential, impartial and fast public service.**

Text of the AMF Ombudsman's video broadcast on Facebook at the end of 2018. Some audience figures: 30,016 people saw the post, and it has been available since then on YouTube (in French only): <https://www.youtube.com/watch?v=satJlyL9kFU>

2- Issued by INC in partnership with AMF Retail Investor Relation Directorate.



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- Or by post:
The Ombudsman – Autorité des Marchés Financiers – 17, place de la Bourse 75082 Paris Cedex 02 – France

Cases received outside the Ombudsman's jurisdiction are quickly redirected to the appropriate Ombudsman.

— Cases received outside the Ombudsman's jurisdiction are quickly redirected to the appropriate Ombudsman. They are even sent directly when a case concerns the banking sector. Of the 631 cases processed and closed outside the Ombudsman's jurisdiction in 2018 (compared with 663 in 2017), 377 were from the banking sector, representing, as every year, almost 60% of these cases.

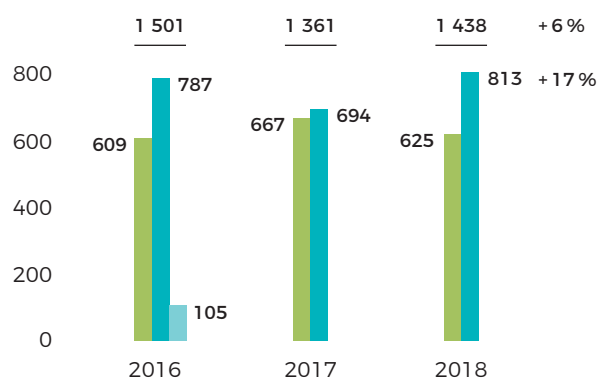
— It is actually very difficult for retail investors to distinguish between bank investments (regulated savings and fixed-term accounts), insurance investments (life insurance policies in euros or units of account) and financial investments (stock market, OPCs, tracker, SCPIs, FCPIs, PEAs, etc.). Similarly, a distinction should be drawn between services linked to execution orders, financial advice, custody account-keeping (with cost price calculation) and account transfers, which are covered by the AMF Ombudsman, and tax calculations linked to securities account-keeping, tax interpretations of financial transactions, disputes over bank fees, etc., which are not covered by the AMF Ombudsman.

— The fact remains that financial institutions are required to inform their customers as clearly as possible about the relevant consumer Ombudsmen. In this regard, it was noted that some banks, when informing clients of the option of referring to the bank's ombudsman, add that they may also use the AMF Ombudsman for financial disputes³. The term "also" may imply to the client that he/she may refer the matter to either ombudsman, whereas it is actually one or the other, and the choice is final.

— For cases outside the Ombudsman's jurisdiction where the dispute relates to a criminal offence, there can be no amicable mediation. The case is then sent to the Public Prosecutor (62 cases in 2018). Of these, 35 complaints concerned crypto-asset fraud, i.e. all the cases received on this subject. As in 2017, although down sharply, the remaining cases relate to unauthorised Forex trading sites or investment diamonds.

3- This is the case when the AMF Ombudsman has signed an agreement with a banking ombudsman that gives the client the choice to contact either one or the other (see Appendix 5, point 4, for more details on this point).

GRAPH 1.
Number of cases received



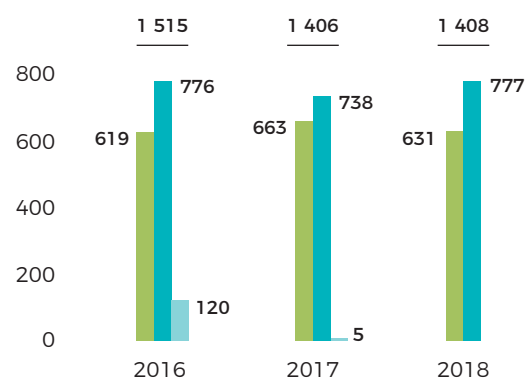
Outside the Ombudsman's jurisdiction

Within the Ombudsman's jurisdiction:

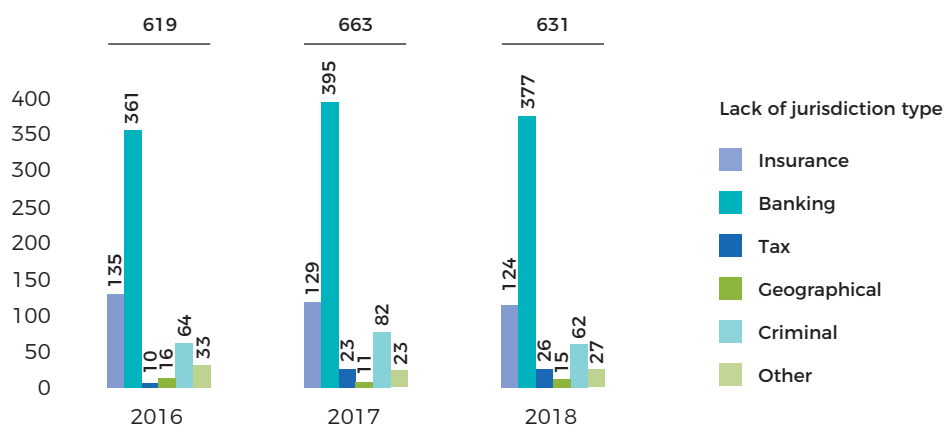
All subjects, excluding class actions

Class actions

GRAPH 2.
Number of cases processed



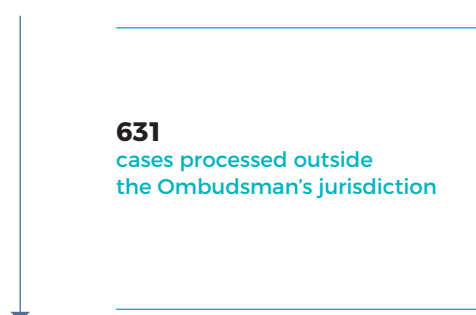
GRAPH 3.
Details of lack of jurisdiction processed



GRAPH 4.

Reasons for closing the 1,408 cases processed in 2018 compared with 2017

1 408 + 0,1% on 2017
Cases processed in 2018



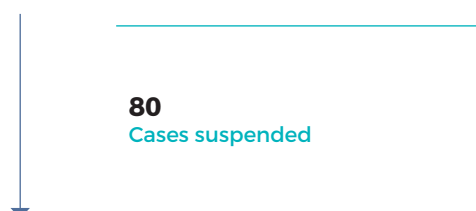
Lack of jurisdiction type	Number of lack of jurisdiction cases processed
Banking	377
Life Insurance	124
Criminal	62
Geographical	15
Tax	26
Other	27

777 + 0,5% on 2017 (743)
Cases processed within
the Ombudsman's jurisdiction in 2018



Reasons for closing	Number of cases closed
Premature request	113
Request reclassified as consultation	15
Request reclassified as alert	14
Late request	4
Legal proceedings	7
Submitted to another Ombudsman	8
Not able to be processed	6
Not able to be processed	7

603 - 2% on 2017 (618)
Mediation procedures initiated in 2018



Reasons for closing	Number of cases closed
Abandoned by the applicant	64
Mediation procedures rejected or abandoned by the firm	16

523 + 3 % on 2017 (506)
Opinions issued in 2018

■ In 2018, 777 cases were processed and closed within the AMF Ombudsman's jurisdiction (743 in 2017). Of these cases:

- 6 cases were closed because they could not be processed, 7 because they were subject to legal proceedings incompatible with mediation, which is an amicable process, 8 because the case had also been submitted to another Ombudsman, 4 as late requests where the prior complaint was dated more than a year before;
- 113 cases were closed because they were referred prematurely, since the retail investor provided no proof that a prior claim had been rejected or gone without a response for at least two months;
- 14 cases had to be reclassified as alerts, as they sought to expose a practice without claiming compensation. Once reclassified as alerts, these cases are forwarded to the relevant AMF staff for monitoring;
- 15 cases had to be reclassified as consultations, as they involved questions for the Ombudsman but no dispute was referred;
- 64 cases were closed because they were abandoned, as permitted under the charter, either because the dispute was settled after the referral was received, or because the retail investor did not provide the evidence necessary to continue processing the case;
- 16 cases involved firms who rejected or abandoned the mediation procedure, against 13 in 2017.

■ In total, 523 cases were subject to a proposal in an opinion in 2018, against 506 in 2017, 534 in 2016 and 364 in 2015. The 2016 figure included 120 class action cases, making comparison difficult.

■ Those 523 proposals in opinions, also referred to as Ombudsman's recommendations, were favourable to the applicant in 284 cases (i.e. 54%) and unfavourable to the applicant in 234 cases (i.e. 46%). It is noted that a high rate of favourable recommendations cannot be an objective in itself, since the nature of the recommendation depends on the intrinsic characteristics of the case, i.e. on the merits of the request.

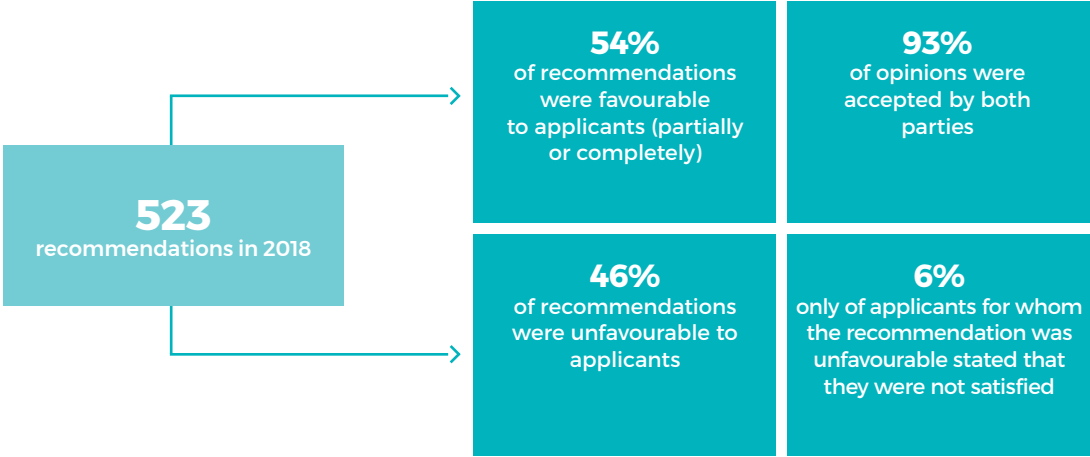


Employee from the Ombudsman's Office.

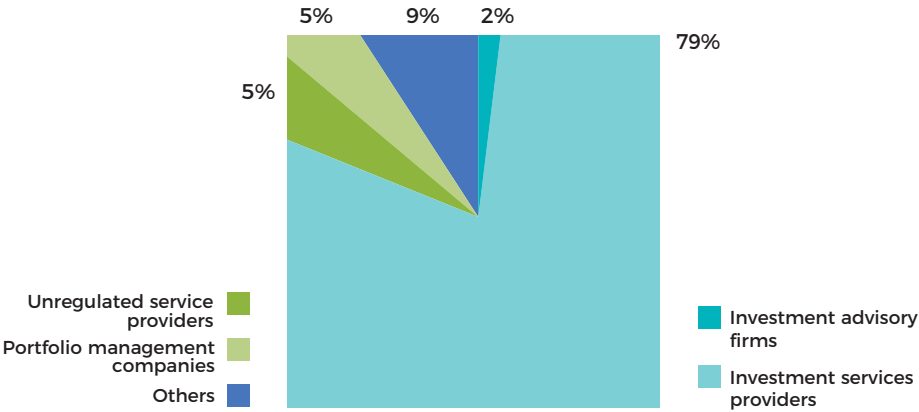
■ The level of compliance with the Ombudsman's recommendations can be expressed in two ways: firstly, 93% of proposals, when they are favourable to retail investors, were followed by both parties, and secondly, only 6% of recommendations unfavourable to retail investors were appealed by them. These percentages are again good, as every year. They mean that, for most cases submitted, retail investors have found mediation to be a way of resolving their disputes without resorting to the courts. It should be noted that in the event of persistent disagreement, retail investors always have the possibility of bringing their dispute before the courts.

