Ombudsman's Report 2020

AUTORITÉ
DES MARCHÉS FINANCIERS
AMF

WHO IS THE AMF OMBUDSMAN?

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

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

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

Formerly, she worked as a legal expert in banking for 25 years.

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

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

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

The Ombudsman's editorial

"A LOOK BACK OVER A YEAR LIKE NO OTHER"

During this unprecedented period of global health and economic crisis, the AMF Ombudsman's Office organised to stay active. The power of the internet proved to be like Aesop's tongue, i.e. both the best and worst of things.

The best, in the sense that, chiefly thanks to teleworking, both finance professionals and the AMF mediation team were able to operate satisfactorily despite an increase of more than 27% in requests within the Ombudsman's jurisdiction (and more than 14% in total requests, representing 1,479 requests compared with 1,295). Moreover, and for the first time in the annals of the AMF Ombudsman's Office, the majority of retail investors making requests to the Ombudsman (58% versus 27% of requests in the past) did so by means of the web form which immediately filters requests outside her jurisdiction, which are therefore no longer counted.

The worst, in the sense that there were numerous fraudulent investments promoted by online phishing and scam attempts were exacerbated by new identity theft trends. They concerned Forex and some atypical miscellaneous investment products, not to mention bitcoin, profiting from the fact that retail investors were glued to their computers as a result of the lockdowns. In such cases, as we know, the Ombudsman can only note their inadmissibility, unless the dispute leads to civil litigation against the bank intermediaries for having given no warning (which is seldom proven) despite abnormal signals.

This unprecedented crisis was also very quick to have repercussions on investor behaviour. Volatile share prices and the initial market crash last March led many investors, fearing an even more severe decline in their assets invested in UCITS, to give sell orders without having good knowledge or being informed of the very specific rules regarding unknown net asset values. Conversely, a very large number of novice investors, attracted by these sudden drops, wanting to be served first and not knowing the basic rules of the stock market, experienced setbacks, in some cases substantial.

That is why, for this annual report, I wanted to devote a more thorough study to all the types of dispute that I have observed resulting from this crisis, in the hope that it could provide a wealth of information.

In any case, in 2020 the key statistics again testified to the continuing effectiveness of the AMF Ombudsman's Office: of the 505 opinions issued in 2020 (12% more than in 2019), 53% were favourable to the investors and were accepted in 95% of cases. And the 47% of unfavourable opinions were disputed by only 4% of investors. In addition to being an authority quoted by the press, the AMF Ombudsman's Office even became an element of policy for some large financial institutions thanks to the monthly case studies published on the AMF website, whose audience, it should be specified, surged in 2020 with 57,000 visits counted, i.e. a 50% increase year-on-year.

This major effort of increased productivity and mobilisation by the entire Mediation team, its legal experts and the Deputy Ombudsman to whom I want to pay tribute in these times that are so exceptional, nevertheless has a limit, as the backlog of unclosed cases increased by 50%, which suggests that, with a constant number of staff, processing times risk becoming longer in 2021.

Marielle Cohen-Branche
25 March 2021

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2020 key figures

2020 key figures

2020 was a year of accelerating disruptive change. The number of requests received increased by 14% to 1,479, compared with 1,295 in 2019. This growth accelerated in the case of requests received in the Ombudsman's jurisdiction: +27%, i.e. 966 requests versus 762 in 2019. This acceleration is due to the fact that retail investors mostly used the form available on the AMF website to refer cases to the Ombudsman.

Case referrals via the web form this year accounted for 58% of the total, versus 27% in 2019. Each year until now, retail investors used postal mail more than two-thirds of the time to refer cases to the Ombudsman's Office. But the requests received via the form are proportionally more relevant, in particular thanks to filtering by a series of questions enabling applicants to better route their requests to the Ombudsman with jurisdiction. In 2020, 25% of the requests received via the form were outside the AMF Ombudsman's jurisdiction, whereas 46% of case referrals received by postal mail were so.

Of the forms received which are outside the Ombudsman's jurisdiction, a good proportion (40%) concerned criminal cases, which are intentionally not filtered.

The use of postal mail decreased sharply in 2020. The very great majority of exchanges between the AMF Ombudsman's Office and the parties to the disputes took place via email. Since a very large part of the year involved teleworking, the use of conventional mail made communications longer and more difficult. It must be regretted that some applicants who refer their case by postal mail indicate neither an email address nor a phone number.

The questions asked of retail investors when filling in the mediation application form on the AMF website, supported by actual examples, are as follows: what is the nature of your dispute (banking - examples are given, such as bank cards, interest rates, etc., life insurance, tax, credit, finance)? 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 firm concerned? On which date?

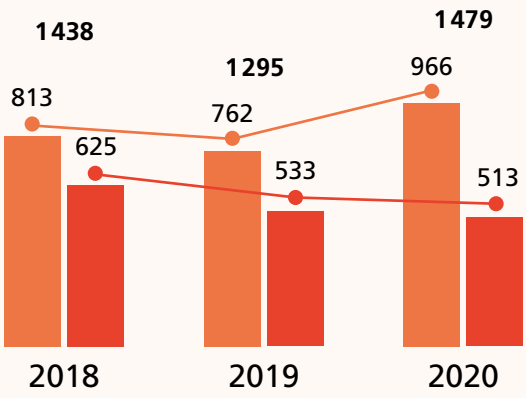
The number of cases processed and closed in 2020 was practically stable, at 1,327 compared with 1,322 in 2019. However, this represents 5% growth if we consider only cases within the jurisdiction. Each year, the difference between the number of cases received and the number of cases processed and closed is reflected in the change in the backlog of open cases at the beginning and end of the year. As at 31 December 2020, the backlog of open cases was 451 compared with 298 a year earlier, which represents a 51% increase. This worrying growth is the result of an accelerating increase in the number of case referrals compared with real, admittedly, but slower growth in case closures.

On arriving, the cases received are examined for their admissibility. Some are then closed on various grounds: a dispute not coming within the jurisdiction of the Ombudsman's Office, absence of prior complaint, late case referral (when the prior complaint was made more than one year ago), case referred to another Ombudsman (a case cannot be referred to two ombudsmen at the same time or following the same dispute), legal proceedings (legal action has been taken), or a request that is in fact a consultation or an alert and not a mediation request and which therefore cannot be processed.

CHART 1

Number of cases received

In 2020, +27% in requests within the Ombudsman's jurisdiction



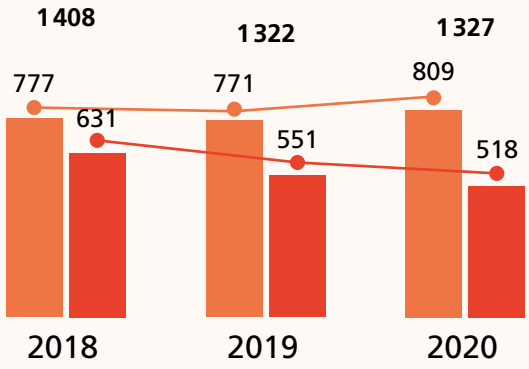
Within the Ombudsman's jurisdiction

Outside the Ombudsman's jurisdiction

CHART 2

Number of cases processed

In 2020, +5% in requests within the Ombudsman's jurisdiction

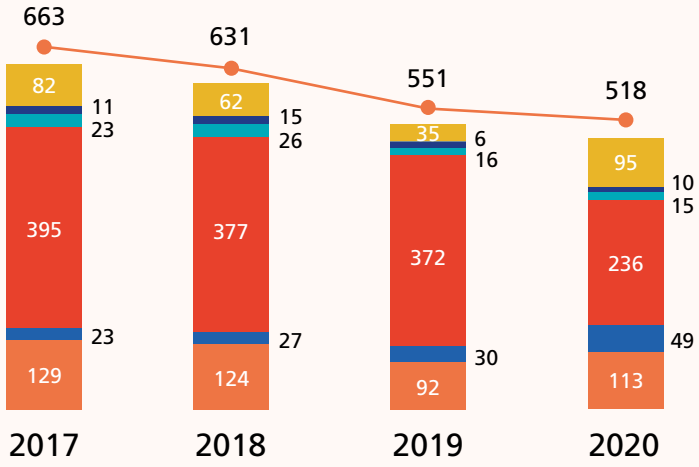


Within the Ombudsman's jurisdiction

Outside the Ombudsman's jurisdiction

CHART 3

Details of lack of jurisdiction processed



Insurance Other Banking Tax Geographical Criminal

Cases received outside the Ombudsman's jurisdiction are quickly redirected by returning the case to the client, informing them, whenever possible, which Ombudsman has jurisdiction. Of the 518 cases processed and closed outside the Ombudsman's jurisdiction in 2020 (compared with 551 in 2019), 236 were from the banking sector, representing 46% of such cases, versus around two-thirds in previous years.

It is indeed not always easy for retail investors to distinguish between bank investments (regulated savings and time deposit accounts), insurance investments (life insurance policies in euros or units of account) and financial investments (stock market, CIUs, ETFs, SCPIs, FCPIs, AIFs, PEA plans[1], etc). Similarly, a distinction should be drawn between services relating to order execution, financial advice, custody account-keeping (with cost price calculation) and account transfers, which are covered by the AMF Ombudsman, and tax calculations relating 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, in accordance with the regulations (Article L. 616-1 of the French Consumer Code), it is incumbent on financial institutions to indicate the contact details of the competent Ombudsman or ombudsmen by whom they are covered, failing which they incur the risk of an administrative fine of €15,000 (Article L. 641-1 of said Code).

For cases outside the Ombudsman's jurisdiction relating to a criminal offence, no mediation can be entered into. Moreover, the request is not covered by confidentiality. The case is then sent to the Public Prosecutor (88 cases in 2020) by the AMF Legal Affairs Directorate. Of these 88 cases, 60 were requests concerning the same firm, some of whose activities were the subject of a warning by the AMF published on 18 November 2020 (see page 41), while for 49 cases outside the Ombudsman's jurisdiction, these are usually disputes between firms and not between a firm and an investor.

In 2020, 809 cases were processed and closed within the AMF Ombudsman's jurisdiction (versus 771 in 2019). Of these cases, 304 were closed without an opinion having been proposed:

- 161 cases were closed because they were referred prematurely, since the retail investor provided no proof that a prior complaint had been rejected or gone without a response for at least two months;
- 10 cases were closed because they could not be processed;
- 4 because they were the subject of legal proceedings incompatible with mediation, which is an amicable process;
- 5 because the case had also been referred to another Ombudsman at the same time;
- 27 cases were reclassified as alerts because they sought merely to expose a practice without claiming compensation. Once reclassified as alerts, these cases are forwarded to the relevant AMF staff for monitoring;
- 9 cases were reclassified as consultations, as they raised questions for the Ombudsman but no dispute was referred;
- 58 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 investor did not provide the evidence necessary to continue processing the case;
- 13 cases for other reasons;
- 17 cases involved firms who rejected the mediation procedure, versus 27 in 2019. As a reminder, the confidentiality governing mediation protects only those parties entering into mediation and not those which refuse to enter into mediation. When the exercise of this occasional right becomes systematic, the Ombudsman considers that said firm no longer guarantees effective recourse to a consumer mediation system, as per its legal obligation (Article L. 612-1 of the French Consumer Code). In 2020, for 13 of these 17 cases, it was again the same asset management company, Nestadio, which was the only firm to have systematically refused to enter into mediation, like in 2019.

[1] Collective Investment Undertaking, real estate investment company, FCPI innovation venture capital fund, alternative investment fund, personal equity savings plan.

Deputy Ombudsman

CHART 4

Reasons for closing the 1,327 cases processed in 2020 compared with 2019

1,327 CASES PROCESSED IN 2020

+0,3% COMPARED WITH 2019 (1,322)

518

cases processed outside the Ombudsman's jurisdiction

Lack of jurisdiction type	No. of lack of jurisdiction cases processed
Banking	236
Life insurance	113
Criminal	95
Geographic	10
Tax	15
Other	49

809 CASES PROCESSED WITHIN THE OMBUDSMAN'S JURISDICTION IN 2020

+5% COMPARED WITH 2019 (771)

229

cases not processed on their merits

Reasons for closing	No. of cases closed
Premature request	161
Request reclassified as consultation	9
Request reclassified as alert	27
Late request	0
Legal proceedings	4
Submitted to another Ombudsman	5
Not able to be processed	10
Other	13

580 MEDIATION PROCEDURES INITIATED IN 2020

+ 12% COMPARED WITH 2019 (517)

75

cases suspended

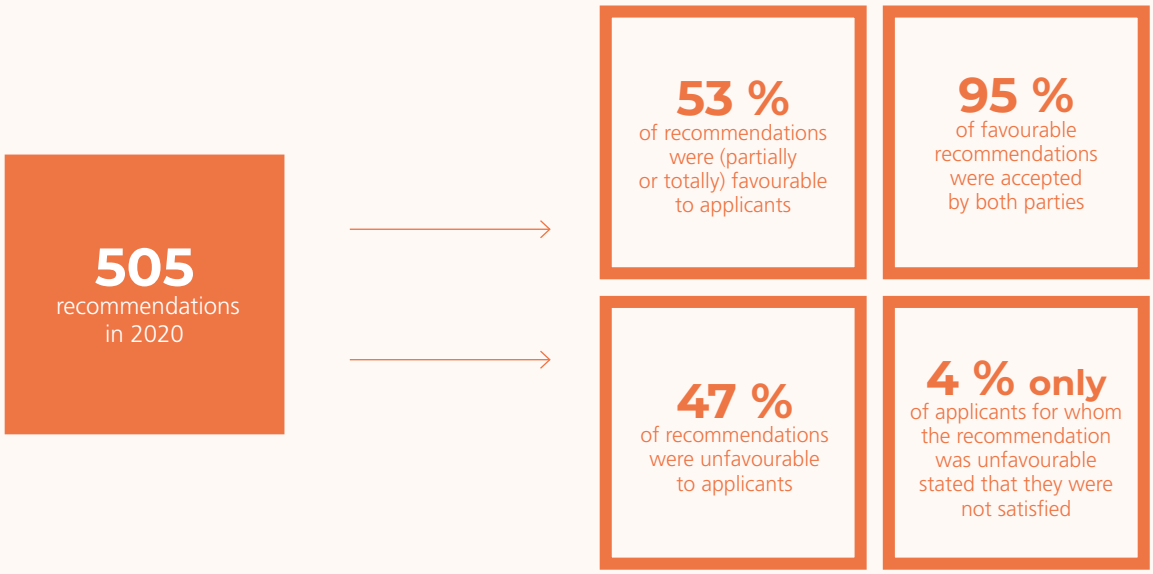
Reasons for closing	No. of cases closed
Abandoned by the applicant	58
Mediation procedures rejected or abandoned by the firm (of which 13 by the same asset management company)	17

505 OPINIONS ISSUED IN 2020

+ 12% COMPARED WITH 2019 (451)

CHART 5

Breakdown and acceptance of opinions issued in 2020



In all, an opinion was proposed for 505 cases in 2020, versus 451 in 2019.

These 505 opinion proposals, also called Ombudsman's recommendations, were favourable to the applicant in 266 cases (i.e. 53%) and unfavourable to the applicant in 239 cases (i.e. 47% of cases). Note 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. the merits of the request.

IN 2020, THE CASES RECEIVED CONCERNED 294 DIFFERENT FIRMS (250 IN 2019):

Investment service providers, financial investment advisers, market operators, unregulated service providers and listed companies. The vast majority of cases (79%) were related to investment service providers.

The rate of compliance with the Ombudsman's proposals is expressed in two ways: first, 95% of proposals, when they are favourable to investors, were followed by both parties, and second, only 4% of proposals unfavourable to investors were appealed by them. This gives an overall compliance rate of 96%. These percentages are again high, like every year. They reflect the fact that, for most cases submitted, retail investors have found mediation to be a way of resolving their disputes without resorting to the courts. Note that in the event of persisting disagreement, investors can always bring their dispute before the courts, which they are always reminded of, moreover, as required by the regulations (Article R. 612-4 of the French Consumer Code), and that the statute of limitations is suspended throughout the mediation period.

MAJOR TRENDS BY SECTOR IN 2020

- Many cases concerned problems of order execution in the stock market and net asset values of UCITS.
- Case referrals relating to Forex speculation by retail investors stopped declining, and rose from 1% of cases in 2019 (6% in 2018) to 2% in 2020. Overall, scams increased significantly.
- Case referrals relating to employee savings schemes were stable compared with 2019, but remained the principal subject of dispute.
- Cases concerning "PEA" personal equity savings plans, especially the length of time for requested transfers, are tending to increase.

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 complaint;
- other.

In 2020, like in previous years, the top two categories of complaints represented 90% of mediation cases processed. Mismanagement accounted for only 4%.

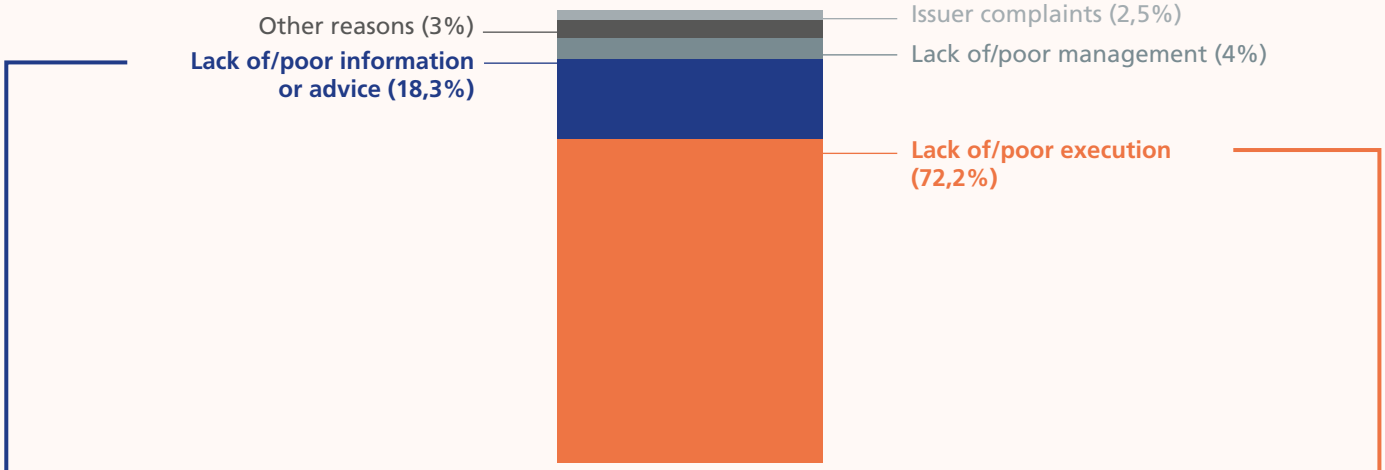
Each year, the topics addressed differ widely, as illustrated by the Ombudsman's Online Diary, which is published monthly on the AMF website (see page 50).

The main trends of the requests processed this year are obviously related to the health and economic crisis and also, of course, result from the stock market turmoil caused by this crisis.

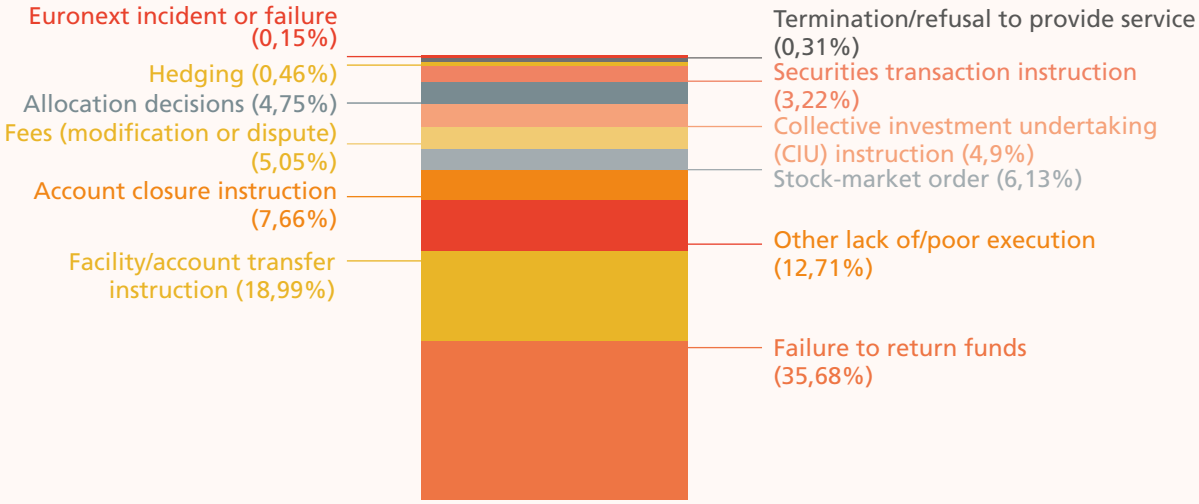
Assistant Ombudsman

CHART 6

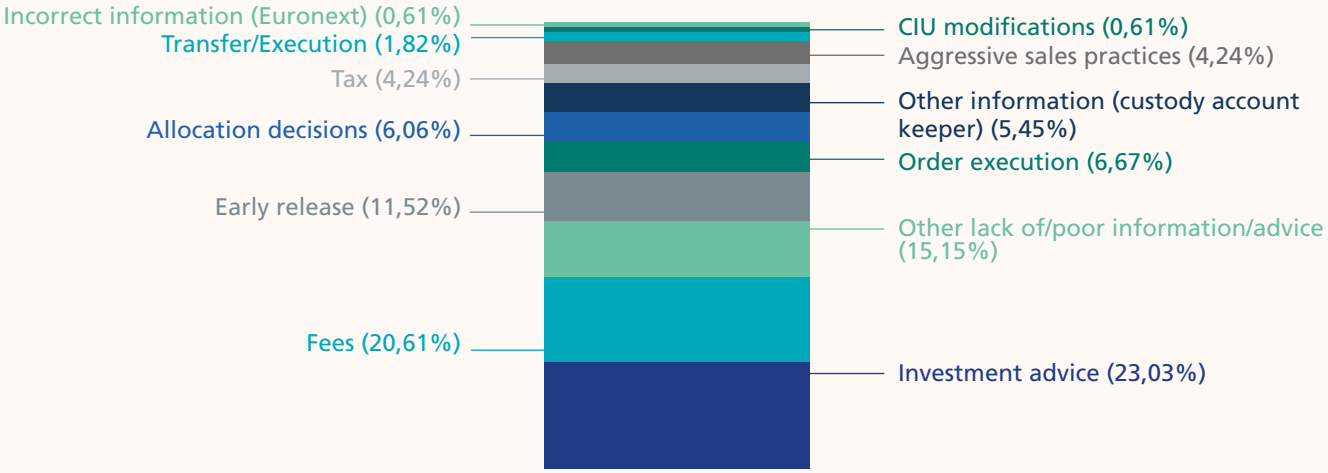
Reason for complaint is not empty



Reason for complaint is Lack of/poor execution in 2020



Reason for complaint is Lack of/ information or advice in 2020



DURATION OF MEDIATION

In accordance with Articles R. 612-2 and R. 612-5 of the French Consumer Code decree, based on the transposition of European Directive 2013/11/EU, the Ombudsman must examine admissible cases within 90 days except if the case is complex, when the time may be extended. Recital 40 of this European Directive states, for its part, that this period begins when the Ombudsman has received the documents on which the request is based, i.e. all the documents necessary to carry out the procedure.

Given the time needed to obtain a full reply from the firm (a time, need it be repeated, which is not limited by the legislation or by a professional obligation, which may be regretted), the period from case referral to the Ombudsman may be longer than 90 days, especially when the case is complex. Hence, in 2020 the process as a whole lasted on average five and a half months (with a median of three and a half months), i.e. until the date of issue of the Ombudsman's opinion, which marks the end of mediation. However, in the event of a favourable opinion, of course, the Ombudsman will wait for the reply from the investor, who generally has 30 days for this purpose. Upon request, the Ombudsman may supervise drafting of the memorandum of understanding and oversee payment of the agreed compensation. Purely administrative closing of the case is then deferred by the same amount of time.

The AMF Ombudsman's charter, in the spirit of the European legislation, also reiterates 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.

As a general rule, cases concerning financial products and services are, indeed, complex. This complexity may be further exacerbated due to certain characteristics.

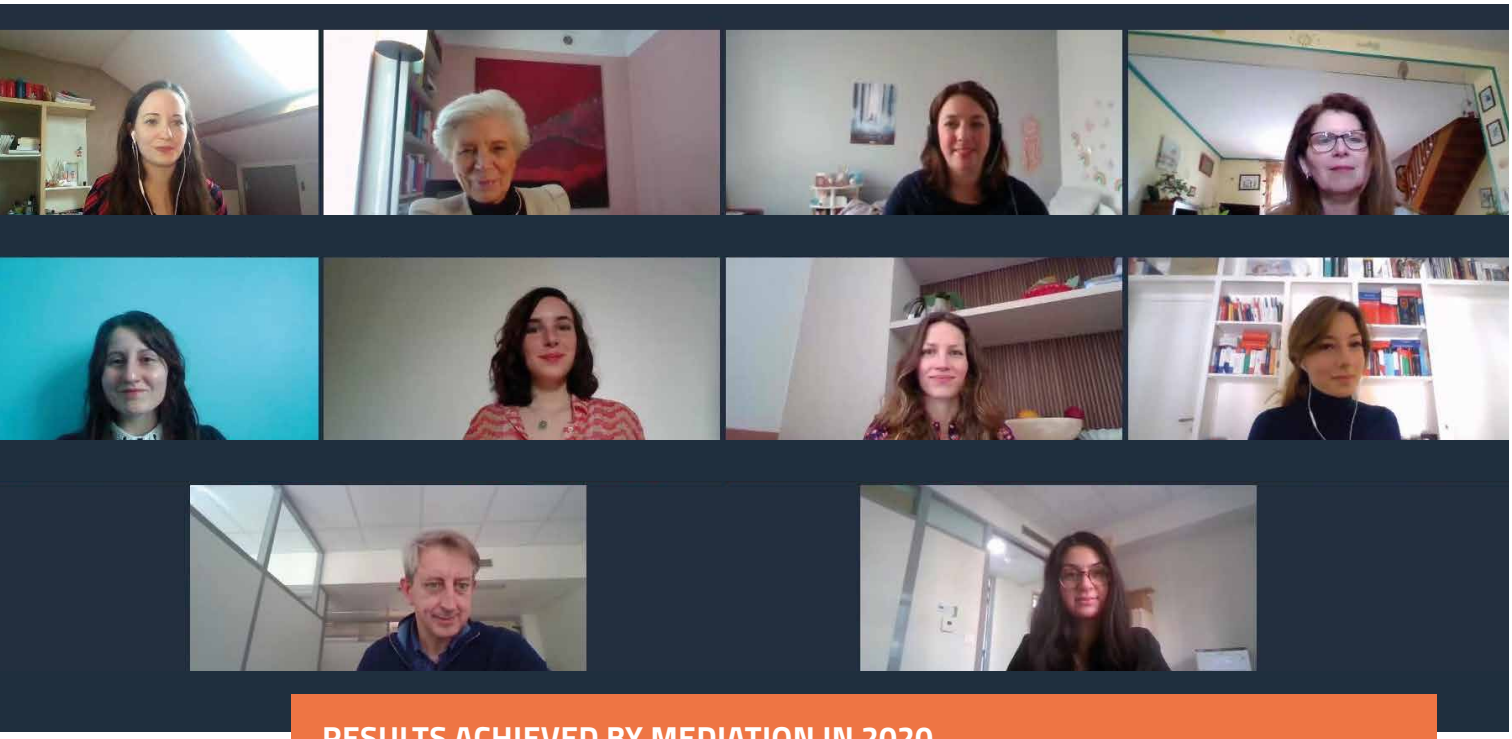
In 2020, average processing times resulting in an opinion from the Ombudsman were as follows:

- **About four and a half months**: between receipt of the complainant's case and when it was complete, with a median of slightly more than two months. This period includes time waiting for replies to the Ombudsman's requests, which sometimes require follow-ups and several exchanges of correspondence. Some financial intermediaries are less responsive than others.
- **About five and a half months:** between receipt of the complainant's case and the issuance of the Ombudsman's opinion, with a median of about three and a half months.
- **41 days:** between completion of the case and issuance of the Ombudsman's opinion. The AMF Ombudsman's Office is therefore well within the time frame imposed by European regulations, which must be less than 90 days.

In accordance with Article L. 612-2 of the French Consumer Code, consumers shall be informed by the Ombudsman of the inadmissibility of their mediation request within a period of three weeks after receiving their case. In 2020, notice of inadmissible mediation requests was given to the applicants within fifteen days on average, with a median of 11 days.

As the Ombudsman announced in her editorial, it is to be feared that in 2021, with a constant number of staff, these time frames will deteriorate for a combination of reasons:

- increased pressure of requests (+27% within the jurisdiction) which resulted in a 50% increase in the backlog at the start of 2021; and
- longer times, sometimes several months more, observed in firms' replies to correspondence from the Ombudsman. In most cases, this deterioration is a consequence of the disorganisation of the operations departments of many firms in the current health and economic environment.



RESULTS ACHIEVED BY MEDIATION IN 2020

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** (53% of favourable opinions accepted);
- or **to obtain reparation for the loss through compensation** (47% of favourable opinions accepted). In 2020, the total amount of compensation obtained was €533,562, compared with €716,992 in 2019.

Out of all cases closed in 2020, 266 favourable recommendations were made, including 126 financial recommendations. For those 126 financial recommendations, goodwill gestures ranged from €4 to €150,000, with an average of €4,235 and a median of €404.

Of the Forex cases closed in 2020, three favourable recommendations were made, all financial. For those three financial recommendations, the goodwill gestures were €2,500, €4,500 and €5,200.

Of the employee savings scheme cases closed in 2020, 73 favourable recommendations were issued, including 27 financial recommendations.

For those 27 financial recommendations, goodwill gestures ranged from €16 to €62,000, with an average of €2,938 and a median of €808.