■ In 2018, cases processed and closed concerned 308 different institutions: investment services providers, financial investment advisors, market undertakings, unregulated service providers, listed companies and portfolio management companies. The vast majority of cases (74%) were related to investment services providers.

GRAPH 5.
Breakdown and acceptance of opinions issued in 2018



GRAPH 6.
Breakdown of financial institutions involved in mediation in 2018



DURATION OF AMF MEDIATION PROCESS IN 2018

The AMF's mediation process consists of several stages.

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

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

If a response is not forthcoming after two reminders, as occurred with 16 cases in 2018 (2.5% of cases opened on their merits), half of which were FIAs, the Ombudsman considers that the firm is refusing to enter into mediation, which is their right. The Office then reminds the professional that their refusal is not covered by confidentiality because mediation has not yet been able to begin due to a lack of agreement between the two parties.

In accordance with Articles R. 612-2 and R. 612-5 of the French Consumer Code, the Ombudsman must examine admissible cases within 90 days. This period begins when the Ombudsman has received the documents on which the request is based, i.e. as stated in recital 40 of the European Directive, all the documents necessary to carry out the procedure.

These different factors mean that, once a mediation process has been initiated, the entire process lasted five and a half months on average in 2018, i.e. until the date when the Ombudsman's opinion was issued, marking the end of the mediation process. However, in the event of a favourable opinion, the Ombudsman will wait for a response from the retail investor, who usually has 30 days to respond. Upon request, the Ombudsman may supervise the drafting of the memorandum of understanding and oversee the payment of the agreed compensation. The purely administrative closure of the case is then deferred by the same amount of time.

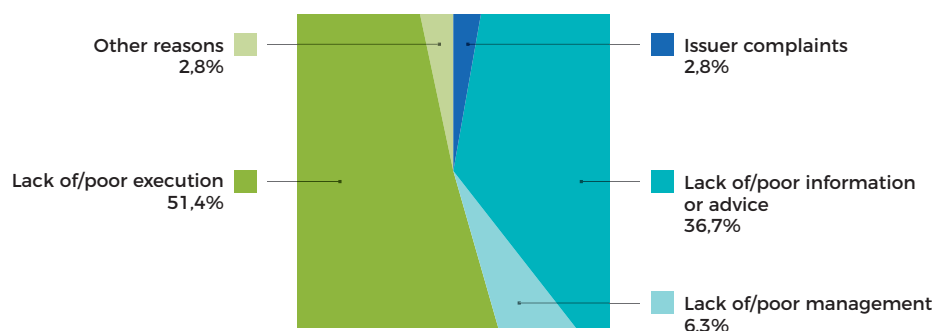
The AMF Ombudsman's charter states that once the Ombudsman has received all the relevant information from all parties, she has 90 days to issue her opinion.

The decree and charter specify that this time frame may be extended at any time by the Ombudsman when the complexity of the dispute so requires. In 2018, average processing times resulting in an opinion from the Ombudsman were as follows:

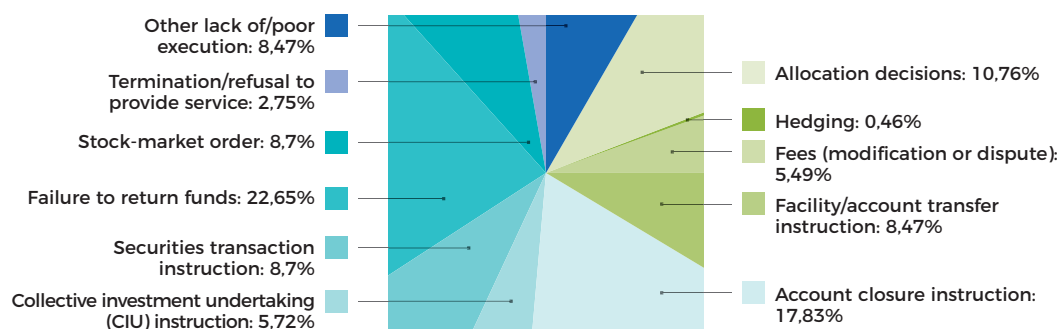
- **4 and a half months approximately: between receipt of the complainant's case and when it was complete, with a median of three months.** This time includes time spent waiting for responses to the Ombudsman's requests, which sometimes require follow-ups and several exchanges of correspondence. Some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

The AMF mediation procedure is therefore well within the time-frame imposed by the regulations, which must be less than 90 days.

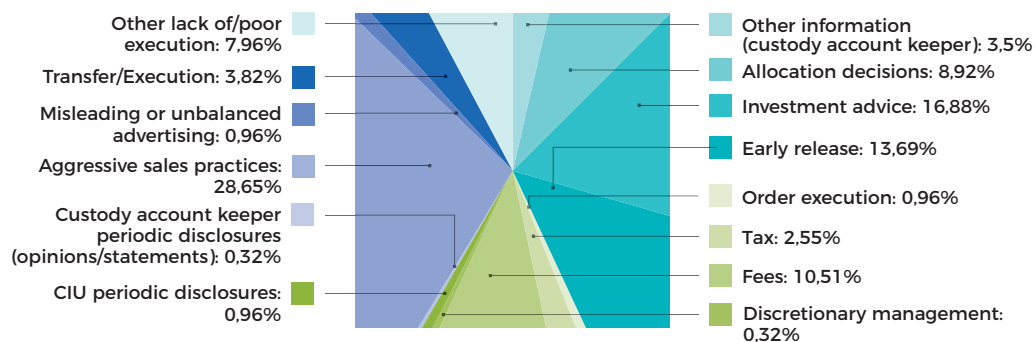
GRAPH 7.
% cases by reason for the complaint



GRAPH 8.
Cases closed due to poor execution



GRAPH 9.
Cases closed due to poor execution



Mediation topics

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

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

— In 2018, the top two categories of complaints represented 88% of mediation cases processed. Mismanagement accounted for only 6%.

— Each year, the topics addressed differ widely, as illustrated by the Ombudsman's Online Diary, which is published monthly on the AMF website (see page 44).

— In addition to recurrent disputes, the Ombudsman noted three significant trends in 2018:

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

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



RESULTS ACHIEVED BY MEDIATION IN 2018

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

- either to obtain execution of an instruction (58% of favourable opinions accepted);
- or to obtain compensation of the loss through compensation (42% of favourable opinions accepted). In 2018, the total amount of compensation obtained was €903,394 against €1,623,224 in 2017, €1,531,067 in 2016 and €851,653 in 2015. The decrease in the compensation obtained is mainly due to the significant decrease in the number of Forex-related complaints.

Out of all cases closed in 2018, 284 favourable recommendations were made, including 122 financial recommendations. For those 122 financial recommendations, goodwill gestures ranged from €9 to €286,000, with an average of €7,226 and a median of €575.

Of the Forex cases closed in 2018, 13 favourable recommendations were made, all financial. For those

13 financial recommendations, goodwill gestures ranged from €300 to €66,000, with an average of €17,267 and a median of €5,000.

Of the employee savings scheme cases closed in 2018, 92 favourable recommendations were made, including 20 financial recommendations.

For those 20 financial recommendations, goodwill gestures ranged from €9 to €5,929, with an average of €432 and a median of €96.



Deputy Ombudsman

The requirements to be complied with, which are a condition of this tax treatment, are a regular source of friction between retail investors and their financial institution.

2

Practical lessons in 2018

Reforms obtained for PEAs

— The Ombudsman's Office worked hard on the PEA issue in 2018. The PEA is a securities account with a particularly favourable tax treatment in return for a commitment to hold the securities for a minimum of five years. The requirements to be complied with, which are a condition of this tax treatment, are a regular source of friction between retail investors and their financial institution. Where unlisted securities are involved, but not only in this case⁴, the responsibility to comply with these constraints falls very squarely on the PEA holder and, if they are not complied with, even unintentionally, the reaction of the account-keeping institution may appear strict, even severe, to the retail investor, since this involves the outright closure of the PEA, as required under tax law. The PACTE Bill, which is currently under discussion, provides for more flexible closing and lock-in conditions.

— The number of PEA-related cases processed and closed in 2018 was 70, compared with 53 in 2017. Half of the cases concerned difficulties in transferring from one banking institution to another. It should also be noted that almost all of the cases concerned a traditional PEA and not an SME-PEA. This is no doubt due to the relatively recent creation of the SME-PEA and its lower penetration, but the essential issues would not require any distinction to be made.

— In the 2017 Annual Report, the focus was on the method of holding securities in direct registered form and the complications involved in managing the PEA. In particular, the holding of unlisted securities is likely to slow down or even prevent the transfer from one banking institution to another.

— Two proposals had been made by the

Ombudsman and were presented to the Financial Sector Advisory Committee (CCSF) in 2018. The first was that securities affected by court-ordered administration proceedings could be withdrawn from the PEAs without any tax loss, regardless of the age of the plan. This proposal could be included in the measures of the PACTE Bill. In the event of court-ordered administration proceedings starting against a company, that company's securities could be withdrawn from the PEA without causing the plan to close or payments to be withheld.

— The other proposal concerned a change in the practice used in institutions in relation to transfer orders (a document standardised by the French Banking Organisation and Standardisation Committee (CFONB)). This proposal, which was discussed with the representatives of professionals within the CCSF, was also accepted and was the subject of a unanimous opinion of the CCSF published on 12 September 2018, which is presented below in full (see p.18).

— To summarise: it is no longer necessary, in the event of a transfer of unlisted securities between two account-keeping institutions without a change in the holder of the securities, to obtain the agreement of the issuing company. It is only necessary to inform the issuing company. This simplification should be sufficient to unblock transfers that have been paralysed due to the lack of an agreement that was in fact only required, not by law or regulation, but by an administrative practice that is more than 30 years old...

4- Another issue is the question of the eligibility of securities for the PEA. The February 2015 mediation case dealt with this subject: "Investing an ineligible security in a 'traditional' PEA – who is responsible?" This is a real problem that still needs to be addressed because neither the institution nor the retail investor is often in a position to make a decision. With regard to the securities that cause this confusion, it should be noted that it is generally the retail investor who is at the origin of the choice of investment. The question of eligibility also arises when a security that was eligible is exchanged for a security that cannot be held in a PEA. In these cases, the Ombudsman's Office can only remind the retail investor that the financial institution is only applying the tax rule. This question may arise again in a few years' time following Brexit.



HOW TO IDENTIFY AND CALCULATE A LOSS IN THE EVENT OF AN ABNORMAL DELAY IN A PEA TRANSFER

The most frequent loss highlighted by retail investors is the loss of opportunity of carrying out one or more transactions on the PEA during the period of the transfer. It is possible that the retail investor was unable to respond to a securities transaction or to carry out a switch during the time period in question. For the retail investor, this will mean demonstrating, in the most precise way possible, that he or she has indicated, at a given time, that he or she intends to make a particular acquisition or sale. With regard to the losses associated with transfer delays, the challenge for retail investors resides in being able to present sufficient evidence to substantiate their claims for compensation. This may be difficult to prove and will have to be compared with the retail investor's usual stock market behaviour. For example, it is not very persuasive for a retail investor to complain that he or she was unable to carry out a profitable switch when his or her PEA has not been active in recent months or when the type of security concerned has no connection with the securities usually traded.