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2020 : a look back over a year marked by the consequences of the health crisis for financial markets

2020: a look back over a year marked by the consequences of the health crisis for financial markets

The health crisis due to the Covid-19 pandemic was not without consequences for financial markets, which experienced unprecedented volatility, and for retail investors' behaviour.

In the AMF Ombudsman's Office, the cases received during this period very clearly reflected the (sometimes radically differing) reactions of investors who, however, did not always measure the impact of the health crisis on markets and the consequences of high volatility on their intended transactions. Some saw the crisis as an opportunity to invest in the stock market, either for the first time (400,000 new investors entered equity markets) or in attractive and innovative sectors such as biotechnologies, which aroused growing investor interest. Others confirmed the behavioural bias generally observed in such cases and, faced with market uncertainty and fear of seeing the situation get worse, they preferred to sell, while a few of them, credulous and often in lockdown before their computer, became the favourite target of new scams, in particular by performing financial transactions on highly speculative financial products, after having subscribed to paying offers of "training" in trading, or offers presented as risk-free, such as passbook accounts (see page 38, section on scams).

This unprecedented environment may have resulted in problems inherent in this situation, but more than ever, the disputes submitted to the Ombudsman this year highlighted the need for special due diligence both on the part of investors regarding the transactions that they perform and on the part of firms in their various processes. Given this, it seems important to repeat a number of points to look out for, and also some good practice rules, which are always useful, but especially so in the very exceptional period we are going through.

POINTS FOR RETAIL INVESTORS TO LOOK OUT FOR IN THEIR TRANSACTIONS

Have a good knowledge of the specific features of the type of stock exchange order chosen

Remember, first, that investors must pay special attention to the type of order that they choose. Depending on the order chosen, priority will be given to speed of execution, the quantity or the price. For example, a limit order controls the execution price but may be split up, or not executed in whole or in part. Conversely, a market order, which takes priority over all types of orders, guarantees the quantity but not the execution price. Likewise, a so-called best limit order, although it optimises the price, because it is executed at the best bid price appearing in the order book, has the major disadvantage of offering no guarantee concerning the price obtained, and therefore entails risks (link to the planned box describing an actual example of a setback which could have been avoided by an investor who gave a buy order for a security at the market price, Page 22).

Identify the appropriate channel for sending instructions

Be aware that some transmission channels are prohibited

In one case received in 2020, a retail investor reproached his bank with not having taken into account his instructions to protect his assets in risk-free financial instruments. The instructions, transmitted by email, were executed around one week later. This late execution resulted in a loss of €16,000, corresponding to the difference in price between his initial request and the execution of his orders.

After questioning the institution involved, the Ombudsman noted that, apart from the fact that the client's instructions lacked precision (on this subject, see the section entitled Referring back to the client in the case of ambiguous instructions), the orders transmitted by email were not admissible, which was very clearly specified in the provisions of the account agreement: *"orders may be submitted in person, in the branch office, by postal mail or via the online services described in the deposit account agreement, namely telephone, internet or mobile internet platforms. […] The transmission of orders by electronic mail (email) is prohibited."*

In this case, however, the complete absence of reaction by the bank justified partial damages, sharing responsibilities between the bank and the client, i.e. 50% of the loss suffered.

Adopt the habit of using an alternative channel in the event of computer malfunctions affecting the placement of orders

In certain cases processed this year, investors claimed that computer incidents affected the transmission of their orders, depriving them of certain opportunities. However, in such cases, retail investors should remember that alternative means, such as the placing of orders by telephone, are usually available to them; this should be verified by reading the securities account agreement.

This was so in a case in which the applicant claimed reparation for the loss resulting from the failure to execute his sell instructions concerning a stock. The Ombudsman first reminded the applicant that, having the task of amicable settlement of disputes, she had neither powers of enquiry nor means of investigation to enable her to search for and hence confirm the existence of a technical or computer incident.

Also, the Ombudsman stressed that in any case, even if the assumption that a computer malfunction affecting the placement of orders at the date mentioned by the investor were proved, she observed no resulting loss. Indeed, after examining the price history, the Ombudsman noted that the stock in question was subsequently quoted at a higher price than the price claimed by the client, and this on numerous occasions: the share price had actually exceeded the defined price in 42 trading sessions (out of a total of 54 sessions).

Lastly, the Ombudsman pointed out that she noted no evidence in the case of alternative measures undertaken by the applicant to send his instructions, in particular by contacting the customer service by telephone, noting that this point was mentioned specifically in the general conditions: *"The Client recognises being able to have permanent access, notably by telephone, to the firm's services, even when the electronic systems, and in particular the Client website, are completely or partially unavailable."*

In another case, in almost identical circumstances, it was found that the complainant who, according to his statements, had been prevented from transmitting an order and had booked a capital loss, had also transmitted other orders by telephone during the period in question. The Ombudsman therefore considered, in this case, that given that the complainant was able to transmit his instructions by telephone (a possibility that he had used), he could not claim the loss of an opportunity to sell his securities on the sole grounds that his customer area was inaccessible.

Never reply to emails sent with *"no-reply"* instructions, especially in the case of corporate actions

In one case processed this year, a client who was a shareholder in a company had received a notification of corporate action from his financial intermediary, informing him of a takeover bid targeting the shares that he owned.

As he wanted to accept the bid, the client apparently expressed his instructions by return mail directly to the email that had been sent to him. However, his instructions were unable to be processed because the address to which the client had sent his reply to the takeover bid was a no-reply address, i.e. a message sent by robot and not allowing the receipt of a reply in return.

On studying this case, the Ombudsman was able to observe that not only did the indication "no reply" appear clearly in the email address, but also that the content of the email specified as follows: "This message is generated by a robot. Please do not reply to it directly, because your message could not be accepted". The Ombudsman therefore concluded, in this case, that she could not issue a favourable opinion concerning the investor's request regarding the failure to act on his instructions.

Allow for a margin regarding the time or amount

Anticipate firms' time for administrative processing when opening an account prior to an investment

For several cases received this year, the Ombudsman was able to observe that it was sometimes not possible, given the specific administrative constraints of financial institutions, to perform opening of an account, in this case a PEA plan, and make an investment the same day.

For example, in a case investigated this year, a retail investor wanted to open a PEA plan and on the same day take part in the Open Price Offering of Française des Jeux (FDJ). However, the investment in FDJ shares had been made on his ordinary securities account and not on the PEA plan opened for this purpose and credited beforehand with the amount of the investment. This investor considered that this situation caused a loss for him since the FDJ shares would not benefit from the advantageous tax conditions of the PEA plan.

In reply to the Ombudsman's request, the institution called into question recognised that the error noted at the time of the investment in FDJ shares could be the result of a misunderstanding or of imprecise information given by the adviser during a telephone conversation that took place the same day, but stressed that in any case, due to the PEA opening time, it was not technically possible to carry out an acquisition of securities on the very day of subscribing to the plan.

This institution therefore proposed a solution to repair the damage sustained, taking into account the specific features of the FDJ shares subscribed to.

The solution consisting of transferring the FDJ securities mistakenly acquired on the securities account to the PEA plan was legally not feasible. Due to the tax wrapper framework of the PEA plan, it is only possible to buy securities via the associated PEA cash account.

The situation could, however, have been rectified by selling the shares held on the client's securities account and buying them back on the PEA plan, with the bank covering any price difference and tax consequences. However, in that case, given the particular conditions of the initial public offering of Française des Jeux, the client would then have lost the benefit of the free share issue (1 additional share for 10 shares bought at the time of the Open Price Offering and held for a period of 18 months), which concerned only the shares subscribed to within the framework of the Open Price Offering and not shares bought subsequently in the market.

As a consequence, in this case, it was proposed to keep the shares subscribed to in the ordinary securities account and offer €650 as a commercial gesture, which the applicant accepted.

Make sure not to wait for the last minute (or second!) to send your stock exchange order

In one case investigated by the Ombudsman this year, a holder of BEST Unlimited Turbos disputed the failure to execute his sell order sent at 6.29 pm and 58 sec., at which time the market was still open, the closing being at 6.30 pm. In this case, after questioning the issuer, the Ombudsman reminded this investor that the European market for warrants and certificates includes a system of dynamic price refreshing and that, whenever an investor places an order which could generate a transaction, a Request For Execution message is systematically sent to the issuer of that instrument. The issuer receiving a Request For Execution message can:

- either respond by sending an updated market price. As soon as the new price reaches the order book, any possible transaction is then executed; or
- decide that its existing price is in line with the current conditions of the underlying market and should therefore not be updated. In that case, the transaction will be executed at the end of a period called the *"updating period"*. This updating period varies depending on the listing group of the instrument in question.

In the case in question, the Ombudsman observed that the turbo in question belonged to the IH listing group for which the request-for-execution time is three seconds.

The Ombudsman stressed that the applicant's order was sent at 6.29 pm and 58 seconds, i.e. only 2 seconds before the closing and before the expiry of the period of 3 seconds after which the issuer had to respond to the request for execution. In light of these factors, the Ombudsman considered that the failure to execute the order resulted from the operating rules specific to the market for warrants and certificates and not from a malfunction that could give rise to compensation.

Allow for a sufficient cash provision including a margin in light of the type of order given

Link to box 22: an insufficient PEA cash balance provision to cover the amount of an investment following a stock exchange order may lead to closing of the PEA plan, as shown by the actual example of a setback which could have been avoided by an investor.

Be aware of the existence of a settlement time lag after the order has been executed

Some investors think that they immediately become owners of securities or the proceeds of their sale as soon as their stock exchange order is executed. However, there is a time lag for "settlement and delivery", so there is a difference between the time of execution and settlement of the transaction. This time lag can be a source of misunderstanding for investors, and the situation can be even more complicated when you add, depending on the year, exceptional shutdowns of the stock exchange at the end of the year, which are not without tax consequences, and which the Ombudsman was able to observe once again in a case that was submitted to her this year.

At the end of the year, investors must be especially aware of this time lag and should not wait until the last minute to place their stock exchange orders, if they want them to be registered for tax purposes in the current year.

Learn more
Flash or click on the QR Code
Case of the Month, December 2020:
Stock exchange orders: precautions to be taken so that transactions may be registered before 31 December

Know the consequences of failure to reply to the client questionnaire

The client assessment questionnaire is sometimes perceived as intrusive, but is not merely a regulatory obligation. It is a document that is useful and important for both the bank and the investor. The bank, which is required by the regulations to submit it to clients, can thereby assess their profile and determine whether the proposed financial service or instrument is suitable for them. It is therefore in the client's interest to fill it in carefully and accurately.

For example, in one case investigated by the Ombudsman this year, a client felt that given his profile, which he described as "novice", he should not have been authorised to transmit stock exchange orders, and he considered that his financial intermediary had failed in its obligations by not preventing him from carrying out the contentious transactions. However, the Ombudsman noted that the client had refused to fill in the assessment questionnaire and pointed out that his bank was in no case obliged to refuse to transmit his order, but merely to warn him that it was not able to determine whether the product (or service) was suitable for him.

Depending on the investment service in question, the consequences of failure to reply to the client questionnaire are not the same, as shown by the table concerning the client questionnaire on the next page.

Learn more
Flash or click on the QR Code
Case of the Month, October 2020:
In the event of an incomplete questionnaire, the bank must alert its client but transmit their stock exchange orders

ILLUSTRATION 1

Summary of client questionnaire

Investment services concerned	Discretionary portfolio management and Investment advice (4. et 5. of Article L. 321-1 of the Monetary and Financial Code)	Investment services other than portfolio management and investment advice (as referred to in Article L. 321-1 of the Monetary and Financial Code), such as order reception-transmission or execution.
Obligations of the ISP	Verify the **suitability** of the service or financial instrument	Determine the **appropriateness** of the service or financial instrument (except for the "simple execution" service)
Information to be gathered from clients	▪ Knowledge and experience of the client in investment, relating to the specific type of financial instrument or service, ▪ Financial situation, including their ability to bear losses. ▪ Investment objectives, including risk tolerance	Knowledge and experience of the client in investment, relating to the specific type of financial instrument or service being proposed or requested
Consequences if the client does not provide the required information	**Obligation to refrain** If the ISP does not obtain the required information, it refrains from recommending investment services or financial instruments to the client in question	**Duty to alert** If the client does not provide the information referred to above, or if the information provided is insufficient, the ISP warns them that it is not able to determine whether the service or financial instrument is suitable for them

Make sure that you meet the legal conditions to which you are entitled in the case of a joint account

A retail investor who held a joint securities account wanted to sell the securities held in the portfolio on the death of her husband. For this purpose, she transmitted her orders to the branch office. However, she noted that the fees charged did not correspond to the stock exchange rates subscribed to by her late husband.

Learn more

Flash or click on the QR Code

Case of the Month, February 2020: *Deferred Settlement Service (SRD): when duly warned clients invest at their own risk*

The examination of this case and discussions held with the bank showed that, in the case of a joint account, each of the holders must subscribe to a contract in order to be assigned a personal ID and password so as to be able to manage said account online. Accordingly, the online bank access is personal, even in the case of a joint account. Now, in this case, only the husband had opted for the stock market option. The bank emphasised that the ID and password make it possible to perform transactions and to have a view of the joint account but also of all the holder's accounts. Therefore, as of her husband's death, his ID and password could no longer be used to access his accounts online.

The Ombudsman therefore considered that, insofar as the investor had not personally subscribed to the stock market option and accordingly that access to her husband's personal space was inactive from the time of his death, she could in no case transmit her sell orders online and benefit from the corresponding rate.

To justify additional coverage

In another case, the applicant, who had open interest positions on Euronext Liffe (comprising the MATIF and MONEP), contested the action taken by his account-keeper, who had liquidated his positions as a result of insufficient coverage. The applicant felt this action was unjustified given that, upon receiving the formal notice, he had informed his account-keeper that a funds transfer had been sent that same day for an amount which covered his position.

Information provided by the firm concerned showed that such a means of restoring coverage could not enable his account to regain a positive coverage given the time lag specified in the formal notice (one day). In the case of insufficient coverage, the client must take into consideration the technical time needed for registering the funds transfer on the account and, in the case in question, only a reduction in the open interest positions on the traded options market (MONEP) could restore the coverage. The applicant could therefore not refer to a funds transfer order initiated the same day since, moreover, in this case, it had in fact never been performed, in light of inter-bank transfer times.

The case of a "stop on quote" order

In one case processed this year, an investor wanted to sell his certificates having the CAC 40 as underlying and, to do so, he had submitted a stop order at €8 (known as a "stop on quote" order in the warrants and certificates market). Now, on the grounds of a lack of market-making for a period of several hours, he was disputing the price at which his order had finally been able to be executed.

After several discussions with the product issuer, the Ombudsman first reminded this investor that the issuer is only required to provide bid and offer prices in normal market conditions. Accordingly, in the event of technical problems or exceptional market conditions, buying and selling turbos may be impossible. On Thursday 12 March 2020, financial markets were severely disrupted, with the CAC 40 closing down 12.28%, i.e. suffering its worst trading session since its creation. This exceptional situation and high volatility were not without consequences, in particular for market-making in products having the CAC 40 as underlying, and for their valuation.