Of course, compensation can only be obtained if the delay is abnormal. In this case, there is no standard time limit, but if the departed account-keeping institution immediately informs its future ex-client that the required time frame is five weeks, except for securities transactions, the retail investor cannot complain about any loss resulting from the unavailability of his or her PEA during this period. It is therefore important that the client who wants to transfer his or her PEA is aware of this and adjusts his or her portfolio in advance. It is also advisable to avoid initiating a transfer while securities transactions or dividend payments are happening, as these automatically extend the duration of the transfer.

OPINION OF THE FINANCIAL SECTOR ADVISORY COMMITTEE ON THE SIMPLIFICATION OF THE PROCEDURE FOR TRANSFERRING UNLISTED SECURITIES IN THE PEA

Background

The Financial Sector Advisory Committee was alerted by the Ombudsman of the Autorité des Marchés Financiers (AMF) when presenting its annual report and then informed by the AMF Chairman on 13 November 2017 of certain obstacles to banking mobility when transferring Equity Savings Plans (PEAs).

The difficulties identified relate to the regulatory characteristics of PEAs, which are themselves linked to the tax advantages attached to them: the transfer of a PEA can only be carried out in its entirety. Therefore, any delay in the transfer of a single line in the portfolio results in the transfer of all other lines being blocked.

The resulting loss to the holder may be significant if the blockage persists, since no further switch can be carried out during this period, regardless of market developments.

Two main causes affect the transfer of lines:

- first, the occurrence of securities transactions, such as the distribution of a dividend with a reinvestment option,
- and second, the nature of the security itself, in the case of unlisted securities, whether in direct or administered registered form.

As the first hurdle could not be resolved within the Committee, it was on the second that the Committee met on 13 March to examine possible areas for improvement.

A technical group including the French Banking Federation (FBF), the National Association of Joint Stock Companies (ANSA), the AMF and the French Association of Securities Professionals (AFTI), which are involved in the Committee's work, was then set up to assess these areas.

It was first of all pointed out that, with regard to listed registered securities – whether direct

registered securities or securities under administered management – the change of PEA manager does not pose any problem other than compliance with the various stages associated with transfers involving registered securities (no specific authorisation from the issuer and information from the subscriber or the new PEA manager).

For unlisted securities, however, the analysis showed that the change of manager follows a consistent and long-standing practice of seeking the prior consent of the issuer, even though it is a transfer to a new manager and not a change in the holder. This practice is not based on any legal or regulatory obligation. It is based on an interpretation of ANSA⁵ recommendations that present an identical transfer order model requiring the issuer's signature for approval for all unlisted securities transactions, including transfers that do not involve a transfer of ownership. However, a change in the manager of the PEA in which the unlisted securities are held does not result in the transfer of these securities, which remain in the issuer's account (registered securities account-keeper).

It should be noted that the security may be unlisted at the time of acquisition or may have become unlisted as a result of a delisting, for example with the issuing company being placed into court-ordered administration. In this latter case, obtaining the transfer order is extremely difficult or even impossible.

Considering that it is the mandatory information provided by the issuer that is the main objective of the approach, and the only benefit of the current practice, the Committee considered a solution that would guarantee this information without blocking the transfer of the entire portfolio.

At the end of the plenary meeting of 11 September 2018, the CCSF adopted the following Opinion:

1. The Committee stresses the importance of simplifying procedures for the transfer of unlisted company securities, particularly in a context where the financing of SMEs should be encouraged by an increase in the importance of the SME-PEA in accordance with the objectives of the PACTE Law.
2. The Committee notes that the current procedure of making the explicit agreement of the issuer a condition of the validity of the transfer of securities from one institution to another is without regulatory basis and may lead to a total blockage of the transfer of the PEA as a whole, even though there is no change in the holder of the securities concerned.
3. The Committee, in agreement with ANSA and the AMF and on the basis of the mechanism proposed by the FBF and AFTI (see Appendix), anticipates that:
 - the agreement of the issuer shall no longer be a prerequisite for the transfer;
 - the institution previously managing the account (the departed bank) shall send the transfer order to the issuer by any means that proves it was sent, in particular by registered post with proof of receipt;
 - the departed bank shall send the transfer order to the new institution managing the account (the joining bank);
 - the change in the PEA manager shall be considered effective as soon as proof of sending the transfer order to each of the issuers concerned is available with the manager at the departed institution.

The Committee points out that this simplification of the transfer order procedure is limited to transfers of PEAs or SME-PEAs from one manager to another without any change of holder.

4. The Committee calls for this simplification to enter into force as soon as possible.
5. The Committee will evaluate the success of this simplification by the end of the first half of 2019, with the help of the AMF Ombudsman.

6. In relation to securities of companies in administration, the Committee notes that their presence in PEAs or SME-PEAs constitutes a barrier to banking mobility by limiting the transferability of plans. It penalises the account holder who is charged custody fees on securities that are often of no real value.

The Committee endorses the AMF's proposals, submitted by professional organisations to the French Department of Tax Legislation (DLF), to remove unlisted securities from the scope of PEAs and SME-PEAs as soon as court-ordered administration proceedings have been started against the issuer, without such an exit constituting a withdrawal within the meaning of the tax regulations, i.e. without the plan being closed or new payments being impossible to make.

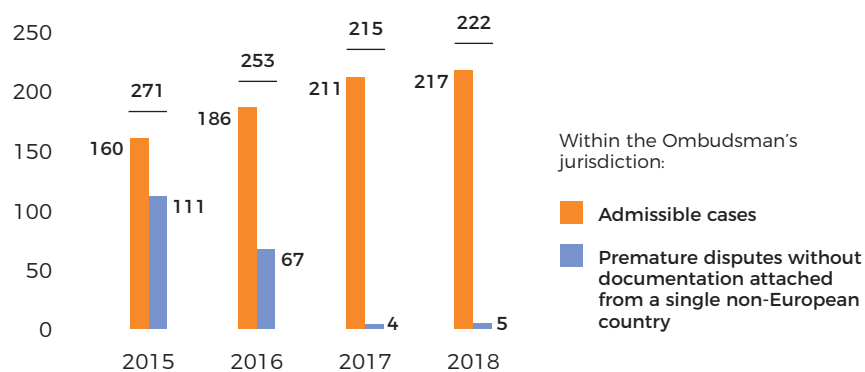
The Committee therefore calls for a fair solution that applies regardless of the value of the securities and the age of the plan.

Content of the FBF and AFTI mechanism

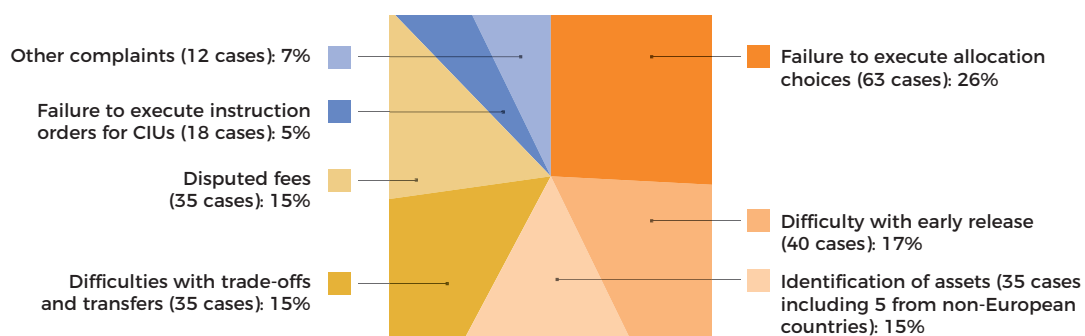
1. The departed bank sends a Transfer Order Form to the issuer by registered post with proof of receipt.
2. The departed bank tracks the return of proofs of receipt and other responses (not known at this address, unclaimed, etc.).
3. Once all returns have been received for all unlisted securities in the PEA, the departed bank transfers the PEA concerned to the beneficiary bank.
4. The departed bank sends the Transfer Order Form slip to the beneficiary bank at the same time.
5. The departed bank sends back to the issuer any transaction (dividend payments, securities transactions) sent in error by the issuer to the account closed on its books.
6. The bank informs the affected client of the rejection, by post or by e-mail to the last known address in its databases.

5- The ANSA specifications, published in 1984 and again in 2008, applicable to account-keepers of financial instruments not admitted to a central depositary's transactions.

GRAPH 1.
Change in number of employee savings scheme cases received



GRAPH 2.
Problems encountered in employee savings scheme cases closed in 2018 (238 cases)



The continuing importance of employee savings schemes for the AMF Ombudsman's Office

— In 2018, the number of mediation cases involving employee savings schemes continued to increase. In employee savings schemes, 53% of the Ombudsman's recommendations were in favour of the retail investor in 2018. The collaboration introduced by the Ombudsman with the main account-keepers of employee savings accounts continued. As a result, 96% of the Ombudsman's recommendations are accepted by the financial institutions. Furthermore, the Ombudsman's proposals in such cases are more often about the resolution of a situation, for example a reinstatement, than the payment of a gesture of goodwill. Less than 20% of the Ombudsman's recommendations in this area are actually financial recommendations.

— In 2018, it can be noted that disputes over fees applied to employee savings scheme assets decreased from 18% in 2017 to 15% in 2018, while mediation requests relating to the default allocation of discretionary or compulsory profit-sharing bonuses increased very significantly from 19% in 2017 to 26% in 2018.

— Based on the information gathered during the processing of cases, the Ombudsman was therefore keen to present her recommendations by participating in the discussions on new draft legislation in this field aimed at improving practices.

— As part of the discussions on the PACTE Bill, the Ombudsman had the opportunity to make two recommendations to the AMF in order to respond to the disputes that she is most concerned about: the introduction of a right of withdrawal following the default allocation of the employee's compulsory profit-sharing bonus to the PERCO collective employment savings scheme and the early release from "small PERCOs". These two recommendations were adopted by the AMF in the ongoing discussions on this legislation, at the time of writing.

— The Ombudsman was also asked to participate in the working group created by the French General Labour Directorate on the harmonisation of annual employee savings statements.

The right of withdrawal for the default allocation in the PERCO

— The Ombudsman regularly receives mediation cases in which employees note that their compulsory profit-sharing bonus has been allocated by default, in part (50% of the bonus), to their retirement savings scheme, namely the PERCO, where one exists.

— This default allocation, i.e. without their express consent, whether due to an error or oversight on the part of the employees or because they did not send their response within the specified time limit, has very serious consequences for them. The employee's assets will then be locked into his or her PERCO until retirement, instead of five years if they had been allocated to the company savings scheme (PEE). In addition, there are significantly fewer possibilities for early release for the PERCO than for the PEE. For example, with the PERCO, early release is not allowed in the event of termination of employment or unemployment, as there is a requirement to wait until the unemployment benefits expire. Furthermore, once the employee leaves the company and the employment contract has ended, account maintenance costs will be charged to these assets, which year after year will nibble away at his/her capital, or even completely exhaust it, if it is modest.

With the PERCO, early release is not allowed in the event of termination of employment or unemployment.

Some employee savings account-keepers, sensitive to the Ombudsman's recommendations, are already showing flexibility. For example, in one mediation file, the retail investor indicated that, as every year, she had sent her option form requesting payment into her bank account of the full amount of her profit-sharing bonus of €1,086. In the absence of the payment to her account, she then questioned her employee savings scheme account-keeper, who told her that they had not received her allocation choices and had therefore invested her profit-sharing bonus partly in the PERCO by default. During the examination of this case, the Ombudsman noted that the procedures for sending allocation choices had been changed for the first time and that the employee savings scheme account-keeper had decided to give priority to sending this information by electronic means using the online portal for allocation choices. The Ombudsman notes that the option for employees to send their choices by post was mentioned on the profit-sharing notice only in very small print. In addition, the account-keeper made this option conditional on using a paper-based reply form requested by telephone. The Ombudsman also found that the presentation of the document attached to the profit-sharing notice, intended to explain the instructions for using the online entry method, could be misleading and could legitimately suggest that it was not only a profit-sharing notice but, as in previous years, an option form to be completed and returned. In this case, the Ombudsman also noted that the retail investor requested payment of her profit-sharing bonus every year, indicating that she needed this money; her salary was €1,350 per month. In view of the circumstances of this case, the Ombudsman recommended that the profit-sharing bonus be released. The employee savings scheme account-keeper followed the Ombudsman's recommendation.

Some employee savings account-keepers, sensitive to the Ombudsman's recommendations, are showing flexibility.

The right of withdrawal proposed by the Ombudsman and adopted by the AMF in the discussions on the PACTE Bill could be exercised within two months of the day on which the retail investor sees the allocation error in his/her PERCO, i.e. the day on which he/she receives the transaction notice. This right of withdrawal would therefore allow employees who have made a mistake or who have not made their choice within the specified time limit to request the refund of their bonus placed in the PERCO or to allocate this bonus to the company savings scheme (PEE). This measure could be included in the order provided for in Article 20 of the PACTE Bill.

This proposal is largely based on the provisions of Article 3315-2 of the French Labour Code as amended pursuant to Article 150 of the "Macron" Law of 2015 providing (for two years) for a three-month right of withdrawal when implementing the default allocation to the PEE of the discretionary profit-sharing bonus that was previously paid by default to the employee.

Approving such a measure seems all the more desirable as it is not impossible for the public authorities to consider taxing early withdrawal from the PERCO on the grounds of acquiring a main residence.

Early release from small PERCOs

When the employer/retail investor benefits from a PERCO, the employer pays the account management fees. When the employee leaves the company, this coverage ends and the account maintenance fees are then deducted directly from the former employee's assets, in the form of thousandths of units. These fees represent on average €30 to €50 per year. These fees, which are broadly justified, can lead to a confiscatory result for small PERCOs with low or even derisory amounts of assets held. This is all the more problematic as these small PERCOs have often been set up by people in fragile professional or financial situations (short-term or temporary fixed-term contracts).

During the examination of cases, the Ombudsman was able to establish several circumstances in which the former employee's savings were nibbled away year after year by account maintenance fees: when the former employee does not find a job and benefits from his rights to unemployment insurance, when the employee's new employer has not set up a PERCO or when the former employee no longer pursues an activity as an employee.

For example, the Ombudsman received a request from a former employee who had worked for a year on an apprenticeship contract and who, as such, had received a profit-sharing bonus that he had placed in his PERCO. In this case, the Ombudsman found that the retail investor, who had just finished his studies, did not satisfy any of the PERCO's reasons for early withdrawal. The Ombudsman also noted that, given the young age of this retail investor (26 years old), the small amount of assets he held (€246) were destined to disappear through the deduction of account maintenance fees. The Ombudsman therefore recommended, in this case, that, exceptionally, this small PERCO be released. The financial institution in question agreed to accept the Ombudsman's recommendation.

The PACTE Bill aims to facilitate mobility between retirement saving schemes and in particular from the PERCO to other retirement saving schemes such as the PERP. The PACTE Bill, as it stands, provides for a limit of 1% of assets on the amount of transfer fees and a zero transfer fee after five years from the first payment into the scheme or when the transfer is made after retirement. These measures, which only concern transfer fees, seem insufficient to the Ombudsman in relation to small PERCOs.

The AMF, based on the Ombudsman's proposal, recommends that a fairness provision be implemented in favour of investors whose small assets do not allow them to cover the fees, which over the years will wipe out the savings they have accumulated. This would add a new case for early withdrawal from a PERCO when the assets held are, for example, less than or equal to €2,000. This measure had been discussed with the Financial Sector Advisory Committee.

The PACTE Bill aims to facilitate portability between retirement saving schemes and in particular from the PERCO to other retirement saving schemes.

Working group on the harmonisation of employee saving statements

In addition to the discussion on the release or transfer of assets from the PERCO, the Ombudsman also participated, at the request of the French General Labour Directorate, in a working group set up to clarify the provisions of the PACTE Bill concerning the annual statement of employee saving accounts and the information to be included in them.

It brought together representatives of account-keepers, a financial market association, the General Labour Directorate, the General Directorate of the French Treasury and the AMF. The aim of this working group, based on the provisions of the new Article L. 3332-7-1 of the French Labour Code (Article 58 of the PACTE Bill), was to define the annual financial position statement based on existing best practices without creating new constraints for account-keeping institutions. At these meetings, the working group reached a consensus to improve the annual employee saving statements in order to provide clearer and more practical information to the retail investor. The Ombudsman was able to provide concrete examples of problems identified during the examination of mediation cases. For example, it appeared in some cases that the insufficient disclosure of fees on the annual statement could be the cause of the dispute.

— In 2015, the French legislature, already aware of the need to change the regulation on this subject, had taken into account the Ombudsman's recommendation when drafting the Macron Law. It had, for example, made it possible to provide employees with more appropriate information on the existence of these fees at key times, in particular by introducing an obligation to provide information at the employer's expense when the employee leaves the company.

— However, the Ombudsman is still involved in mediation cases in which information on fees is not easily accessible to the employee retail investor. As this information does not appear on the statements, employees must check their personalised online space to determine that fees have been charged. The only indication on the account statement is the variation in the value of an employee's assets, which may in any case be due to normal market fluctuations. For the Ombudsman, this is not sufficiently informative and does not allow employees to determine the amount, or even the existence, of account maintenance fees deducted directly from the assets.

From Forex to crypto-assets (Bitcoin) - how predators have adapted

From Forex...

— For the third consecutive year, the Ombudsman observed a decrease in the number of cases received relating to Contracts for Difference (CFDs)/Forex or binary options. The number of cases decreased from 172 in 2016 to 98 in 2017 and 51 in 2018. This decrease can be explained, firstly, by the measures against advertising taken by the AMF⁶ and, secondly, by the measures taken by the European Securities and Markets Authority (ESMA) in July and August 2018 to ban binary options and restrict the marketing, distribution or sale of CFDs.

— For several years, ESMA, as the European financial watchdog, and the financial regulators of the EEA Member States have been concerned about the marketing, distribution and sale to retail clients of binary options and CFDs, which are essentially over-the-counter products that are highly risky and very complex. This concern is reinforced by the considerable losses (more than 80% on average) suffered by retail investors, the aggressive marketing techniques used and the lack of transparency and information provided to retail investors who are unaware of the risks involved in these products.

— The measures adopted by some national authorities, including the AMF, regarding advertising bans have proved insufficient to protect retail investors. Consequently, at a European level, ESMA has taken over, with so-called product intervention measures, concerning binary options and CFDs, on the basis of Article 40 of EU Regulation 600/2014, namely:

- banning the marketing, distribution or sale of binary options to retail investors since 2 July 2018;
- restricting the marketing, distribution or sale of CFDs to retail investors since 1 August 2018, including a significant limitation on leverage effect (which could be up to 400!).

— However, it should be noted that these ESMA measures can only be temporary (3 months with an option to renew). They were renewed for the third time in spring 2019 to give the national authorities time to take appropriate measures. However, it is not known whether all national authorities will align themselves with these ESMA measures.

6- Article 72 of the Sapin 2 Law of 9 December 2016, which came into force on 1 January 2017, introduced a mechanism for preventing ISPs from distributing, by electronic means, promotional communications on categories of financial contracts considered risky, as specified by the AMF General Regulation.

LOOKING BACK AT 2018

When examining these cases, the Ombudsman is faced with two situations:

- either the company has no authorisation and, in this case, mediation cannot be considered since the company incurs criminal sanctions relating to the illegal exercise of the activity of an investment service provider;
- or the company operating the platform has an authorisation issued by a financial regulator of a State that is a party to the European Economic Area (EEA) Agreement, in which case the mediation process may be initiated.

Non-authorised companies (22%)

It is in these types of cases that the decrease was greatest: only 11 cases were received in 2018, against 43 in 2017. Nevertheless, the Ombudsman observes that some illegal platforms have adapted and now offer crypto-asset trading.

Authorised companies (78%)

The decrease in the number of cases received, which began in 2016, continues: 40 cases received in 2018, against 55 in 2017. The more or less favourable outcome of these mediations is essentially based on the evidence provided by the retail investors (e-mails, Skype conversations and phone call recordings). It also depends on the attitude of so-called “account managers” who often perform services for which their company has not been authorised. These companies are generally only authorised to receive, transmit and execute orders, whereas their employees are actually providing advisory services.

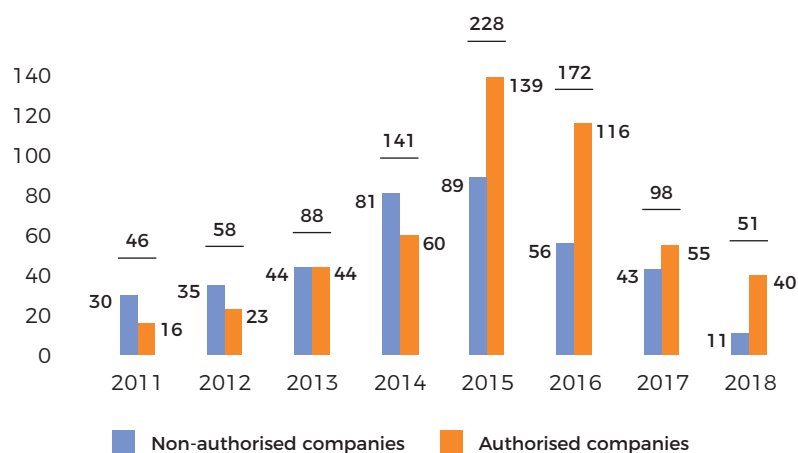
During the examination of these cases, the Ombudsman observed once again this year that the unscrupulous “account managers” of these platforms have tirelessly continued to use aggressive and misleading commercial practices, such as inducing a retail investor to take out a consumer loan in order to continue trading to allegedly make up for



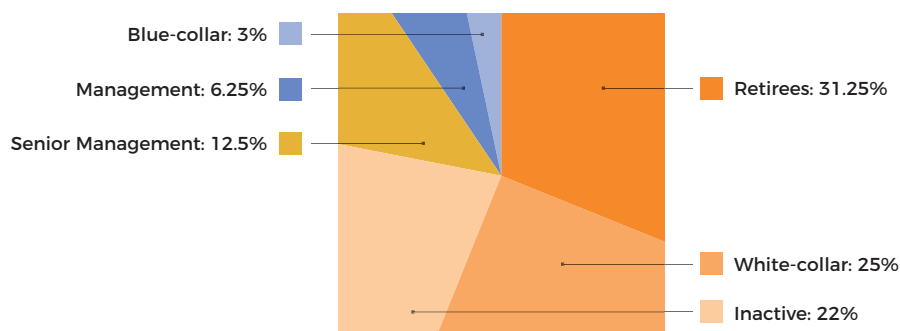
Ombudsman's office legal expert

If the platform operator has no authorisation, mediation cannot be considered since the company incurs criminal sanctions.