Moreover, the Ombudsman told the applicant that "stop on quote" orders, dedicated to the warrants and certificates market, are triggered by the issuer's quotation spread and not by a transaction (as is the case for shares, for example).

The Ombudsman also specified to him that when it is entered, a stop on quote sell order must have a triggering price lower than the buying price of the liquidity provider, and that this was indeed the case in this instance, as she had been able to verify based on the Euronext order book.

Besides, the Ombudsman noted that upon the resumption of market-making, since the purchase price offered by the issuer was less than the price set by the applicant, his order was therefore executed, in accordance with the functioning of this type of order.

It should be emphasised that the specific feature of this type of order lies in the fact that, once the trigger price has been reached, the order is then executed like a market order, i.e. with no price limit. Thus, in situations of high volatility and major market moves, the investor runs the risk of seeing his order executed at a level very far from his trigger price.

Regarding this point, the Ombudsman told the investor that, in light of the historic fall of the CAC 40 on 12 March 2020, and since this was a certificate which functions by amplifying downward fluctuations of the underlying by a factor of seven, it did not seem abnormal that such a drop had had a significant impact on the value of said certificate.

The Ombudsman therefore concluded, in this case, that no there was no evidence for considering this execution as abnormal given the functioning of stop on quote orders and the exceptional market conditions prevailing on 12 March 2020.

Legal Advisor

CONCRETE EXAMPLE OF A SETBACK THAT COULD HAVE BEEN AVOIDED BY AN INVESTOR WHO GAVE A MARKET BUY ORDER FOR A SECURITY

This year a retail investor referred a dispute to the Ombudsman aiming to cancel a buy order which was executed even though, according to him, his account was not sufficiently provisioned. He had entered a market buy order, i.e. with no price limit, on 15,000 shares of a company in the biotech sector, which were valued at €2.39 the previous day. Now, this order had been executed at a price almost four times higher, resulting in a debit balance of more than €150,000 on his "PEA" personal equity savings plan.

Following a very detailed examination of this case, entailing numerous discussions with the account-keeper but also consultations with the market operator, the Ombudsman made the following observations:

- In light of his knowledge and experience and the history of his transactions, the client could not claim the status of a novice and had a definite appetite for risk;
- Based on the information obtained from Euronext Paris, the execution price was not considered aberrant given that it was the market itself that contributed to setting this price at the fixing upon reopening of the market for this security, reflecting investors' exuberance;
- Wanting to privilege priority and full execution of the quantities requested, the client had chosen to transmit no-limit orders (as he was accustomed to doing) in a "limit up" context of which he was informed when placing his order;
- The client was aware of a possible price difference since he had established a larger provision than that which could be calculated according to the last known price, thus reflecting his awareness of the nature of the risk taken by not choosing a form of order that would have protected him from a larger price rise;
- The provision was checked at the time when the order was given, based on the last known closing price: in the case in question, since the security had been limit up since the previous day, the last known closing price was €2.39. At that price, even if the quantities requested were large, the provision established on the PEA plan was sufficient. The order was therefore able to be regularly sent to the market for execution, thereby going beyond the scope of responsibility of the account-keeper, whose check was performed earlier;
- Noting the suspension of trading in the security, the client had contacted the trading room and the Ombudsman was able to establish, by listening to the recording of this phone call, that he had been informed that if quotations resumed that same day, the theoretical price at resumption would then be €13.80, the figure that appeared on its order book. Despite this essential information, the client clearly chose to keep his order in the book even though, at this stage, he could still cancel it;
- In the absence of a cancellation instruction and since the investor had not set a price limit for his order, it was executed when quotations resumed at the start of the afternoon, at the price of €13.70, resulting in the contested debit balance;
- Article L. 211-17-1 of the Monetary and Financial Code stipulates that: *"The purchaser and the seller of financial instruments referred to (…) are, upon the execution of the order, definitively bound, the former to pay, and the latter to deliver, on the date mentioned in paragraph II of Article L. 211-17"*. Therefore, as soon as an order is executed, it is incumbent on each counterparty to fulfil their obligations, and the client could therefore, in no case, avoid payment of the securities purchased, despite the significant debit balance generated by this transaction on his PEA plan, which led his account-keeper to demand him to cover this debit balance prohibited by the regulations applicable to the PEA plan.

To conclude, in light of the market conditions not considered aberrant by Euronext, the client's investor profile and, especially, in view of the call made to the trading room which gave him an opportunity to avoid the situation in which he found himself, the Ombudsman considered that there was no evidence for considering the execution of this order as abnormal and for requesting its cancellation.

POINTS TO WATCH AND RECOMMENDED GOOD PRACTICES FOR FIRMS

Refer back to clients where their instructions are incomplete or ambiguous

A retail investor consulted the Ombudsman with a request for regularisation following a failure to execute his orders on the Deferred Settlement Service (SRD). While the main problem in this case was insufficient coverage, the Ombudsman noted that there was also a lack of clarity on the part of the investor in the instructions he sent to his bank. The Ombudsman observed that the client had asked his bank *" to buy [his] shares at the best price"*, and the bank had not acted on this request. Now, the Ombudsman considered that although this wording was ambiguous, because it corresponded to no known type of order, it was nevertheless true that the bank ought to have referred back to the client to have his instructions clarified and explained in detail, which it had not done. Taking this into account, the Ombudsman considered that the responsibility could be shared in this case, and recommended partial compensation of the investor's loss.

Inform clients clearly of particular conditions liable to limit their choices

Information relating to restrictions resulting from the place of deposit of the securities

An investor stated that on 24 February 2020 he entered a sell order for thirty shares listed on Euronext Brussels, but his order had not been executed due to insufficient liquidity on this market. However, the applicant asserted that the equity in question, listed on several markets, had been quoted that day on a US stock market but that this alternative had not been proposed to him when transmitting his sell order.

In reply to his request, the bank told the Ombudsman that the client can indeed choose the market on which he wants to be positioned, provided that this market is linked to the place of deposit of the security. But in this case, since these shares had been bought on the European market, they were held in custody by the domestic custodian (in this case Euroclear) and could therefore only be sold on the European market.

The Ombudsman told the firm in question that she understood this restriction but that she found in the case no evidence that could demonstrate that the client had been informed of this when buying the securities in question, so as to make an informed choice.

Therefore, in addition to the commercial gesture granted to the investor, the financial institution told the Ombudsman that it understood that it would have been good practice to provide this information to its clients at the time of purchasing their securities so that they could make an informed choice regarding the market for execution of their orders. Also, this firm specified to her that it was going to include information in its general conditions concerning the link between the place of share custody and the market of order execution.

Information relating to specific technical constraints

In one case received this year, a retail investor holding a joint securities account with his wife and wanting to take part in the Open Price Offering (OPO) of Française des Jeux, reproached his bank with not having allowed him to transmit an order for each of the co-holders. Although each co-holder was effectively entitled to transmit an order, the in-house software program of this firm did not make it possible to send more than one order for each account.

The Ombudsman considered in this case that a commercial gesture should be proposed to the investor, and this was accepted by the bank. She reminded the firm that since its platform was not provided with the appropriate technical functionality, it was strongly recommended, in such a case, to inform joint account holders beforehand.

Learn more

Flash or click on the QR Code
Case of the Month, May 2020:
Stock exchange: each holder of a joint securities account must be able to place a purchase order in the case of an Open Price Offering

Legal Advisor

SALIENT POINTS RESULTING DIRECTLY FROM THE HEALTH CRISIS

Prohibition of short selling

Exceptional trading measures, short selling and more generally strategies aiming to profit from a fall in share prices were restricted by the AMF from 17 March to 18 May 2020, in light of the Covid-19 epidemic and its impact on financial markets.

While certain investors disputed this decision, in one case received for mediation, an investor gave this decision as grounds for implicating the liability of the issuer whose turbos he had bought, which were deactivated a few days after his purchase. However, after analysing this request, it immediately became apparent to the Ombudsman that this was the result not of a dysfunction attributable to the issuer but of a misunderstanding by the investor of the decision taken by the AMF to prohibit short selling, in two respects:

- regarding the scope of the ban, which applied only to shares traded on French markets and, as a consequence, to instruments for taking a position in those shares, which was not the case of the turbo in question, for which the underlying was the DAX;
- regarding monitoring of compliance with the ban on short selling, which was the personal responsibility of the investor and not of his financial intermediary or the issuer of the securities.

Learn more

Flash or click on the QR Code
Case of the Month, June 2020:
Prohibition of short selling: who had to ensure compliance with this ban, and for which securities?

Suspension of redemptions by certain employee savings scheme funds

Given the worrying situation created by the health crisis and the fear of a fall in value, a number of retail investors asked to recover the assets from their employee savings scheme. However, their requests could not always be carried out because of the suspension of valuation of the employee savings scheme fund in which they owned units.

Accordingly, several employees, who owned a PEE company savings plan and were holders of a fund invested in unlisted shares of their company, referred the matter to the Ombudsman, since it was impossible to redeem their assets. In light of the international economic context related to the health crisis, the company, after consulting the experts, considered[2] that a new evaluation of its security was required to allow a valuation reflecting the fair value of this security in the fund in question. As a consequence, no subscription or redemption order on this fund could be executed during this suspension.

In these cases, the Ombudsman gave a reminder that a suspension of valuation can only take place in exceptional circumstances and must be for the purpose of safeguarding the rights of the fund's unitholders, in accordance with Article L. 214-24-41 of the Monetary and Financial Code. She considered that this was indeed the case, in this instance, since the fund valuation could not be determined in light of the unpredictable and exceptional circumstances, and that this suspension had therefore been decided to safeguard the rights of the unitholders.

Losses amplified by price fluctuations

Some cases received this year, although they raised a familiar and habitual problem, illustrated the market consequences of the crisis and this period characterised by high volatility, since in some cases these major price fluctuations amplified the losses recorded by investors.

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[2] By the terms of Article R. 3332-23 of the French Labour Code, the securities are *"valued by the company and the appraisers appointed in accordance with the fund's regulations, under the supervision of the auditor, at least once each financial year and whenever an event or a series of events occurring during a financial year could lead to a substantial change in the value of the company's shares"*.

This was the case in particular of certain investors who, in March 2020, held positions on the Deferred Settlement Service (SRD) and who found themselves with insufficient coverage following the historic market decline observed on Thursday 12 March 2020, when the CAC 40 dropped 12.28 % in the trading session.

This phenomenon was also observed on the occasion of employee savings scheme redemptions which, it should be remembered, are executed at an unknown price. Therefore, although a valuation is displayed when entering the redemption request online, it is merely indicative. This is normally specified very clearly when entering the redemption request, and the investor should be very attentive to this point. This year, however, some investors who issued their request for redemption or early release of funds in this troubled period were disappointed to receive a redemption amount that was much less than the estimated amount indicated at the time of their redemption request.

This was so in a case concerning 9 March 2020, the date on which the Paris stock exchange suffered its worst decline in one trading session since 2008 (-8.39%). An investor had issued a redemption request for an amount of his assets then valued at around €80,000, with a net asset value calculated monthly; three weeks later, this request gave rise to a reimbursement of €51,000. In this case, the Ombudsman noted the absence of the essential information that redemption would take place only on the basis of the unknown net asset value or, at the least, information concerning the merely estimated nature of the known net asset value. Moreover, the day after this instruction was given, when the client could still have cancelled his order, he received a message of congratulations for this redemption request, reminding him once again only of the known value of the fund units without any other indication. The Ombudsman therefore reminded the account-keeping institution of its duty to provide its clients with clear and non-misleading information. In the absence of such information, the client may indeed consider that he was misled. The Ombudsman therefore recommended that the investor be compensated for a loss of opportunity in this specific case, and the account-keeper accepted this.

THE PROBLEMS INHERENT IN HOLDING MEMBERSHIP SHARES OF MUTUAL BANKS INCREASED IN THE UNPRECEDENTED CONDITIONS RELATED TO COVID-19

Membership shares are transferable securities each corresponding to part of the equity capital of a mutual bank. They allow their owner to obtain the status of member of their regional or regional bank. The holder therefore has a right to vote in the annual general meeting and receives annual income.
In some institutions, the acquisition of membership shares is sometimes required to open a bank account. In others, a membership share may be offered when opening an account.

In general, it should be pointed out that holding a membership share in the bank may lead to situations of blockage when operations (closing or else transfer of account) are requested.

The conventional rules for redemption of membership shares[3]

Even outside the current health context, holding a membership share can inhibit banking mobility by preventing the closing of a securities account, for example, because this closing is subject to a preliminary procedure of redemption of the membership share.

This redemption of membership shares is governed by more or less flexible rules that are stipulated in the bank's articles of association. In certain mutual banks, for the request for redemption of membership shares to be admissible, it must be made directly to the branch office, before the end of the bank's accounting period (which is usually on 31 May every year), and therefore before holding the bank's annual general meeting (which takes place in the second fortnight in June). It is at these meetings that changes in the capital are voted to allow securities to be released. The redemption operation takes place on the first trading day of the following financial year, and redemption is therefore effective from the month of July.

To sum up, redemption of membership shares can take place, in principle, only once a year. In practical terms, when a client wants to benefit from the provisions relating to banking mobility provided for by the Act of 6 August 2015 (the "Macron Act"), he must have obtained beforehand the redemption of the membership share(s) that he owns.

Although redemption of membership shares must, in principle, take place before the end of the financial year of the company issuing said shares, there are cases of redemption by derogation. In some cases, stipulated restrictively in the articles of association, it is sometimes possible to make an exceptional request for the redemption of membership shares in a shorter time frame, i.e. without waiting for the end of the company's financial year, e.g. dismissal, a disability or the divorce of the holder, moving house outside the jurisdiction of the firm, or again an exceptional case of particular gravity, or, finally, death.

In several mediation cases it was therefore possible to make use of the derogation by examining various situations in which clients found themselves, thus making it possible to avoid waiting an extra year for the requests to be carried out.

NB: Shares sold under the derogatory redemption procedure eliminate entitlement to payment of the profits.

Payment of dividends in the context of the health crisis

In the context of the current health crisis, new problems arose for the execution of transactions demanded by the holders of fund units, even though redemption was performed in accordance with the statutory rules, i.e. before the end of the company's financial year.
As a reminder, holding membership shares gives entitlement to annual remuneration in the form of a dividend. This remuneration is determined each year by the annual general meeting of the company issuing said shares.

In the banking and finance sector, the European Central Bank (ECB) has issued a recommendation in which it enjoined credit institutions to postpone the payment of dividends until 1 October 2020, which was obeyed by these institutions, especially the mutual banks which then deferred closures and transfers of members' accounts so as to be able to perform payment of the annual dividends due on 1 October 2020.

This problem was referred to the Ombudsman's Office several times in 2020. For example, a client having a PEA plan requested the redemption of all her securities and membership shares before the end of the companies' financial year, i.e. in accordance with the normal procedure for redemption of shares. However, in accordance with the ECB's recommendation, the institution postponed the payment of her dividends until 1 October 2020, thereby placing the transfer of her PEA plan on hold. But this suspension of the requested operation inevitably implies custody of the deposit account and therefore the invoicing of account keeping charges which may, depending on the situation, be more or less significant. In various cases the Ombudsman proposed and obtained, equitably, the reduction or elimination of the charges inherent in the unwanted continuation of custody for various banking services.