GRAPH 3.
Change in number of CFD/Forex/Binary Options cases received



GRAPH 4.
Socio-professional categories of retail investors who have subscribed to investments in Bitcoin offering financial returns and who have referred the matter to the Ombudsman



losses⁷.

Furthermore, the Ombudsman noted that several platforms now offer to trade CFDs on crypto-assets which, given their very high volatility, are obviously extremely risky. The way these products are presented is often misleading. For example, an investor who initially wanted to acquire crypto-assets was completely taken aback when he discovered that he had actually purchased CFDs on crypto-assets rather than crypto-assets.

Last but not least, the Ombudsman's attention was particularly drawn to the attempts of these platforms to circumvent the ESMA measures by encouraging all their retail clients to declare themselves professional clients in order to escape this restriction. A retail investor, for instance, who had neither knowledge nor experience in financial matters, received documents from his so-called "advisor" to convert him to professional status. The "advisor" even dictated the required answers to him over the phone.

While the Ombudsman therefore welcomed the measures taken by ESMA, their temporary nature raised the fear that the return in 2019 to national measures, which may be very different from one country to another, will again lead to less protection for private individuals.

To crypto-assets

After the investments diamond, a myriad of fraudulent crypto-asset offers is now mushrooming. Companies that operate through websites are riding the wave of the craze generated by the speculative rise in Bitcoin at the end of 2017 and are swallowing



Ombudsman's Office legal expert

The Ombudsman noted that several platforms now offer to trade CFDs on crypto-assets.

7- Over the years, the Ombudsman has noted numerous failings: aggressive business practices, misleading advertising, obvious mismatch between the client's profile and the products offered, insufficient warnings, information on the balance between risks and benefits not adhered to, advisors who clearly do not act in an honest, fair and professional manner to serve the best interests of the client, etc. For more details on these practices, please refer to the AMF Ombudsman's reports from previous years.



SAPIN 2 LAW

Since the law of 9 December 2016 on transparency, anti-corruption and economic modernisation (known as the "Sapin 2 Law"), the AMF has been responsible for regulating "miscellaneous assets". As a result, platforms offering an investment in crypto-assets with a promise of returns must be authorised by the AMF, which, after checking that there are sufficient guarantees as to the quality of the intermediary and the transaction, as well as guarantees on the balanced nature of the promotional marketing materials, assigns a registration number.

To date, no platform has been authorised to offer this type of investment. All platforms offering crypto-assets with a promise of returns are therefore illegal.

Companies that operate through websites are riding the wave of the craze generated by the speculative rise in Bitcoin at the end of 2017 and are swallowing up the savings of retail investors dreaming of astronomical gains.

up the savings of retail investors dreaming of astronomical gains. Retail investors, who are generally novices and laymen in financial matters, do not have the necessary perspective to view with scepticism the promises of colossal returns that are made to them. They think they are seizing an exclusive opportunity, while at the same time participating in a cutting-edge technological revolution.

— The profiling carried out by the Ombudsman based on the 35 mediation cases received in 2018 reveals the following observations on the retail investors who are victims of this scam:

- they are aged between 31 and 77 years old (average age: 56 years);
- they live mainly in small towns;
- they belong to different socio-professional classes but are mainly retired and, for the most part of non-managerial level;
- losses range from €500 to €104,000 (average loss; €24,660).

— Here is how retail investors quickly fall into the trap:

1. Scammers canvass their victims by telephone (cold calling) or contact them when they provide their details via the contact forms on websites offering the opportunity to invest in crypto-assets. During these interactions, they build the confidence of retail investors, use the growth of Bitcoin to present this investment as simple and safe and promise a huge return.

2. Sometimes over the course of several months, the retail investors are deceived by the scammers, who maintain the illusion of a very lucrative investment, not hesitating to create personal online spaces and account statements on their website that show a significant capital gain. They often even pay interest to retail investors in the first few months to entice them and encourage them to invest more.

To demonstrate their integrity, some also impersonate large banks by using their logo on documents, exploiting the reputation of these institutions to reassure savers.

3. Most retail investors do not even realise the scam when, a few months later, they ask for their money

back and the alleged capital gain on their investment. Scammers do not actually oppose this head-on, but make the refund conditional on the payment of an additional sum described as a tax, which is effectively the “double penalty” previously described by the Ombudsman in Forex cases (see below).

4. Once retail investors have invested their entire savings, the scammers become unreachable.

The Ombudsman notes that, even at this stage, some investors are still unaware they have been scammed and hope that an intervention by the AMF Ombudsman will be sufficient to get their money back.

The handling of these cases in mediation is obviously unthinkable since they are scams of ghost companies and the funds have been going abroad for quite some time. In accordance with Article 621-20-1 of the French Monetary and Financial Code, the Ombudsman must forward these cases directly to the specialised departments at the AMF, which is required to inform the Public Prosecutor.

THE “DOUBLE PENALTY”

The scammers tell retail investors that, before their investments are refunded, they must pay a tax (Blockchain tax, VAT, UK-France taxes, OECD taxes, etc.), which generally represents 20% of the investments and capital gains allegedly generated. Almost all retail investors pay this sum. Once the supplement has been paid, scammers use various excuses not to release the money to them (incorrect IBAN, a bug, hacking, etc.) and vanish into thin air.



THE SCAMMER’S MESSAGE IS BASED ON 3 TYPES OF ARGUMENTS:

Political

It is an anti-system investment:

“Escape the control of the government or the banks that are stealing from you!” “Your savings are at risk if you leave them in the bank.” “The government and the tax authorities have changed the terms of all savings contracts and increased taxes while lowering the promised returns.”

Economic

It is an alternative to the Livret A passbook and other classic investments that no longer yield anything. “Demand for blockchain is increasing by more than 500% per year, nothing can stop the phenomenon.” The advertised return is between 10 and 300% per month (!) in most cases, according to the cases.

Psychological

Arguments that are both convincing

(“Get on board”; “It’s the future”;

“Don’t let this opportunity pass you by”;

etc.) and reassuring (“It’s easy, risk free, available at any time in a few clicks and 100% guaranteed”; “In the event of a loss, the company will activate its insurance to recover the entire investment”).



The main themes encountered in specific mediation cases



Ombudsman's Office legal expert

FIAs are subject to a number of obligations and prohibitions, supervised by the AMF.

What are the obligations of financial investment advisers? What are the outcomes of mediation?

— An investor may, for advice on the choice of financial products, call on the services of a financial investment advisor (FIA). This year, for the first time in the Ombudsman's annual report, it seemed appropriate to present a more comprehensive review of their obligations together with specific cases encountered in mediation and their outcomes.

The organisation of FIAs

— The legal regime for FIAs was created by the Financial Security Act of 1 August 2003 to strengthen investor protection. Previously, this function was carried out by professionals under various non-regulated job titles: wealth management advisors, financial advisors, financial experts, etc. Since then, it has been governed by the Monetary and Financial Code (MFC) and the AMF General Regulation. FIAs are subject to a number of obligations and prohibitions, supervised by the AMF. This regime has undergone several changes, the latest dating back to the entry into force of MiFID 2⁸.

— The FIA may carry out the following activities⁹:

- investment advice¹⁰ regarding financial instruments (shares, bonds, SICAV shares or FCP units, etc.);
- advice on the provision of investment services such as order reception and transmission or portfolio management;
- advice on the execution of transactions in miscellaneous assets, i.e. products that are not financial instruments but which have the potential for financial returns.

— The FIA may also receive, for transmission purposes, orders for a client to whom it has provided an advisory service under the conditions and within the limits set by the AMF General Regulation and may carry out other wealth management advisory activities¹¹.

— On the basis of Article L. 541-1 paragraph II of the Monetary and Financial Code, the AMF Enforcement Committee decided that the AMF could have the jurisdiction to discipline FIAs who have carried out “other wealth management advisory activities”, rather than strictly providing “investment advisory” services, in particular by marketing products that are not strictly speaking financial instruments, such as shares in a joint venture or shares in a simplified limited partnership. The main objective of this expansion of jurisdiction, supported by past decisions handed down by the Enforcement Committee, is to avoid a legal vacuum and ensure that the marketing of certain products, which are not covered by any other regulation, is not allowed to escape any control.

— In addition, 96% of professionals “wear several hats” and combine various roles, including banking and payment services intermediaries, insurance intermediaries and property intermediaries. They must, where applicable, comply with the regulations specific to each of these legal statuses.



PLEASE NOTE – THE FIA CANNOT, FOR EXAMPLE:

- receive funds from a client other than those intended to pay for its FIA activity (this restriction is not applicable to other activities that this firm may carry out);
- provide portfolio management services on behalf of third parties without specific authorisation to operate as a portfolio management company;
- provide investment services for the benefit of an issuer;
- act as both a direct marketer and an FIA as part of the same service.

8- The legal status of FIAs was amended in 2007 by MiFID 1, then clarified in 2013 and further amended in 2018 by MiFID 2. The relevant provisions of the directive, integrated into the corresponding legal regime for FIAs, entered into force on 8 June 2018.

9- In accordance with Article L541-1 paragraph I of the Monetary and Financial Code.

10- According to Article D.321-1, 5° of Monetary and Financial Code: The investment advisory service includes the provision of personalised recommendations to a third party, either at its request or on the initiative of the company providing the advice, concerning one or more transactions relating to financial instruments or one or more units mentioned in Article L. 229-7 of the Environmental Code.

11- In accordance with Article L. 541-1 paragraph II of the Monetary and Financial Code.



SOME NOTABLE DEVELOPMENTS SINCE THE ENTRY INTO FORCE OF THE DELEGATED REGULATION AND MIFID 2 IN JUNE 2018:

- The Know Your Client questionnaire needs to be more specific regarding the investment horizon, risk tolerance and the client's ability to sustain losses. The term "written report" is no longer used, but rather "suitability declaration".
- Producers subject to MiFID 2 must now define the characteristics of their products and their target market. Consequently, the FIA, as a distributor, will be able to rely on these aspects to ensure the suitability of the product to his/her client and must define not only a "positive target market" but also a "negative target market".
- The description of the risks of financial instruments is being stepped up, as Article 48 of the MiFID 2 Delegated Regulation adds information on the constraints or restrictions that apply to the resale of these products.
- Transparency and information (*ex ante* and *ex post*) on investment costs and charges is increased.

The conditions under which FIAs operate

FIAs must:

- take out professional indemnity insurance and be able to prove they have it at any time;
- join the professional association of their choice among those authorised by the AMF. The association is responsible for monitoring the individual professional activity of its members, implementing the conduct of business rules and monitoring compliance with these rules. The AMF, for its part, approves and supervises professional associations and can also directly supervise FIAs. In the event of non-compliance, the AMF's Enforcement Committee may sanction them;
- register with ORIAS (the body in charge of maintaining the single register of insurance, banking and finance intermediaries). ORIAS checks in particular the conditions of age, good reputation and professional competence, the taking out of insurance, membership of an authorised professional association, etc.

When a case is referred to the Ombudsman, the analysis focuses on the conduct of business rules, checking in particular that the FIA has:

- obtained information, prior to any advice being given, about the product offered;
- sent an initial contact document to the client;
- sent a letter of engagement to the client;
- had the client complete a questionnaire to assess his/her knowledge and expertise in financial matters and his/her objectives;
- informed the client of the costs and expenses related to the investment made and the remuneration the FIA receives;
- sent a suitability declaration to the client once the advice had been given;
- provided clear, accurate and non-misleading contractual and commercial documents and any necessary warnings, etc.

Failure to exercise the due care required of FIAs

FIAs must carry out their activity in the best interests of their clients. Before offering investment advice, FIAs must inquire about the investment knowledge and experience of their clients, their financial situation and their investment objectives¹².

The advice provided by FIAs must be formalised in a written suitability declaration justifying the various proposals, their advantages and the risks they entail, which also explains how the recommendation made is suited to the client and, in particular, is consistent with the client's objectives, investment period required and ability to sustain losses, etc¹³.

Failure to provide mandatory documents: initial contact document, Know Your Client questionnaire, letter of engagement, written report

During the examination of a case concerning an investment in a company that was building and operating a wind farm, the Ombudsman found that the FIA had failed to obtain the required information from its client and drawn up a written report presenting the advantages and disadvantages of the products it was recommending to him, the risks related to that investment and the reasons that led him to recommend that investment. The FIA had tried to justify its actions on the grounds that it considered that its client was already "informed" because he was a banker. However, neither the retail investor's profession nor his possible status as an "informed" client exempted the FIA from its obligations. It also turned out that the retail investor was not a "banker" but an "IT professional in a bank".

DISPUTES WITH FIAs

While the Ombudsman is generally satisfied with the success of financial mediation and notes that almost all financial institutions willingly respond to her requests for comments, this is not the case when an FIA is involved in a dispute. On some occasions, FIAs do not respond at all to the Ombudsman's request for comments. In total in 2018, of the 16 cases that were abandoned during the procedure or in which the firm refused to take up mediation, seven involved an FIA. In this case, the Ombudsman considers that the persistent silence of an FIA is tantamount to a refusal to take up mediation. The Ombudsman then reminds the FIA that it is certainly his/her right, but that this refusal is not, however, covered by the confidentiality that governs the mediation once it has begun. The AMF is then informed.

The FIA may also have deregistered and/or disappeared. Some letters are returned because the recipient is *"not known at this address"*.

The advice provided by FIAs must be formalised in a written suitability declaration justifying the various proposals, their advantages and the risks they entail.

12- Article L. 541-8-1, 2° and 4° of the Monetary and Financial Code.

13- Article L. 541-8-1, 9° of the Monetary and Financial Code specified by Article 325-17 of the AMF General Regulation.



IMPORTANT NOTE

Sometimes FIAs have their clients complete multiple Know Your Client questionnaires (one per product offered), which sometimes leads to contradictory profiles being created for the same retail investor.

— In this case, the Ombudsman succeeded in ensuring that the investor could recover all of his investment, as the FIA had redeemed the subscribed shares. However, the Ombudsman had to take on an educational role and explain to the retail investor that if he claimed nullity on the grounds of wilful misrepresentation¹⁴, in accordance with Article 1178 paragraph 2 of the Civil Code, this implied that the contract should be regarded as not having taken place and the parties should be returned to the situation they would have been in had they never entered into a contract. Consequently, in this case, even if the retail investor could prove that his consent had been vitiated by wilful misrepresentation or fraudulent concealment, he could obviously get his initial investment back in its entirety, but not the dividends he would have received if the investment had gone well.

The obvious mismatch between profile and product offered

— In some cases, the Ombudsman has observed that while, in terms of form, the FIA appeared to have fulfilled all its obligations when entering into a relationship with a client and when formalising advice (initial contact document, client questionnaire, letter of engagement, engagement report, etc.), it did find a clear mismatch between the client's profile, his/her objectives and the proposed investments.

— In particular, the Ombudsman examined one case where an FIA had offered complex and high-risk products to an investor who had no financial knowledge or experience and was only willing to accept a low risk of loss. In this case, the FIA had recommended an investment, among others, in a company that offered money management of speculative trading accounts on FOREX (the foreign exchange market) through companies based in Ireland and Gibraltar respectively. In this case, the Ombudsman was able to obtain a refund of the entire loss made on this investment, since this investment was clearly not in line with the retailer's prudent profile.

14- Wilful misrepresentation is defined in Article 1137 paragraph 1 of the Civil Code as the use of deception or lies by a contracting party to obtain the consent of the other party. Fraudulent concealment is defined in Article 1137 paragraph 2 of the Civil Code as the intentional concealment by one of the contracting parties of information that he/she knows is of a determining nature for the other party.

Failure to comply with the obligations to warn of the risks involved and to provide clear, accurate and non-misleading information

FIAs must act in an honest, fair and professional manner, serving the best interests of their clients, in particular by ensuring that all information they provide, including promotional communications, is accurate, clear and not misleading¹⁵.

The absence of warnings

Case law has detailed the main risks to which the obligation to information must relate, which are more generally *"any reasonable foreseeable circumstance likely to deprive the investor of all or part of the profit he/she can legitimately expect from his/her investment"*¹⁶. The FIA must inform its client about the various economic, financial and legal aspects of the proposed transaction, describe its advantages and disadvantages and provide a full and documented opinion, enabling the client to take a fully informed management decision that is consistent with his/her interests¹⁷.

During the examination of one case, the Ombudsman noted that the documentation provided to clients by an FIA only presented the advantages of a tax exemption transaction without warning about the tax implications in the event of default by the operator or non-achievement of an investment. In this case, the Ombudsman was able to obtain a refund of the entire amount invested by the retail investors, without the increase in the tax administration's adjustment.

Unclear, inaccurate and misleading information

The retail investor must be provided with clear, accurate and non-misleading information so that he or she can make informed decisions. According to the AMF's Enforcement Committee: *"the argument that the CIF is merely required to pass on the information provided by the author of the commercial brochures relating to the disputed products is irrelevant to the characterisation of the complaint, since the obligation to provide information that is accurate, clear and not misleading [...] is applicable even if the FIA is not the author"*¹⁸.



Ombudsman's Office legal expert

FIAs must act in an honest, fair and professional manner, serving the best interests of their clients.

15- Article L. 541-8-1, 1° and 8° of the Monetary and Financial Code specified by Article 325-12 of the AMF General Regulation.

16- Reims Court of Appeal, 4 February 2014, no. 12-01508.

17- Montpellier Court of Appeal, 27 January 2015, no. 13/05419.

18- The AMF's Enforcement Committee, 6 October 2015.

— In one case that the Ombudsman had to analyse, it was noted that the commercial brochure of an investment presented the financial package as *"both very profitable for investors, and reaching a level of guarantee close to the total absence of risk"*, when in fact it was risky. In this case, the Ombudsman succeeded in ensuring that retail investors could recover their entire investment.

Failure to fulfil the obligation to obtain information about the product before any advice is given

— Furthermore, the Court of Cassation has established the principle that the person who has agreed to provide information has a duty to be informed in order to provide well-informed information¹⁹. The FIA is bound by an obligation to be informed not only about its clients but also about the products offered and more specifically about the seriousness, feasibility and reliability of the transaction before recommending that its clients subscribe to the transaction²⁰.

— It is primarily as a result of this case law that the Ombudsman was able to obtain the refund of all the sums invested and lost by one retail investor. None of the information produced by the FIA showed that it had performed the necessary due diligence to verify the company's solvency, the integrity of its directors and the reliability and regularity of the proposed transaction before recommending this investment to its clients.

19- Court of Cassation, 19 June 2016, no. 94-12777.

20- Paris Court of Appeal, 17 January 2016, no. 15/01274.

Collective investments in SCPIs ("Malraux Law" investments) and in FCPIs

The specific case of "Malraux SCPIs"

— The Ombudsman was contacted regarding some ten cases in which a recommendation was made to investors, with different degrees of knowledge of financial products, to subscribe to units in so-called "Malraux" SCPIs.

— These SCPIs (real estate investment companies) acquire properties to be renovated, involving extensive work, with a view to renting them out, in protected areas of certain cities. Investors in these SCPIs undertake to keep them for at least nine years, in practice fifteen, and in return they benefit from significant tax relief on their income tax in the year of their subscription, particularly important to them as they are in a high income tax bracket.

— In these types of cases, the complaints related to two aspects:

- marketing of the product;
- management of the product.

Marketing

— First, the Ombudsman checked, on a case-by-case basis, that the product to which the investors subscribed was consistent with their objectives.

— For example, the Ombudsman found in one case that a financial institution had not committed any regulatory breach in connection with the marketing of "Malraux SCPIs" because, although it appeared from the investor questionnaire submitted that the retail investor had a profile classified as "prudent"²¹, he had expressly accepted significant fluctuations in the value of the SCPI units to which he had subscribed. This investment proposal met, above all, the specific objective of tax exemption for the applicant whose taxable income was significant and was part of a diversification of his assets, as this investment represented a very small part of those assets.

— In another dispute, however, the Ombudsman considered that the financial institution had committed a regulatory breach by marketing units of “Malraux” SCPIs to a retail investor with a “prudent” investor profile since, in addition to this aspect, the investment represented three quarters of her assets and was thus inconsistent with the principle of diversification necessary for a prudent profile.

— In another case, a financial institution that marketed “Malraux” SCPIs to a retail investor claimed that this product was consistent with its client’s objectives at the time of subscription. However, it was unable to provide the Ombudsman with a copy of the investor questionnaire duly completed and signed by the retail investor. In addition, the subscription for these units had been financed by the granting of a bullet loan²² that had to be repaid in full from the income that SCPI should have generated. However, it was found that the SCPI never produced the expected income and that the unit value had been discounted by about 70%. As a result of these factors, the Ombudsman asked the financial institution to offer a gesture of goodwill for two-thirds of the loss suffered, which it agreed to do.



Ombudsman’s Office legal expert

Investors in these SCPIs undertake to keep them for at least nine years, in practice fifteen, and in return they benefit from significant tax relief on their income tax in the year of their subscription.

21- Obligation imposed on financial institutions since the transposition into French law in the form of the Executive Order of 12 April 2007 of Directive 2004/39/EC (known as MiFID 1), which entered into force on 1 November 2007 and was applicable at the time of the events.

22- Repayment of the principal and interest in one payment when the period of the loan ends.

— In another mediation procedure, a financial institution had marketed a bullet loan to a retail investor via a financial arrangement involving the subscription of units in these “Malraux” SCPIs. At the time of subscription, the financial institution had guaranteed its client in writing on the institution’s headed paper and signed by the advisor that this transaction would be a source of an overall increase in wealth for him, whether through the appreciation in the unit value in the future, the future income generated by the SCPI or the tax benefit that the retail investor would obtain. This document did not mention the risks that the customer was exposed to. Four years later, having failed to receive the income advertised at the time of marketing, the retail investor approached the institution. He managed to obtain an initial gesture of goodwill in the form of a payment and a renegotiation of his loan. However, five years later, the retail investor discovered, following a general meeting of the SCPI, that the unit value had been devalued by 70%. After approaching the financial institution a second time and not getting a satisfactory response, he referred the matter to the Ombudsman. The Ombudsman found that the retail investor had received very little of the tax relief associated with the subscription, as he was not in the marginal tax bracket that allowed it. Consequently, the Ombudsman asked the financial institution being challenged to offer a gesture of goodwill equal to the loss suffered by its client, which it agreed to do.

Management

— Finally, the Ombudsman had to deal with disputes in which the retail investors alleged that the investment management company had mismanaged the “Malraux” SCPIs. However, here again, as in the case of questioning the management of retail local investment funds (FIPs) or retail venture funds (FCPIs), the Ombudsman’s powers are limited. Since the complaint raised concerns the decrease in the unit value (very significant in this case), it is the responsibility of the client, and not of the firm, to gather the evidence to prove that this decrease in value was caused by mismanagement. However, it is unusual for such evidence to be on file. The Ombudsman, whose responsibility is to settle disputes amicably, is completely dependent on the evidence voluntarily provided by the parties. She has neither the powers nor the means to start an investigation. In these situations, unless the complainant has conclusive proof of mismanagement, it is rare for the Ombudsman to be able to act effectively.