[3] The information relating to the rules for redemption of membership shares appear in the subscription forms, and on a technical data sheet submitted at the time of acquisition.

3

The three traditional problems of the AMF Ombudsman's office

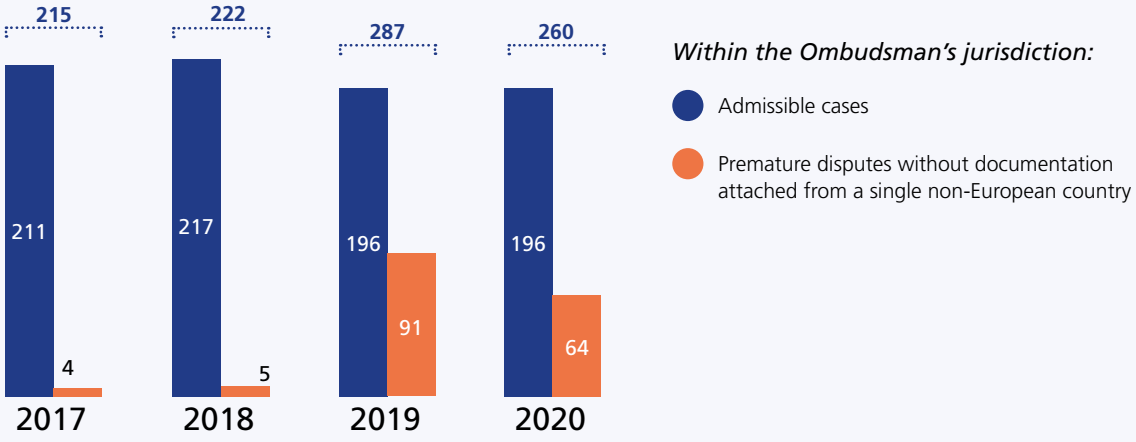
The three traditional problems of the AMF Ombudsman's office

EMPLOYEE SAVINGS SCHEMES ARE DECREASING IN TERMS OF THE NUMBER OF CASES BUT REMAIN THE LARGEST SECTOR

For the first time in several years, the number of cases received concerning employee savings schemes declined, if we include premature disputes coming from a non-European country. The number of mediation requests received in 2020 was 260, compared with 287 in 2019. The Ombudsman is pleased by this trend, which reflects her good collaboration with the account-keepers of employee savings schemes and the extensive dissemination of good practices that she was able to identify. This decrease also illustrates the capacity of the account-keepers of employee savings schemes to provide investors with a satisfactory response more directly in advance, thus putting an end to disputes before any mediation.

CHART 7

Change in number of employee savings scheme cases received in 2020

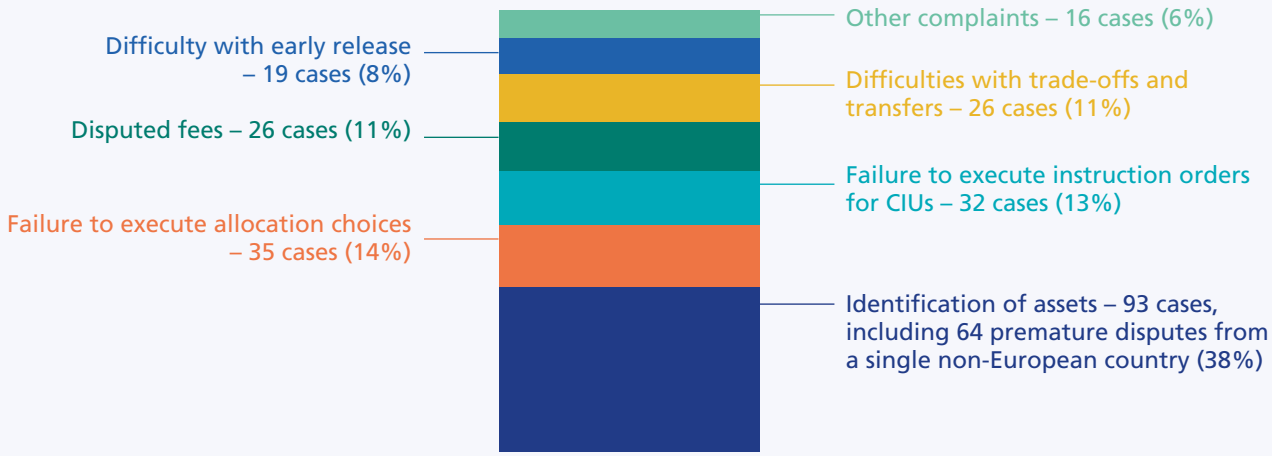


Regarding the issues in the cases received, this year the Ombudsman noted a reduction by half in the number of cases concerning the observation of employees' allocation choices. In 2020 these cases represented only 14% of the mediation cases processed, versus 22% in 2019. In 2020, therefore, investors were apparently more aware of the need to submit their choice of allocation concerning their incentive bonus and/or share of profits within the allotted time limits. The peculiar circumstances due to the health crisis and the flexibility requested of employee savings scheme account-keepers in this context may also explain the fall in the number of cases on this subject. In a FAQ note published on 17 April 2020, the Ministry for Labour specified that "given the current difficulties, the employees concerned may also benefit from more flexible deadlines to reply to the firm and the account-keeper whether they choose immediate receipt of the bonus and share of profits, or investment in the savings plan" (https://travail-emploi.gouv.fr/le-ministere-en-action/coronavirus-covid-19/questions-reponses-par-theme/article/prime-exceptionnelle-et-epargne-salariale). This year, therefore, the account-keepers had to be more flexible in their approach to retail investors.

In light of the sometimes dramatic consequences of the health crisis for retail investors, the Ombudsman, for her part, usually called for fairness. For example, she was consulted on a case in which a self-employed worker was forced to stop work after suffering Covid-19 and was subsequently not able to resume his job full-time. In this case, the investor cited Article 12 of the third revised Budget Act (loi de finances) published in the French Official Journal ("JO") of 31 July 2020, authorising non-salaried workers to make an exceptional and temporary derogatory redemption, for a maximum of €8,000. Unfortunately this article does not apply to the collective retirement savings plan (PERCO), but only to the contracts referred to in Article L. 144 1 of the French Insurance Code, i.e. the so-called "Madelin" contracts and the contracts referred to in Article L. 224 28 of the Monetary and Financial Code, i.e. the new retirement savings plans (PERs) established by the PACTE Law. However, sensitive to the argument raised by the Ombudsman concerning the very difficult financial situation of the employee saver, the account-keeper agreed, exceptionally, to release assets from the latter's PERCO plan.

CHART 8

Problems encountered in employee savings schemes in 2020 (247 cases)



This year, the Ombudsman reiterated on several occasions that her sphere of action remained limited to financial matters and that she could not take action when the dispute opposed the saver and their employer or ex-employer. In such cases, therefore, she is forced to decline jurisdiction. In several cases, for example, the Ombudsman observed that the employer had not chosen to delegate collection of the allocation choices of his employees to an employee savings scheme account-keeper. It is therefore the employer who collected the choices of his employees regarding their profit sharing and incentive bonuses directly, within a time limit that he had himself determined. In these cases, therefore, a disappointed employee who disputes the allocation of his bonuses by default, for failing to have sent his choice within the allotted deadline, has a dispute opposing him and his employer, for which the Ombudsman does not have jurisdiction.

The Ombudsman therefore cannot play a useful role when the dispute concerns the information given to employees regarding the provisions of the PEE company savings plan rules. In one case, a saver contested the blocking of his available assets after switching to an employee savings scheme fund (FCPE) proposed in his PEE company savings plan. After examining this case, the Ombudsman found that the constraint of blocking of the assets allocated to this FCPE fund did not appear in the KIID or in the fund's regulatory documentation but in the Group savings scheme ("PEG") of his employer. Information regarding the contractual provisions of the PEE plan, and therefore regarding this blocking constraint on the FCPE fund, was therefore incumbent on the employer. In this case, the Ombudsman therefore had to decline her responsibility, since this concerned an employee/employer relationship.

Lastly, the Ombudsman also recapped the conditions for the acquisition and registration of shares on an account in the case of an employee share ownership offering. For example, in one mediation case, a saver requested release from his participation in such an offering. He considered that the date of his participation in the operation corresponded to the date of acquisition of his securities and that, as a consequence, his securities could be released as he requested. In this case, the Ombudsman specified to the saver that the date of participation in the employee share ownership offering, i.e. the date of reservation by the employee, did not correspond to the date of registration of the shares on his account. The subscriber was deemed to have acquired his securities only following the period after which he could retract. It was therefore only at the end of the cooling off period that his reservation had been confirmed and that his securities had been registered on the account of his PEE company savings plan. The Ombudsman observed that this cooling off period appeared clearly on the border of the documentation distributed to the subscribers. The securities not registered on the account could therefore not be released as requested by the saver.

PERSONAL EQUITY SAVINGS PLANS (PEAS): AGAIN A DIVERSITY OF PROBLEMS FACED BY INVESTORS

The transfer of a PEA plan outside France no longer entails automatic closure, unless otherwise specified in the general conditions

Since the administrative instruction of 8 March 2012 published in the French official tax bulletin (BOI: Bulletin Officiel des Impôts) No. 33 of 20 March 2012 and still in force, *"the transfer of the tax residence of a PEA plan holder outside France no longer entails automatic closure of the plan, irrespective of the State to which the plan holder transfers his tax residence (European Union or not), except if this transfer takes place to a non-cooperative state or territory (NCST) within the meaning of Article 238-0 A of the French General Tax Code (CGI)"*.

However, although this closure is no longer automatic, the Ombudsman noted, when examining a case, that one firm had decided to continue to exclude it contractually in the event of a transfer of the plan outside France. The Ombudsman verified this in one particular case by obtaining a copy of the general conditions which were indeed applicable at the time of the disputed facts. Note: The new general conditions of a firm communicated by said firm are deemed to be accepted by the client in the absence of objections at the end of a two-month period.

In their general conditions some firms exclude the holding of unlisted securities in a PEA plan

On examining a mediation case, it was found that a firm's general conditions specified that unlisted securities could not be held in a PEA plan, given the complexity involved in their management.

The Ombudsman therefore calls for enhanced due diligence by investors on this issue, especially when they want to transfer their PEA plan to another firm. In that case it is incumbent on the investor to check whether the firm to which they want to transfer their plan has not included such a clause in its general conditions, in which case that firm could refuse to receive the transferred plan, which will cause a loss of time for the investor, who will be unable to later blame the firm for having refused said transfer, as the Ombudsman had to reiterate in one case.

Investment in securities within a PEA plan: exclusively with funds from the cash account of that PEA

As stipulated by Article L. 221-31 II 4° of the Monetary and Financial Code, securities which have not been subscribed to within the PEA plan may not be lodged there later. Investors should therefore be careful when subscribing to securities in their PEA plan. If the investor asks for a sum of money to be used to acquire securities in his PEA plan and makes the request explicitly, the firm must therefore send this sum through the PEA cash account (within the limit of the legal ceiling), so that the securities may effectively be purchased in that PEA plan.

In one actual mediation case processed in 2020, however, the exclusive liability for overlooking this rule lay with the firm which had precisely granted a loan and advised its client, a novice, to use it to optimise an investment in the shares of a company in which he was going to become a partner, within a PEA plan to be created. Against all expectations, the investment was made outside the PEA plan. The dysfunction was obvious, and most of the negotiations, which were tricky, concerned the amount of the loss, which was a loss of opportunity; the amount negotiated was accepted by both parties.

Sale of unlisted securities lodged in a PEA plan: the letter of intent that the bank has signed by its client must not be ambiguous

The proceeds from a sale of securities lodged in a PEA plan absolutely must be paid back into that PEA. Any sale of securities lodged in a PEA plan for which the proceeds are not paid back into that PEA will entail the fiscal irregularity of the PEA plan and hence its closure.

Extra vigilance is required on the part of the PEA holder in the case of a disposal of unlisted securities lodged in their PEA plan. It is this holder who must inform the buyer, by providing them with the IBAN of his PEA cash account. The holder must pay all the proceeds of the sale back into his PEA cash account within two months following the sale, as specified in the BOI, failing which the PEA plan will be irregular for tax purposes and will have to be closed.

Trainee Legal Advisor

Regarding this point, the Ombudsman gives a reminder that account-keepers must provide precise information on these rules to their clients holding PEA plans opened in their books. When they invest in unlisted securities, the account-keeping firms are, moreover, required to have their clients sign a letter of intent specifying clearly that their client must inform them of any transaction affecting the unlisted securities lodged in their PEA plan and pay the proceeds of the sale of those securities back into the PEA. This rule also holds for the payment of dividends, which must be paid back into the PEA cash account – whether those dividends were paid by bank transfer or by cheque. This rule also holds in the case of a transfer transaction which resembles a sale followed by a purchase of new securities. In that case the client must inform the company issuing the securities and his account-keeper that the proceeds of the sale should be paid back into his PEA plan and that he wants the new securities to be also lodged in his PEA plan. Finally, this letter of intent may also give a reminder that in the event of payment by instalments following a sale of securities, the client must pay back the equivalent of the final price of sale, within two months following not the date of receiving the proceeds of the sale - as might legitimately have been understood by an investor given the ambiguous terms used in this letter of intent - but following the date of sale, and so topping up temporarily with his own funds.[4] In the latter actual case of mediation, compensation for the client, representing the loss of the tax benefit resulting from closing the PEA plan, was able to be obtained by the Ombudsman.

Investors should therefore be very vigilant regarding this point, in the event of any transaction affecting the securities lodged in their PEA plan, even if those transactions might seem to them to be *"mere intercalary changes in their securities"*. The Ombudsman was consulted on cases where investors became aware of the exit of securities that they would have wanted to lodge in their PEA plan only when they wanted to sell those securities again, which therefore caused them a great disappointment, since such an error could only lead to the closure of their PEA plan due to fiscal irregularity.

[4] BOI-RPPM-RCM-40-50-50-20120912:
"When the sale price of the securities listed on a PEA is subject to a deferred or staggered payment, this transaction is considered as a divestment which in principle entails the closure of the plan. However, in this event, and in order to avoid the closure of the plan, the holder of the PEA plan may, within two months following the sale, make a cash payment to the credit of the PEA cash account, equivalent to the deferred portion of the sale price."

Cap on the cash account linked to the PEA securities account and impossibility of debiting a PEA cash account: the client must adopt a sufficient margin if he does not control the purchase price

It is good practice for account-keepers to inform their clients having PEA plans of the need for vigilance when buying securities for which they do not control the purchase price.

PEA transfer times: even longer, notably due to the pandemic

The Ombudsman is increasingly receiving cases concerning PEA transfer times, which investors consider too long. In 2020, the number of cases received by the Ombudsman concerning PEA transfer times increased sharply. As a result of lockdowns and the widespread adoption of teleworking, which sometimes led to disorganisation of firms' line departments, these times did indeed become longer. The Ombudsman's task is to identify the cause(s) of such time lags from one firm to another, which are often multi-faceted, and then speed up the transfers.