Since the complaint raised concerns the decrease in the unit value (very significant in this case), it is the responsibility of the client, and not the firm, to gather the evidence to prove that this decrease in value was caused by mismanagement.

The specific case of extending the term of FCPIs and FIPs

Again this year, the Ombudsman had to deal with many cases related to term extensions of FCPIs (retail venture funds) and FIPs (retail local investment funds) beyond the statutory period of eight years, which can be extended by two years.

A specific example of this type of dispute is described in the May 2018 edition of the Online Diary, available on the AMF website under the heading *The Ombudsman*.

As this problem is regularly encountered in mediations, it seemed important to the Ombudsman to reiterate the rules which form the basis of her recommendation:

- the term of an FCPI or FIP is provided in its rules and in its information leaflet. The Ombudsman therefore seeks to verify whether, at the time of marketing, the retail investor was properly informed of this term and whether he/she acknowledges having had at his/her disposal the legal documents governing the fund concerned;
- a decision of the Enforcement Committee of 14 December 2012²³ clarified, however, that liquidation of the fund continuing beyond the regulatory term of the FCPI does not, in itself, constitute a regulatory breach;
- in its Position-Recommendation 2012-11, the AMF, while reiterating that the management company must have taken the necessary measures to liquidate the portfolio under favourable conditions and before the end of the statutory term of the fund, specified that the management company is otherwise liable only if it has not acted in the interests of the unitholders. Consequently, a review of the evidence suggesting that it is in the interests of the investors that a period beyond the authorised term be established becomes essential. However, it is once again necessary to point out that the Ombudsman does not have any means to start an investigation and that she is therefore dependent on the information provided by the parties. The Ombudsman therefore considered that when certain indicators were

present, she could not conclude that the extension was not in the interests of the investors. These indicators include the following: the management company has, since the fund's term was extended, stopped charging management fees and/or made partial paybacks to all unitholders and is able to provide a provisional liquidation schedule.

23- Decision of the Enforcement Committee of 14 December 2012 with regard to Company X, formerly Innoven Partenaires SA and to Walter Meier, Gilles Thouvenin and Thomas Dicker.

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4

The Ombudsman's national and international activities

On a national level

— Since 2007, the AMF Ombudsman has been a member of the Club of Public Service Ombudsmen, chaired by Jean-Pierre Teyssier, the Tourism and Travel Ombudsman since February 2014. She is also a member of the Club's board, which, in addition to the bimonthly plenary meeting, meets once every two months. The Club's Secretary General is Xavier Barat.

— There are 29 Ombudsmen from various sectors and with very different roles (public ombudsmen, institutional ombudsmen, sectoral ombudsmen, company ombudsmen, etc.) who are members of the Club and who regularly discuss their practices and any difficulties they encounter.

— As every year, the Club met in June 2018 for an internal seminar day. Many topics were discussed and debated among the attendees, such as the Ombudsman's delegation of signing authority in the context of increasing volumes of cases or the practical arrangements for complying with the obligations arising from the General Data Protection Regulation (GDPR).

— Once again this year, under the aegis of the Club, Marielle Cohen-Branche jointly organised a training day on mediation from a legal perspective, with Amaury Lenoir, Mediation Policy Officer at the General Secretariat of the French Council of State. During this fifth edition, the presentations were expanded to include information on the 2018-2022 Programming Bill and the Reform for Justice Bill, aimed at establishing a legal framework for online services for alternative dispute resolution. This training also provided an opportunity to draw on the first lessons learned from the introduction of administrative mediation in 2018.

— In addition, the AMF Ombudsman also attends meetings of the AMF's Retail Investors Consultative Commission, whose main role is to inform decisions by the AMF Board likely to have an impact on the protection of retail investors' interests. Since September 2018, the Ombudsman has been presenting the specific mediation case published monthly in her *Online Diary*.



Ombudsmen's Club

At a European level

— The AMF Ombudsman belongs to the European Network of Financial Ombudsmen (FIN-NET) established by the European Commission, which currently has 60 members from 27 countries and meets twice a year in Brussels. These meetings are an opportunity to discuss their approach to alternative dispute resolution for consumer disputes as introduced by the 2013 directive on consumer mediation.

— Furthermore, this year the Ombudsman was invited to the Alternative Dispute Resolution Assembly 2018 organised by the European Commission, which took place in Brussels on 11 and 12 June. It was attended by consumer Ombudsmen accredited by the European Commission, national authorities responsible for regulating them, representatives of both professionals and consumer organisations, and the European Commission. The AMF Ombudsman explained to the 350 attendees how FIN-NET works, where it originated, what it is based on and why it exists²⁴.

At an international level

— In September 2018, the Ombudsman and her Deputy travelled to Dublin for the INFO network's annual conference. As a reminder, since January 2013, the AMF Ombudsman has been a member of INFO (International Network of Financial Services Ombudsman), a group of financial Ombudsmen (banking, finance and insurance) from around the world, with which the AMF Ombudsman discusses the respective mediation practices that are very different from one country to another.

— Finally, in March 2018, the Ombudsman attended the annual seminar on "Consumer Protection, Inclusion and Financial Education", organised by the Banque de France for representatives of central banks from various countries, to present the processes and results of the AMF Ombudsman's Office.



Ombudsman's Office legal expert

**As every year,
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Many topics were
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²⁴- An equivalent European network in the energy sector and a more recent one in the transport and travel sector have been created.



The Ombudsman's communication initiatives in 2018

Educational initiatives

The Online Diary

2018 proved to be no different to previous years and, once again, even more users followed the Ombudsman's Online Diary each month. There were 2,932 visits per month recorded, a 20% increase compared with 2017 and a tripling of the average number of visits per month since the Online Diary was launched in 2014.

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

Increasingly, professionals are letting the Ombudsman know that they are forwarding this publication within their own department, which was one of the objectives of the Online Diary. At the same time, consumer magazines, and sometimes even mainstream newspapers, are fully covering or reporting on the lessons learned that were highlighted in the practical case. Occasionally, consumer associations have told her that they have used one of these cases to convince the firm directly, and successfully, if the circumstances were the same. But be aware that sometimes they are not.

In 2018, Marielle Cohen-Branche also continued her live monthly digest on the Intégrale Placements TV show on BFM Business, where she discusses, this time verbally, cases previously covered in the Daily Diary.

Training provided by the Ombudsman

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

2,932

Number of visits per month recorded to the Ombudsman's Daily Diary in 2018.

The Ombudsman's involvement

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

■ For instance, on 22 November 2018, at the French Ministry for the Economy and Finance, the first public presentation of the 2016-2017 activity report of the National Commission on the Assessment and Supervision of Consumer Mediation (CECMC), the cornerstone of the regulation of consumer Ombudsmen, provided the opportunity to acknowledge the importance of the mission accomplished by its President, Claude Nocquet, at the end of her three-year term. At the invitation of the Director General of the DGCCRF, Virginie Beaumeunier, who acts as the secretariat of the CECMC, the Ombudsman participated in a round table in which she was able to select a firm to explain, in a lively and interactive way, how negotiations can take place with the Ombudsman's Office. In this regard, Xavier Cullot, Director of Employee Savings and Retirement at Amundi, agreed to explain how useful the AMF Ombudsman's Office is for financial firms.

■ In addition to her significant involvement as mentioned previously, Marielle Cohen-Branche regularly publishes articles or studies in specialised publications. For example, in 2018, the following articles were published:

- *The cases submitted to me allow me to identify recurring problems and propose reforms* – Interview in Bulletin Joly Bourse (May-June 2018);
- *Making information available or providing it to a consumer; two obligations to be clearly distinguished for ISPs* – Editorial in Bulletin Joly Bourse (July-August 2018);
- *Are finance and ethics compatible?* Article published in the publication *Droit bancaire et financier (Banking and Financial Law)*, Mélanges AEDBF-France VII, RB edition;
- Update in August 2018 of the comprehensive historical study on the AMF Ombudsman's Office, available electronically to Lextenso subscribers.

A tripling of the average number of visits per month since the Online Diary was launched in 2014.

APPENDICES



**ARTICLE L.621-19 OF THE MONETARY
AND FINANCIAL CODE 45**



**ORGANISATION CHART AS
OF 1 JANUARY 2019 46**



MEDIATION CHARTER 47



**CLASSIFICATION BY THEME
OF THE AMF OMBUDSMAN'S CASES
OF THE MONTH 48**



**SOME GUIDANCE ON THE FRENCH
MEDIATION LEGISLATIVE LANDSCAPE 51**



FIND OUT MORE ABOUT MEDIATION 53

Appendix 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.

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

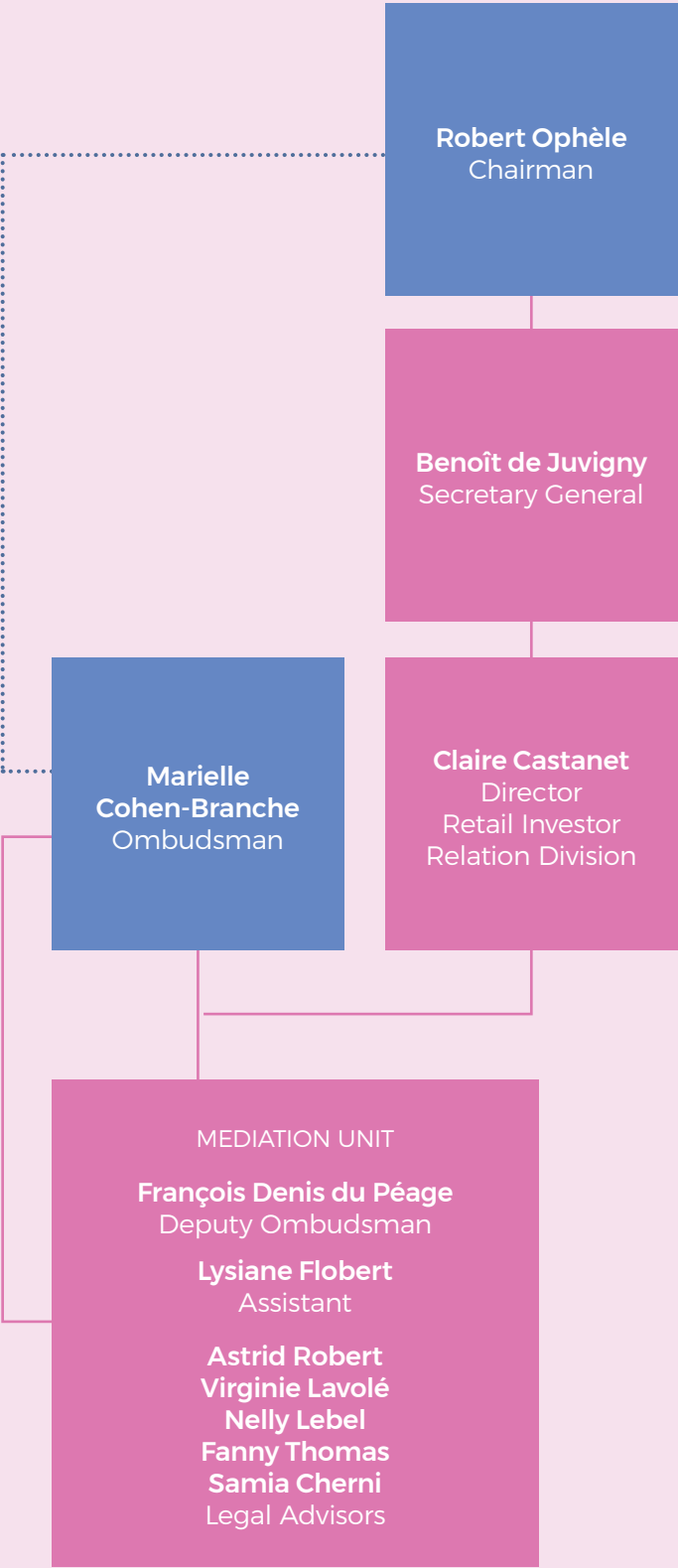
— Each year, it draws up a report to the President of the Republic and to Parliament which is published in the Official Journal of the French Republic. Said report presents, in particular, the changes in the regulatory framework of the European Union applicable to the financial markets and reviews the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

Appendix 2

Mediation Chart as of January 1st, 2019



The Ombudsman and her team as of January 1st, 2019



Appendix 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.