And if the conditions are met, she may ask for the reversing of transfer fees. On the other hand, it is very rare to find sufficient evidence of a loss of opportunity for placing orders which could be liable to compensation.

Capping of charges related to the PEA plan since the PACTE Law, applicable since 1 July 2020

In order to make the PEA and PEA-PME personal equity savings plans more attractive, Decree No. 2020-95 of 5 February 2020, adopted pursuant to the PACTE Law, capped the charges involved in various operations on these accounts (opening, account keeping, transfer of the plan, transactions). Firms therefore had to update their tariffs relating to the PEA plan and apply this capping as of 1 July 2020, the date on which it came into effect (Article D 221-111-1 of the Monetary and Financial Code).

In particular, the Ombudsman received a complaint from an investor to whom transfer charges not corresponding to the new legal caps had been debited. The firm, which was then still in the process of updating its tariff conditions, agreed to reimburse the charges unduly debited to this investor.

SUCCESSIONS: THE EFFECTS OF THE ACCOUNT HOLDER'S DEATH ON FINANCIAL SECURITIES

The Ombudsman would first like to specify that she has jurisdiction solely to deal with questions relating to financial securities involved in successions, and not the successions themselves.

The only legal effect of notification of the PEA holder's death on the PEA plan: closure of the PEA

Following notification of a death, the firm must close the deceased person's PEA plan immediately and transfer the securities that were held in it to a succession securities account, pending instructions from the heirs. NB: the immediate closure of the PEA plan following notification of the death triggers the debiting of taxes, but does not mean that the securities are simultaneously sold, as the Ombudsman had to remind a firm in one case. The heirs may subsequently decide either to sell or transfer those securities.

Unexecuted sell orders for SCPI fund units lapse with the account holder's death

Regarding SCPI funds, the Ombudsman encountered the following case: the fundholder, at that time placed in guardianship, had wanted to sell his SCPI fund units. However, this sale had been unable to be performed while he was alive due to the lack of a counterparty in the secondary market. The registered units were transferred to the heirs. The heirs, wanting to sell them, would therefore have had to issue another order at the date on which the units were registered in their name in the account-keeper's books. The sell order not executed while the account holder was alive expired, because it constitutes a mandate which is terminated at death.

WHILE THE INTERESTED PARTY IS ALIVE, PAY ATTENTION TO BANKING SECRECY RULES:

The Ombudsman would also like to specify, following complaints received, that she was obliged to repeat that unless the client is placed in guardianship or curatorship, in which case the guardian or curator can have access to information concerning the person's accounts or, of course, if the client has given a proxy to the applicant, information concerning the account of an elderly person, while the interested party is alive, is protected by banking secrecy and cannot and must not be disclosed, even to their closest relatives.

Legal Advisor

THE TRICKY ISSUE OF EXTENSION BEYOND THE LIFE OF PRIVATE EQUITY FUNDS (FCPIS, FIPS)

This year again, the Ombudsman received numerous cases concerning the prolonged winding up of FCPR venture capital funds. In these cases, the fundholders, having invested in FCPRs, and especially in FCPI innovation venture capital funds or local investment funds (FIPs), want to redeem their units when the fund reaches the maturity date stipulated in the prospectus. They discover then that the assets held by the fund have not been fully liquidated by the asset management company and are still in the winding-up or even pre-winding-up phase, periods during which no redemption is possible. They therefore contest this situation, especially when the fund's performance is particularly bad.

In these cases, the Ombudsman reminds the fundholders of the characteristics of their investment. FIPs and FCPIs are risky collective investment undertakings, invested mainly in small innovative or regional businesses, unlisted. Therefore, an investment in these funds entails a high risk of illiquidity and capital loss. As the counterpart of this, a major tax benefit is granted when investing in FCPI/FIP fund units, provided that the units be held for at least five years. These products are managed by an asset management company, which announces a lock-in period of eight to ten years.

The legal documentation for this type of product consists of the KIID for the FCPI and FIP, which contains the main information relating to the product. This document is supplemented by regulations, available simply on request from the asset management company. This documentation usually stipulates that the holders of fund units cannot request the redemption of their units when the fund is in a winding-up or pre-winding-up period. Distributions or partial reimbursements may have occurred, as equity stakes are divested during the winding-up operations, but no redemption of units is possible during this period. The exceptional redemptions provided for, notably in the event of the fundholder's death, are also locked up during this period, which poses problems for a succession.

The blocking of unit redemptions during the product's life is designed to ensure equality for the fundholders. An FCPR venture capital fund consists mainly of unlisted assets, which are by nature not very liquid. Hence, their estimated valuation, generally half-yearly, during the products' life, may be different from their real value, when selling them at the time of winding up. In these circumstances, making redemptions possible before winding up the product would allow certain investors to pull out of the fund at a higher price than the valuation of the assets when selling.

As a consequence, in these cases, the Ombudsman cannot find fault with the asset management company for not redeeming fund units given that redemptions are not possible on this product.

Regarding extension beyond the life of an FCPR venture capital fund, the AMF[5] gives a reminder that the FCPR has a contractual lifetime and that winding up of all the assets held by the FCPR must be completed by the date stipulated in the regulations. It is incumbent on the asset management company to manage the fund's portfolio in conditions making it possible to comply with this constraint. This implies, in particular, that the process of asset disposals be initiated sufficiently early to reach completion before the end of life of the fund in question. Otherwise, the asset management company's liability is involved whenever it does not act in the interest of the unitholders, by extending the winding-up

period beyond the lifetime stipulated in the regulations. However, the Enforcement Committee's decision of 14 December 2012 with regard to Company X, formerly Innoven Partenaires SA, and to Messrs Walter Meier, Gilles Thouvenin and Thomas Dicker, which ruled on the subject, specified that winding up beyond the statutory life of the FCPI/FIP fund does not, in itself, constitute a regulatory infringement.

To determine whether there is an infringement, one should therefore examine whether the company has been diligent in the process of winding up the fund. For example, if it has taken management decisions late, or if its latest investments are close to the start of winding up, which could lead one to consider that the asset management company did not act in the best interests of the fundholders and made it impossible to complete winding up within the time limits stipulated by the regulations. However, the Ombudsman has no means of investigation or inspection to determine this. At the same time, it is incumbent on the fundholder to demonstrate that this lack of diligence during winding up caused him a loss. It is often complex for the latter to be able to provide such a demonstration. Therefore, the examination of these cases in the Ombudsman's Office reveals its limits and, for want of proof, often leads to an opinion that is unfavourable to the fundholder.

This risk of exceeding the statutory lifetime of FCPIs/FIPs, which may be several years beyond the ten-year period, is a risk that is admittedly rare but far from being theoretical. Clearly, however, it is brought to the attention of fundholders only when they are faced with the problem. They are then helpless and cannot redeem their units even if they have held onto their investment throughout the period stipulated in the prospectus. The work of investigation of the AMF staff and the Enforcement Committee has nevertheless made it possible to achieve enforcement rulings against asset management companies whose end-of-life fund management is disputable. Regarding this, the AMF Enforcement Committee's decision of 24 September 2020 against Nestadio Capital should be applauded. However, apart from sanctions, which are by nature unable to compensate the fundholders, and given the persisting number of requests for mediation on this subject, **the Ombudsman suggests that research could be started in 2021 on a comparison between the benefits and drawbacks of improved information, as of the subscription stage, e.g. in the KIID or the subscription form for fundholders, not excluding the risk of exceptional circumstances of very lengthy winding up for their investment, so that this risk could be better taken into consideration.**

[5] AMF article published on 22 April 2008, concerning the expiry of private equity funds.

4

A further increase in scams with the health crisis

A further increase in scams with the health crisis

This year again, the Ombudsman noted that the naive belief in the existence of "miraculous" investments led a large number retail investors to fall victims to predators.

These predators, boosted by the health crisis, exploit retail investors' disappointment with the low returns on conventional financial products and take advantage of the fact that they are spending more time at home and therefore on the internet as a result of the lockdown measures.

Unfortunately, on the web there is a proliferation of scams and articles with seductive titles which lead retail investors to imagine that far more lucrative investments exist but are concealed from them by the traditional financial institutions.

Legal Advisor

The Ombudsman, need it be repeated, can enter into mediation only if she considers that the facts indicated by the retail investor in the request could be termed scams.

Thus, in the event of an offence or a suspicion of a criminal offence, the Ombudsman is required, by law, to submit the case to the specialist AMF department which, in accordance with Article L. 621-20-1 of the Monetary and Financial Code, must alert the Procureur de la République (Public Prosecutor).

On the other hand, if a retail investor who is a victim has a civil dispute with his account-keeper, considering that he ought to have been alerted by the latter and that the civil liability of said firm could be involved, the case is admissible, if a prior complaint regarding this allegation has been justified to the Ombudsman. The results obtained are highly variable, as shown by the following examples.

A GREAT VARIETY OF SCAM TOPICS AND VICTIM PROFILES

In 2020, the Ombudsman received 95 cases for which she considered that they probably involved a fraud, including 60 with the same implicated party.

From the mediation requests received this year, the Ombudsman noted that the cyber fraudsters' ability to make up stories was definitely very significant and covered a broad range of themes.

No one standard profile of the victims of these scams

Profiling of the victims, performed on the basis of the 95 mediation cases received this year, shows that:

- the investors are aged between 22 and 88 years (average = 52);
- they come from different socio-professional categories, senior managers being the most represented category;
- the losses range from €300 to €266,207 (average = €20,233).

CHART 9

The different types of scam

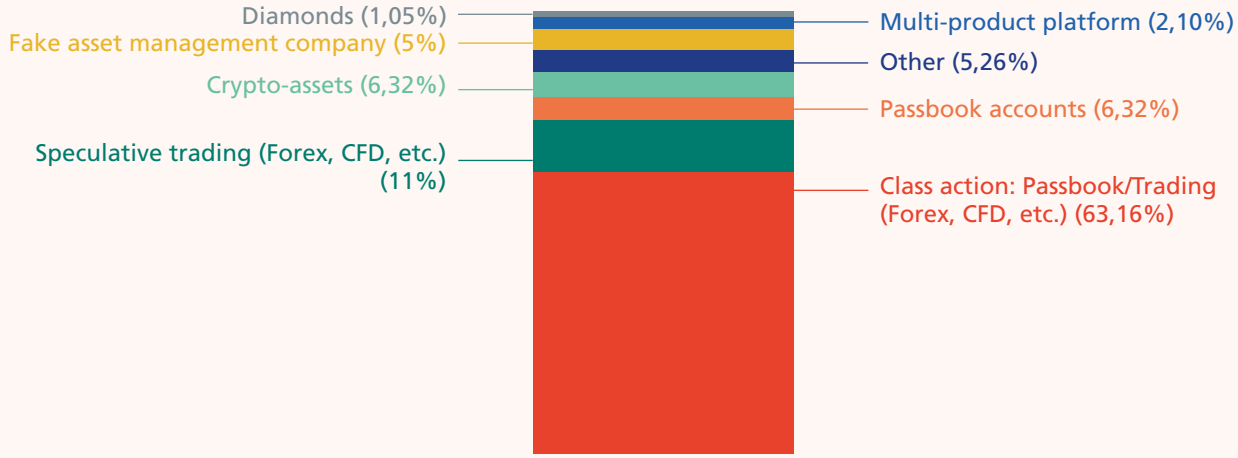
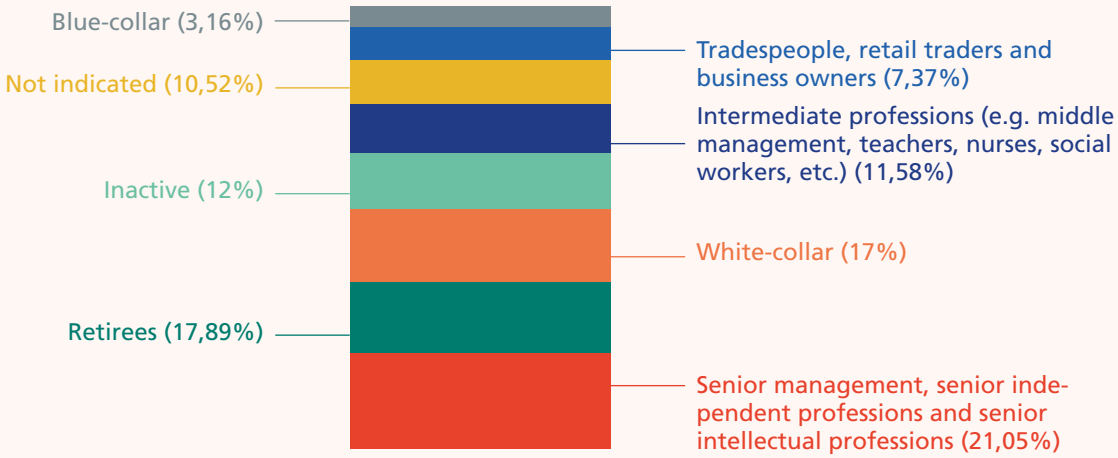


CHART 10

Socio-professional categories of scam victims



A broad range of scam themes

From reading the investors' requests received in 2020, the Ombudsman observes three major trends.

The variety of the fraudulent offers

In addition to the conventional cases relating to speculative trading, crypto-assets and passbook savings accounts, the Ombudsman was consulted on new fraud themes, such as investments in false asset management companies proposing units in SCPI funds or various funds whose nature is not necessarily specified (six cases) or else rental investments in parking lots (one case).

Increasingly frequent identity thefts

Fraudsters increasingly steal the identity of authorised companies (i.e. using a name, registration number and postal address identical or very similar to those of a truly authorised company). For example, in one case an investor said that the fraudster had even enjoined him to check that the company for which he worked indeed appeared on the register of financial agents (REGAFI).

The sophistication of the stratagems and subterfuges used by the fraudsters

The Ombudsman noted, for example, in one case that the fraudsters no longer hesitated to refer, in their fraudulent contracts, to the applicable regulations regarding anti-money laundering and combating the financing of terrorism and even went so far as to alert the investor concerning the risks of dubious emails or websites.

Moreover, and except in some cases, the returns proposed are less extravagant and therefore appear more plausible.

Furthermore, the Ombudsman noted that the fraudsters misappropriated official documents (tax documents in particular) to dupe investors and convince them of the need to pay a tax on the supposed capital gain realised.

Moreover, certain companies exploit the fact that they do not appear on blacklists as a selling point proving their integrity to their future victims.

Lastly, the IBANs used come less and less from companies that have opened an account in a banking institution of an Eastern European country but increasingly from countries reputed more trustworthy such as Portugal.

However, there are common signs of these frauds, such as:

- an enticing offer (high returns, despite the absence of risk);
- a contract which often contains numerous clauses (to give an illusion of legality and trustworthiness);
- a request for a funds transfer to accounts located abroad (and generally with a different name and in a different country from that in which the fraudulent company is supposedly located);
- use of the name or logo of reputed financial institutions or regulators (including the AMF);
- a request for payment of an alleged capital gains tax, to be settled quickly after any request for withdrawal of funds.

WARNING!

Whereas formerly the Ombudsman could recommend to investors to check that the company with which they were in relation appeared in the register of financial agents (REGAFI), now this is definitely no longer sufficient. This is because, through identity theft, predators give the illusion of having the necessary permits and authorisation for the provision of investment services.

Moreover, it is important to remember that the blacklists disseminated by the AMF are far from being exhaustive: it is not because the company does not appear on these lists that it is trustworthy.

Before making any investment proposed by an unconventional channel, it is therefore essential to ask for the advice of your financial adviser or to call *"Epargne Info Service"*, the platform set up by the AMF to answer investors' questions regarding financial saving products, financial intermediaries and possible investment scams.

THE MASS DISPUTE CONCERNING THE SAME PROFESSIONAL: LAURENT CHENOT

The Ombudsman's Office was consulted by some sixty retail investors who were victims of a professional enjoying some small renown thanks to his website, his online videos and a few appearances on television.

He gave the impression that he was an expert in finance and that he held secrets enabling anyone to become rich quickly, easily and without risk thanks to the training sessions that he provided.

The 60 case referrals received by the Ombudsman's Office having been declared inadmissible, because liable to constitute a criminal offence, the Ombudsman forwarded these cases to the AMF Legal Affairs Directorate and to the AMF department tasked with monitoring the advertising issued by financial actors. After analysing the information forwarded, the AMF decided to publish a statement warning against this actor and his fraudulent investment offers.

As the AMF mentioned in an alert on its website dated 18 November 2020 *"the activities conducted by Laurent Chenot and his team would appear to correspond to the investment services of asset management on behalf of third parties and/or financial investment advice, for which neither Laurent Chenot, his team nor his companies, Legendary Learning or Tradinvest, have the regulatory authorisations. In addition, the non-European brokers that Laurent Chenot presents to the retail investors are not authorised to provide investment services in France, either. By the terms of the Monetary and Financial Code, the provision of these investment services requires authorisation from the AMF."*

The Ombudsman considered that it could be useful to provide fuller details regarding the process used for this mass dispute.

1. The retail investors received an advertising email in the autumn of 2019 inviting them to attend a web conference claiming to make them discover, in particular: *"The disgraceful scandal of the financial elites who stuff themselves with easy, quick and free money […]"*, or again *"the best way to receive 133% of the "Livret A" each year […]"*.

This method, presented as being *"100% regulated"*, consisted in subscribing to *"passbook savings accounts"* (Alpha, Alpha Performance and Dollar King passbook accounts) so as to allegedly *"double [one's] money every year in a 100% passive manner"* via trading in speculative financial products.

Presented in the general conditions of the contracts signed by his clients as being mere training tools, these passbook savings accounts could, in light of the documents received, be a copy-trading system (see box).

2. Next, the retail investors were invited to open a trading account with brokers recommended by the organisation (often located outside the EEA) for which it acted as a business getter. Then, they had to follow the instructions to connect their accounts to *"trading signals"* (by means of a monthly subscription).

3. Once connected to these signals, the retail investors' trading accounts automatically reproduced the trades made by the trader, a self-proclaimed expert.

4. During the first months, everything seemed to go well, and the investors were encouraged to make positive testimonial videos. They were also invited *"not to keep scrutinising transactions every day because everyday operations were the trader's job"*.

5. Then, at the start of July 2020, the passbook accounts experienced substantial capital losses which seemed to be due to execution of the trader's strategy. However, the organisation painted investors an enticing picture of an opportunity to offset their losses using the signals of no longer a human trader but a robot, *"Dollar King"*. Reassured, most of the retail investors put in the rest of their savings, hoping to offset their losses, and more.

6. Then, in early August 2020, the organisation indicated that the strategy implemented via Dollar King had also failed.

7. Most of the retail investors lost all the money invested.

COPY TRADING

The presentation of this technique is very attractive, because this system requires neither knowledge, nor experience, nor even any effort, because once the copy system is activated, each trade made by the trader, or the robot (on the "master" account) is automatically copied and duplicated on the investor's account ("slave" account).

Although this practice is not prohibited, on the other hand it is regulated. Companies which propose copy trading services must be authorised to provide "portfolio management services on behalf of third parties".

In 2012, ESMA had specified its position on trading signals in a Q&A (ESMA/2012/382). Thus, according to ESMA, when the service provider acts in a discretionary manner by automatically executing the trading signals, this service can be assimilated to portfolio management on behalf of third parties (called copy trading).

Conversely, when no order is executed automatically and when an action by the client is required before the transaction is executed, this service (commonly called social trading) will not constitute a portfolio management service on behalf of third parties.

Along these lines, in 2013 the AMF and ACPR had also published a recap of the regulations concerning internet decision aid platforms, which specified that the provision of signals, depending on the various ways in which it was proposed, could constitute an investment service, and in particular an activity of portfolio management on behalf of third parties or investment advice.

The sales pitch of this professional, through completely surrealist promises of gains, was based on the three types of arguments that the Ombudsman had already mentioned in her 2018 report:

- Political argument: It is an *"anti-system"* sales pitch of a populist type: *"Are you prepared to serve yourself 100% legally in the cash registers of the elites?"*; *"I am pleased to offer you this possibility of profiting from the methods of the elite to enrich yourself 100% passively and automatically"*; *"Most people live in great financial distress while the elites and big banks stuff themselves, enough is enough! Now it's your turn!"*
- Economic argument: This argument is based mainly on the fact that the investments proposed by the banks no longer yield any return: *"Are you worried by the economic, social and financial situation (financial crash, retirement, negative interest rates, falling returns on investments, etc.)"*; *"To celebrate the easing of lockdown [...], profit from Dollar King and generate 150x the Livret A"*, *"double your money for less than €100 each month"*; "*Gain 1 Livret A every trading day"*.
- Psychological argument: This is an attractive promise: *"it's the key to finally having financial freedom and living life to the full"*; *"There's limited room in the Alpha passbook account"*; *"I know that a lot of people are looking for this opportunity, so profit from it quickly!"*; and it is reassuring: *"Make your money work without having to take care of it"*; *"this investment is 100% legal and regulated"*; *"this investment can protect your family from a crash or a monetary crisis"*; *"Absolute security, absolute liquidity"*.

THE RARE CIRCUMSTANCES IN WHICH THE OMBUDSMAN CAN TAKE ACTION

For many years, financial investment scams have prospered, leaving in their wake numerous victims who have no recourse, or almost none.

While it seems obvious that the best option, in the long run, for combatting this plague is still, above all, financial education so that retail investors may be capable of detecting and avoiding the traps set by fraudsters, the Ombudsman wanted to clarify the situation regarding the attitude to be adopted and the various possible means of recourse for the victims, and regarding the only option within the jurisdiction of the Ombudsman, namely the potential civil liability of the victim's bank if it did not detect conspicuous anomalies.

Unlike conventional frauds, in which funds transfers may be made without the victims knowing it, the specificity of these scams lies in the fact that the funds transfers are made by the victims who issued the orders and who became aware of the deception only too late.

What attitude should investors adopt when they realise they have been the victim of a scam

- Watch your accounts and immediately alert your bank. If you react very quickly, a recall procedure may be attempted by the victim's bank with the fraudster's bank. However, this assumes that the contentious sums are still present on the fraudster's account. Now, in practice, it can be seen that the fraudsters immediately transfer the sums received, because they have closed and opened a large number of accounts in the name of various companies. Moreover, the funds transfers are staggered over time, so that only the last transfer has a chance of being recalled. Also, this procedure is very limited, because it depends on the legislation of the country in which the account is located. It can be observed that the bank generally makes a return of the funds conditional on obtaining an authorisation from the account holder (i.e. from the fraudster).

- Be wary to at least avoid a "double penalty": Above all, do not reply to emails or unsolicited calls from supposed lawyers or institutions which claim to have miraculously regained the lost funds but which make the reimbursement of the victim conditional on a final funds transfer (supposed to correspond to a tax or expenses of all kinds). Investors' personal data move from one fraudster to another, and it is common for investors to be again solicited by fraudsters. This is what the Ombudsman has called a "double penalty" in her previous annual reports.

- Alert the AMF and the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF).

- Out-of-court action against the fraudsters' banking institutions (usually located in the EEA). Mediation, at the instigation of the AMF Ombudsman, with foreign financial institutions may not be undertaken, because these institutions do not come within the jurisdiction of the AMF and, by extension, of its Ombudsman. However, if investors nevertheless want to, they may try to make a claim to the foreign bank and, if this fails, refer the case to the corresponding Ombudsman[6].

- Lodge a complaint against the fraudulent company with the police station or the gendarmerie, if the total amount of money lost is less than €10,000, or send your complaint to the regional court in your place of residence if the total amount of money lost is more than €10,000. Unfortunately, however, the fraudsters are very often already far away and the money initially paid into an account usually opened in an EEA country has been transferred several times to accounts opened in banks which are often located outside the EEA in countries that have very lenient legislation and are not very cooperative. So we should not delude ourselves, the chances of obtaining reparation are very small.

- If the victim considers that his own bank ought to have alerted him in light of anomalies, after having possibly obtained advice from a lawyer, he may attempt civil legal action against the bank.

What recourse is possible with the AMF Ombudsman?

Action by the Ombudsman against the banks keeping the victims' accounts, due to a possible failure to comply with their obligations of detecting "conspicuous anomalies", in order to obtain reimbursement of part of the lost sums of money, is possible in the case of civil legal action, provided that the firm agrees to enter into mediation. However, the chances of success of mediation are limited and will depend on the evidence provided by the investor and the bank. While the bank is required to detect conspicuous anomalies which might vitiate a transaction and the normal functioning of an account, it is also subject to a duty of non-interference in its client's affairs.

The links between the principle of non-interference and the detection of an apparent anomaly

The principle of non-interference (or principle of non-intervention) requires that the banker should not interfere in its clients' affairs. However, legal theory and the firm and constant established legal precedents of the Court of Cassation show that judges tend to consider that this principle, which is stipulated in no legislative document, ends with the start of what are called "apparent anomalies" which a normally diligent and cautious banker is supposed to detect.

Accordingly, there is no clear, uniform and precise case law but, on the contrary, different solutions depending on the jurisdiction but also on the disputed facts. The outcome of each dispute therefore depends on the interpretation and sovereign assessment of the judges, depending on the case, based on a meticulous investigation.

However, the Ombudsman has no power of enquiry or investigation allowing her to make an in-depth investigation of cases. She can merely issue a non-binding recommendation, depending on the objective evidence submitted to her by the parties.

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[6] The list of members of the FIN-NET network (network of national organisations responsible for dealing out of court with consumers' complaints), the financial services that they cover, the languages in which they work and their contact details are available at the following address: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net/fin-net-network/members-fin-net-country_fr

NB:

Sometimes, in support of their claim, retail investors (wrongly) refer to the articles of the Monetary and Financial Code concerning the obligations relating to anti-money laundering and combating the financing of terrorism which are incumbent on institutions, and in particular the *"enhanced scrutiny"* stipulated in Article L. 561 10-2.

However, in the current state of case law, the sole purpose of these specific obligations to which the banker is bound is protection of the public interest in relation to the detection of transactions concerning sums of money whose source or destination is organised criminal activities, sanctioned exclusively on the administrative level.

Therefore, as stated by the Court of Cassation, to reject a liability action brought by a client against his bank, *"a victim of simply fraudulent schemes cannot base his action individually and personally on the failure to comply with obligations resulting from this legislation [anti-money laundering law] to claim damages from a financial institution"*.[7]

[7] Cass., Com., 28 April 2004, appeal No. 02-15.054.

Some examples of mediation and of factors that determine the outcome of the mediation

Signature of documents clearing one's financial institution of all responsibility

In one case, the Ombudsman noted that an institution had a retail investor sign a document entitled *"letter of discharge"*, indicating in particular that the bank had fulfilled its duty to provide information and warnings on the occasion of disputed funds transfers. As a consequence, and even though the investor stated that he regretted having signed the document, asserting that he had not clearly understood its meaning, the Ombudsman could only take formal note of this document in which the client recognised that his bank had performed the due diligence incumbent on it and by means of which he had therefore released it, clearly, from any liability.

Absence of prejudice due to a poor understanding of the concept of prejudice

In the case in question, the prejudice is not equal to the amount invested in a fraudulent company, i.e. the entire loss, but merely the loss of opportunity (which results from an absence of an alert or warning) to stop making these payments by coming to realise that this was probably a fraud. The prejudice resulting from such a loss of opportunity can only be repaired in line with the high or low probability that, once alerted, he would have stopped continuing to make such funds transfers.

For instance, in one case the Ombudsman had noted that a retail investor had attempted to make a funds transfer online from his bank's customer area. For security reasons the bank had made the addition of a foreign beneficiary contingent on establishing contact with its customer service. Moreover, there also appeared an alert message relating to suspicious investments which may be proposed on websites, which referred in particular to an AMF article entitled "how to detect scams". The investor was fully alerted to the risks he was taking and therefore had not continued his attempted funds transfer. The next day, however, he chose to continue making his funds transfers going via the customer area of an account held with another bank. The investor had then complained that the bank providing the services as a second recourse had not reacted immediately and had blocked his funds transfers only after the fourth transfer. The Ombudsman considered that it was duly alerted and on an informed basis that the retail investor had made the funds transfers in the second bank, because the day before he had been alerted by the first bank regarding the possibility of a fraud. The question of the absence of an alert from the second bank did not arise because the investor had persisted despite the sufficiently alarming message from the first bank upon his first attempt at a funds transfer.

Absence of alarming aspects due to the retail investor's lack of transparency

It should be mentioned that in general, retail investors do not ask for the opinion of their adviser before investing. On the contrary, the Ombudsman notes that sometimes retail investors remain vague, or even refuse to indicate the purpose of their funds transfers and even fear that their bank might want to have them miss a "bargain". While retail investors are of course entitled not to give information concerning the transactions they perform on their account, they may hardly complain afterwards that they were not alerted regarding the fraudulent nature of the investment they were making.

For example, a retail investor who had made a first funds transfer to a fraudulent company located in an eastern European country had complained that he was only alerted when he had attempted to make a second transfer. Now, when the Ombudsman examined the first transfer order sent by email, she noted that the investor had not indicated the purpose of the transfer or the name of the platform. However, when the investor had wanted to make the second transfer and had, on this occasion, asked to surrender his life insurance policy, his behaviour had puzzled his adviser, who had enquired about the reason for the surrender. The justifications given by the investor, added to the country of destination of the funds transfers, had aroused the suspicion of his adviser, who, following a quick search, had been able to alert the investor that this was a scam. The Ombudsman therefore considered that no regulatory infringement for not having warned its client at the time of the first funds transfer could be alleged against the firm, because at that time it simply did not have sufficient information.

Alarming factors which could lead the Ombudsman to negotiate with the implicated firm

When the Ombudsman considers that there are more than mere signs (which would require interference by the banker to detect a potential fraud), but convincing factors, compensation may legitimately be claimed. As an illustration:

- if the retail investor has forwarded to their adviser the fraudulent investment offer (on which there was clearly indicated the name of the platform or details on the extremely enticing offer to which he was going to subscribe);
- if the investor has requested that the adviser take action to empty their Livret A, close a life insurance policy or apply for a consumer loan after having clearly indicated that their aim was to invest on a platform revealed as fraudulent;
- if the examination of the mediation case shows a series of alarming signals: unusual behaviour (retail investor who suddenly starts to make several funds transfers), dubious reason (acquisition of shares of a listed French company when the funds transfer is destined for a foreign country), funds transfers to companies located in foreign countries, large amounts, investment against which the AMF had issued alerts (diamonds, crypto-assets, parking lots, etc.), funds transfers to locations which appear on the blacklists, etc.