Appendix 4

Classification by theme of the AMF Ombudsman's cases of the month since launch (May 2014 to December 2018)

THEME	TITLE	DATE
Preferential Subscription Rights (PSRs)	Capital Increase: Note that a share subscription on a "reducible" basis is only possible if the shareholder has previously subscribed to them on an "irreducible" basis.	05/12/2018
	Preferential subscription rights (PSRs): note the shortening of the subscription period.	03/03/2017
	About the disappearance of a value line in a PEA: how to better understand the functioning of preferential subscription rights (PSRs).	03/10/2016
Employee Savings	Employee savings: even in the event of retirement, the liquidation of assets does not result in the closure of the company savings scheme.	06/11/2018
	Employee savings: the risk of absorbing an employee's modest retirement savings in the event of the absence of a PERCO at his/her new employer.	02/06/2017
	Employee savings: note that the termination of an employment contract does not constitute an early release from the PERCO.	02/02/2017
	Employee savings: be aware of the confusion between a transfer and a switch!	01/07/2016
	Employee savings: note that only written documents are taken into consideration when making your allocation choices within the deadline.	02/05/2016
	Employee savings and acquisition of the principal residence: supporting documents are not interchangeable.	01/03/2016
	The treatment of profit-sharing invested after leaving the company.	04/11/2015
	Employee savings can lead to unpleasant surprises after leaving the company.	03/11/2014

THEME	TITLE	DATE
Execution (stock market orders, account transfers)	On what date is the status of shareholder assessed in order for him/her to benefit from the associated right to a dividend?	03/04/2018
	Stock market order executed at an "aberrant price": Euronext may cancel the transaction in exceptional cases.	03/10/2017
	"Penny stock" and "market" orders: note the possible price lag when placing an order on shares with a very low value.	03/05/2017
	Ordinary securities account: when the transfer is hindered by holding securities of companies placed into court-ordered administration.	31/03/2017
	"Best execution" of orders or the primacy of the total cost paid by the client.	02/12/2016
	Poor execution of a stock exchange order: when the actual harm to the complainant is not what he considers...	02/10/2015
	Inheritance: What right is granted to the sole beneficiary of a securities portfolio?	02/10/2015
	Note that one stock exchange order may hide another: what about the priority order execution rules?	04/05/2015
	The detachment of a dividend may have consequences on your stock market orders.	06/01/2015
	Execution of stock market orders at the end of the year: beware of the tax implications!	01/12/2014
	A stock market order and an abnormally long execution time.	21/05/2014
Forex et options binaires	Binary options and training in telephone trading: how you can lose all your savings.	03/11/2016
	Virtual gains but real losses: if extraordinarily the Forex trading reveals gains, when it comes to withdrawing them from the account everything gets complicated...	02/09/2015
	Evidence kept by the client helps the Ombudsman obtain compensation for binary options and Forex, if the company is authorised.	01/04/2015
	The risks of believing in the tempting promises of online Forex trading.	13/10/2014

THEME	TITLE	DATE
Obligation to Inform and Advise	If the client does not provide the information in the MiFID questionnaire, the bank must refrain from providing an investment advisory service.	01/02/2018
	Be aware of certain financial arrangements, clearly not consistent with client needs.	02/09/2016
	US taxpayer "US Person" status: what are the respective obligations of the bank and the client related to the extra-territoriality of US tax regulations?	02/03/2015
	Subscription to a formula fund when the commercial brochure of a product is not sufficiently clear.	28/08/2014
Collective Investment Undertakings (FCPs, SICAVs)	Note that in the event of a merger of mutual funds, the fee-free exit is the only right available to unitholders.	01/12/2017
	Why is the request to redeem mutual fund units on the basis of "known price" unfounded?	04/07/2017
	Deadline for centralising orders on UCITS: beware of confusion!	02/02/2016
	The bank must be able to prove that it has provided the prospectus to its client before he/she subscribes to a UCITS.	02/12/2015
	On what basis should a delayed redemption of SICAV shares be regularised?	06/07/2015
PEAs	Transfer from a bank PEA to an insurance PEA: note the special conditions.	03/09/2018
	The transfer of an Equity Savings Scheme (PEA) to another bank: still an obstacle course.	08/11/2017
	Disposal of unlisted securities held in a PEA: do not forget to pay the proceeds from the disposal into the cash account of your plan and inform your bank!	04/04/2016
	Investing an ineligible security in a "traditional" Equity Savings Scheme (PEA) – who is responsible?	02/02/2015
Limitation Period	The need to use the AMF Ombudsman's Office properly: neither too early nor too late...	01/10/2018
	Beware of the five-year limitation period for dividends.	01/06/2018
	The older a dispute is, the more difficult it is to obtain compensation: the media example of a formula fund.	30/06/2014

Appendix 5

Some guidance on the French mediation legislative landscape – how did it change in 2018?

1. On 1 April 2018 (Decree No. 2018-101 of 16 February 2018), the trialling of administrative mediation²⁵ began prior to the referral to the administrative court, which is mandatory and therefore free of charge in this case, applicable to certain disputes (labour disputes and civil service disputes).

This trial was due to end on 18 October 2020 but is expected to be extended until 31 December 2021²⁶ and could even be extended beyond that date. The use of emeritus judges will also be extended. The first results are encouraging. These mediations mainly involved the Defender of Rights, the regional Ombudsmen of Pôle Emploi (French employment agency) and the relevant regional academic Ombudsmen.

2. The 2018-2022 Programming and Justice Reform Act, which includes provisions on mediation, including online mediation, was adopted by the National Assembly on 19 February 2019.

After two successive readings in each chamber, in December 2018 and January 2019 (necessitated by the lack of a compromise deemed possible by the Joint Commission of Senators and Deputies), the National Assembly adopted Articles 2 and 3 on mediation, which amend in particular Articles 4-3 and 4-7 of Law 2016-1547 of 18 November 2016:

The following provisions are therefore adopted:

- Article 2: An increase in the thresholds, which will be set by decree, below which the absence of an attempt at prior mediation will be liable to be automatically sanctioned by the inadmissibility of the claim in court (probably €5,000 instead of €4,000 at present). The Senate did not want this threshold to be increased.
- Article 3: A framework for online mediation and arbitration services with optional certification²⁷, which will not be provided by the Ministry for Justice, but by an accredited third-party body. (The Senate had opposed optional regulation not directly provided by the Ministry for Justice.) However, there was no disagreement on the fact that these online mediation services cannot be based solely on the algorithmic or automated processing of personal data. Furthermore, when this service is offered using such processing, the

parties must be informed by an explicit statement and must expressly consent to it.

For the record, a merger of the district and regional courts was adopted at the same time.

3. Law 2018-938 of 30 October 2018, known as EGALIM (Law for the Balance of Trade Relations in the Agricultural and Food Sector), gave new and very important powers to the national Ombudsman²⁸.

In addition to its prerogatives (being informed of any dispute related to the conclusion or performance of a contract for the sale or delivery of agricultural or food products intended for resale or processing), the national Ombudsman now has new and very important powers. The Ombudsman may, pursuant to Articles L. 631-27 and 28 of the Rural Code:

- ask the parties to provide any information necessary for the mediation and not only those voluntarily provided by the parties;
- refer to the Minister responsible for economic affairs any terms of contracts or framework agreements which he considers to be unfair;
- decide to make his conclusions, opinions or recommendations public, subject to prior notification of the parties.

Finally, in the event of failure of the mediation conducted by the Ombudsman, any party to the dispute may refer the matter to the presiding judge of the competent court for a ruling on the dispute in the form of summary proceedings based on the recommendations of the Ombudsman for Agricultural Trade Relations.

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

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

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

5. On 30 July 2018, a bill to establish a territorial Ombudsman in certain local and regional authorities was registered in the Senate.

The current law already provides for direct and free-of-charge referral to the Defender of Rights, who succeeded the Ombudsman of the Republic, and who is responsible for ensuring that rights and freedoms are respected by State administrations, local and regional authorities, public institutions and anybody with a public service mission.

At the local level, as mentioned in the explanatory memorandum to this proposal, mayors have set up municipal ombudsmen to settle disputes between the users of public services in their municipality and the municipal administration. This was also the case with the creation of departmental ombudsmen and, more recently, of a regional ombudsman by two regional councils (such as the one in Île-de-France)²⁹.

These experiences have demonstrated the usefulness of such institutions. It is therefore proposed to extend this practice by making it compulsory to establish a territorial ombudsman with jurisdiction over matters falling within the scope of the local authority concerned, as long as disputes are not pending before the courts.

This ombudsman would be appointed in certain local and regional authorities: regional councils, departmental and municipal councils with more than 60,000 inhabitants, as well as in public intermunicipal cooperation institutions with more than 100,000 inhabitants.

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

26- According to Article 20 of the Bill on 2018-2022 Programming and Judicial Reform.

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

28- By decree of 16 July 2018, Mr Francis Amand, Inspector General of INSEE, was reappointed as Ombudsman.

29- The current Ombudsman, Jean-Pierre Hoss, is an Honorary State Councillor.

Appendix 6

For further information on mediation

FIN NET (Network of European Financial Ombudsmen) website:

http://ec.europa.eu/internal_market/fin-net/index_en.htm

INFO (International Network of Financial Services Ombudsman) website:

<http://www.networkfso.org/>

Club of Ombudsmen website:

<http://clubdesmediateurs.fr/>

European Directive 2013/11/EU on the alternative resolution of consumer disputes:

<http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32013L0011&from=FR>

European Regulation No. 524/2013 on the online resolution of consumer disputes:

http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:JOL_2013_165_R_0001_01&from=EN

Executive Order No. 2015-1033 of 20 August 2015 on the alternative resolution of consumer disputes:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031070940&categorieLien=id>

Decree No. 2015-1382 of 30 October 2015 on the mediation of consumer disputes:

<https://www.legifrance.gouv.fr/eli/decret/2015/10/30/EINC1517228D/jo>

Consumer Code, legislative part, Book VI, "Dispute Resolution", Title I, Mediation:

https://www.legifrance.gouv.fr/affichCode.do;jsessionid=B3E6C42BEDF9C3D2338CD-B8236A08DB9.tplgfr22s_1?idSectionTA=LEGISCTA000032224817&cidTexte=LEGITEXT000006069565&dateTexte=20180228

Consumer Code, regulatory part, Book VI, "Dispute Resolution", Title I, Mediation:

https://www.legifrance.gouv.fr/affichCode.do;jsessionid=7F15D7108F2A38893A41E-CEBEC059DA1.tplgfr22s_1?idSectionTA=LEGISCTA000032808320&cidTexte=LEGITEXT000006069565&dateTexte=20180228



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