For example, in one case in which a retail investor had invested more than €220,000 in an offer proposed by a fraudulent platform (but without there being sufficiently suspicious factors), the Ombudsman was able to obtain reimbursement of the last transfer (more than €30,000), made after the investor, who was starting to suspect that he was the victim of a scam, had sent his adviser an email to which he had received no reply. In this message, which the investor had kept, it was indicated very clearly that a platform was asking the investor to settle an alleged "tax" (a very frequent swindling technique) in order to recover his money. Worried, he had requested the opinion of his bank which had remained silent on this occasion, even though the company appeared on the AMF blacklist.

NB:

Usually, the name of the companies to which the investors make funds transfers differs from the name of the web platform. The AMF blacklists cannot be exhaustive and mention only the name of the web platforms operated by fraudsters.

Good practices noted by the Ombudsman (apart from the obligations relating to AML-CFT)

When examining cases, the Ombudsman also requested financial institutions to send her their procedures regarding the detection of apparent anomalies.

Here then are some good practices observed when a retail investor wants to make a dubious funds transfer to a foreign company:

- Check that the company receiving the transfer or the website does not appear on the AMF blacklists;
- Check that the investment service provider appears clearly on the register of financial agents (REGAFI);
- Try to dissuade the retail investor and alert them without fail in the event of a suspicion of fraud, especially if the website appears on the AMF blacklist or if the company does not appear on the REGAFI;
- Forward to the retail investor the warnings published by the AMF and ACPR relating to fraudulent investments;
- When the retail investor records a new beneficiary (foreign in particular) in his customer area on the internet, show an alert message and redirect him to the AMF website.

However, it has been found that the practice of a confirmation call is insufficient in itself if it merely verifies that its client is the originator of the orders given.

The Ombudsman notes that when a retail investor gives a funds transfer order for a large amount or for a foreign country via the internet, execution of the transfer may be contingent merely on a call by the customer service confined to checking that the investor is indeed the originator of the order. Such a confirmation call ought to be supplemented. In most cases, it is indeed the client himself who is the originator of the funds transfer. To be more effective, it would be especially useful for the customer service (without of course interfering in the client's affairs) to simply alert the retail investor regarding the existence of scams on the internet and suggest that they consult the AMF website or the abe-infoservice.fr platform.

Legal Advisor

5

The Ombudsman's national and international activities

The Ombudsman's national and international activities

Due to lockdowns and health measures, meeting practices and customs were thoroughly changed, and in these exceptional circumstances videoconferencing was the preferred solution. The bodies in which the Ombudsman normally takes part were clearly no exception to the rule.

ON THE NATIONAL LEVEL

Since 2007, the AMF Ombudsman has been a member of the Club of Public Service Ombudsmen, currently chaired by Jean-Pierre Teyssier, the Tourism and Travel Ombudsman. The AMF Ombudsman has been one of its vice-chairs since 2019.

There are some thirty main ombudsmen from various sectors and with very different roles (consumer ombudsmen whether they be public, sectoral, corporate or institutional ombudsmen, etc.) who are members of the Club and who meet regularly every two months to discuss their practices and any difficulties they encounter.

In 2020, the Club's bimonthly meetings took place without physical attendance and the annual seminar was held, in October, in the format of a webinar at which the chairman of the French Commission for the Evaluation and Monitoring of Consumer Mediation (CECMC) spoke.

Moreover, following the publication at end-December 2020, on the CECMC website, of 23 CECMC fact sheets on established legal precedents, Marielle Cohen-Branche, Vice-Chair of the Club, supervised a working group in the Ombudsmens' Club, to encourage and group together the suggestions and discussions of the members regarding the interpretation or possible contextualisation to be provided where necessary for some of these sheets. This work culminated with a synopsis which was submitted to the CECMC and Professor Sabine Desvaux-Bernheim, member of the CECMC. The deliberations initiated as a consequence of these proposals are expected to continue in 2021.

Lastly, the AMF Ombudsman attends meetings of the Retail Investors Consultative Commission, established within the AMF, whose main role is to inform decisions by the AMF Board likely to have an impact on the protection of retail investors' interests. In particular, the Ombudsman presents there the practical mediation case study published monthly in her *Online Diary*.

ON THE INTERNATIONAL AND EUROPEAN LEVELS

Although some were able to be held at a distance, most major international conferences were cancelled due to the health crisis.

As a reminder, however, the AMF Ombudsman belongs to the European Network of Financial Ombudsmen (FIN-NET) established by the European Commission, which has 60 members from 27 countries and which meets, in principle, twice a year. These meetings are an opportunity to discuss their approach to alternative dispute resolution for consumer disputes as introduced by Directive 2013/11/EU which enabled consumer mediation to be established in France from 2016.

On the international level, moreover, since January 2013 the AMF Ombudsman has been a member of INFO (International Network of Financial services Ombudsman schemes), a group of financial Ombudsmen (banking, finance and insurance) from around the world, with whom the AMF Ombudsman discusses the respective mediation practices that are very different from one country to another.

In November 2020, at the request of the CECMC, the AMF Ombudsman also spoke at a distance meeting for discussions on the occasion of the creation of financial mediation in the Republic of the Congo, and was thus able to contribute her viewpoint and her experience as a public consumer Ombudsman in financial matters.

6

The Ombudsman's communication initiatives

The Ombudsman's communication initiatives

EDUCATIONAL INITIATIVES

The *Online Diary*

2020 was a year marked by the health crisis, with the particular environment engendered by this situation. And yet, the Ombudsman's Office was able to adapt in order to continue its work, including the monthly publication of an investment case in the *Online Diary* so as to keep providing advice and explanations and allow both professional and retail investors to discover, each month, a new lesson to be drawn.

And once again, more and more website visitors consulted the Ombudsman's *Online Diary*. The placing online of the new AMF website and the resulting improved visibility of the Online Diary is probably not unrelated to the exceptional audience growth noted this year: more than 57,000 visits were counted in 2020, i.e. 4,757 visits each month, which represents 50% growth on 2019 (3,166 visits/month).

In 2020, Marielle Cohen-Branche also continued her monthly digest, by videoconference, on the Intégrale Placements television show on BFM Business, where she discusses, this time live, cases previously covered in the *Online Diary*.

Consomag: "Financial investments, what to do in the event of a dispute?"

Within the framework of the AMF's partnership with the National Consumer Institute (INC), in December 2020 the AMF Ombudsman took part in the production of a Consomag TV programme in which she explains, in a few minutes and very instructively, that in the event of a dispute it is first necessary to make a preliminary complaint, and she summarises how to refer the case to her and the cases in which she can be consulted and those which are not within her jurisdiction.

Training provided by the Ombudsman

The educational role of the Ombudsman can also be illustrated by the numerous training courses she organises each year on the role of her Ombudsman's Office, for Compliance and Internal Control Officers (CICOs) and Investment Services Compliance Managers (ISCMs), ombudsmen (Ombudsmen's Club training course) and, more generally, in the context of several university curricula (University of Paris-Dauphine and École des Mines). Like for her national and international activities, the Ombudsman adapted to the context of the health crisis, and in 2020 she provided all these training sessions by videoconferencing.

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. Accordingly, in 2020 the Ombudsman took part, in particular, in:

- 28/02: the Strasbourg University seminar on *"The Role of the AMF and the Ombudsman's Office in Financial Matters"*, replicated in the special issue of Banque et Droit in May 2020
- 04/03: the Paris V University seminar on *"The Dark Side of the Bitcoin"*, replicated in the May-June 2020 issue of the Revue de Droit Bancaire et Financier

In addition to her involvement as mentioned previously, Marielle Cohen-Branche regularly publishes articles and studies in specialised publications. In particular, she wrote the editorial for the Revue du Bulletin Joly Bourse in July 2020, entitled *"What if we Got Back to Basics?"*.

A NEW OMBUDSMAN PARTNERSHIP WITH CERGY-PONTOISE UNIVERSITY

In January 2020, the AMF Ombudsman signed a partnership agreement with the Chair of Consumer Law created in December 2019 by the Cergy-Pontoise University Foundation by an innovative approach combining business law and consumer law and bringing together researchers and major players in the consumer universe.

The Chair, co-directed by professors Carole Aubert de Vincelles and Natacha Sauphanor-Bouillaud, aims to establish an authoritative centre in consumer law.

The AMF Ombudsman, with the members of the Chair, takes part in the Chair's various activities, and especially in determining topics for research and deliberation in its scientific committee. Accordingly, the Ombudsman spoke at the Chair's inaugural seminar held on 11 September 2020 on the theme of The Modernisation of Consumer Protection Rules.

The Consumer Law Chair is also linked with the Master's course on "Consumer Law and Commercial Practice" for which its members are called on to contribute instruction. Within this framework, the Ombudsman has agreed to regularly receive students from this Master's course on internships.

Appendices

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

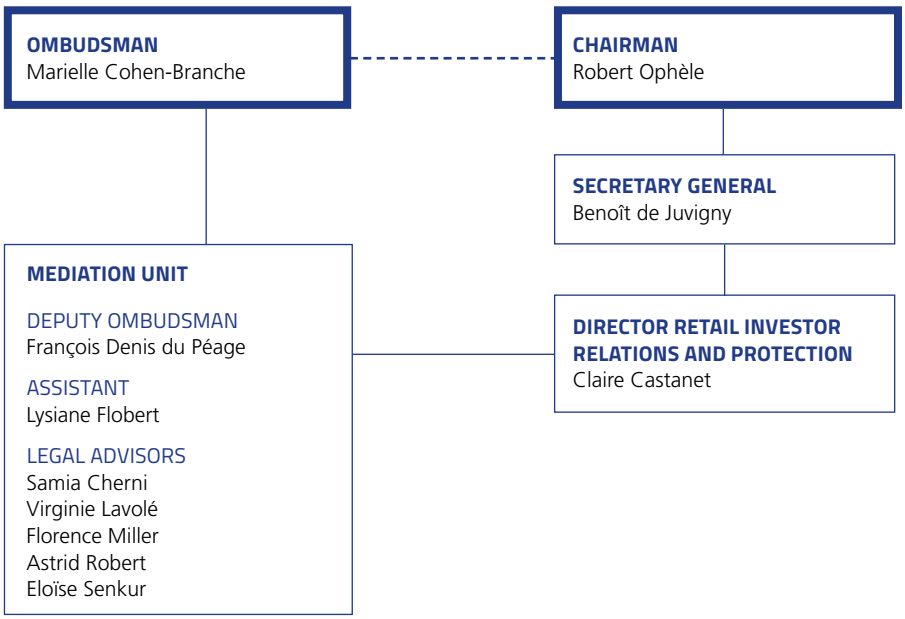
The AMF Ombudsman cooperates with its foreign counterparts to facilitate extrajudicial settlement of cross-border disputes.

The Ombudsman publishes an annual report on his activity.

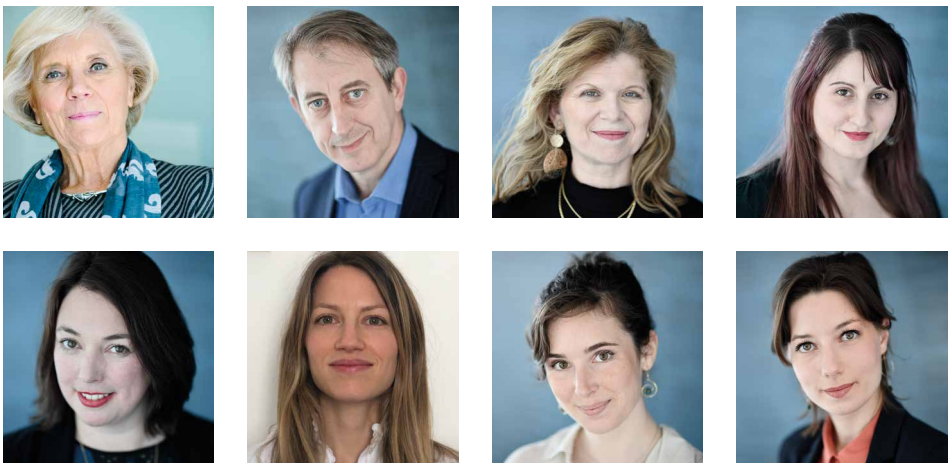
II. – The Autorité des Marchés Financiers may formulate proposals for amendments to the laws and regulations concerning the information provided to the holders of financial instruments and to the public, the markets in financial instruments, in units referred to in Article L. 229-7 of the Environmental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

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

APPENDIX 2
Mediation chart as of March, 25th, 2021



THE OMBUDSMAN AND HER TEAM



APPENDIX 3

Mediation charter

Drawn up in 1997 by the first Ombudsman and approved by the AMF Board, the Mediation Charter, which has since been revised, is intended for any person who refers a case to the Ombudsman.

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 writ¬ten 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 media¬tion process at any time.

Confidentiality
The Ombudsman, his team and the parties to the proceedings are bound to observe strict confidentiality. Communications that have tak¬en 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 com¬pares the parties' arguments. The examination is car¬ried 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 2019)

EMPLOYEE SAVINGS	Employee savings can lead to unpleasant surprises after leaving the company	**03/11/2014**
	Employee investment undertakings: it's useful to be fully informed of the special conditions for an early release when buying a main residence	**02/06/2015**
	The treatment of profit-sharing invested after leaving the company	**04/11/2015**
	Employee savings and acquisition of the principal residence: supporting documents are not interchangeable	**01/03/2016**
	Employee savings: note that only written documents are taken into consideration when making your allocation choices within the deadline	**02/05/2016**
	Employee savings: be aware of the confusion between a transfer and a switch!	**01/07/2016**
	Employee savings: note that the termination of an employment contract does not constitute an early release from the Perco	**02/02/2017**
	Employee savings: the risk of absorbing an employee's modest retirement savings in the event of the absence of a Perco at his/ her new employer	**02/06/2017**
	Please note, early employee savings plan release to purchase or extend a main home owned via an SCI is not permitted	**02/07/2018**
	Employee savings: even in the event of retirement, the liquidation of assets does not result in the closure of the company savings scheme	**06/11/2018**
	What is fairness in mediation? A concrete example in a case where assets held in a Perco are locked in as the result of a default choice	**04/03/2019**
	Employee shareholder investment undertakings: why is there a possible periodic readjustment of the number of units?	**04/06/2019**
	When an employee investor thinks that the allocation decision has been finalised	**04/11/2019**
	Employee savings: default investment in the Perco collective retirement savings plan in light of the Pacte Law	**08/04/2020**
	Employee savings: the list of justifications for early release of funds is not exhaustive	**08/09/2020**
FOREX AND BINARY OPTIONS	The risks of believing in the tempting promises of online Forex trading	**13/10/2014**
	Evidence kept by the client helps the Ombudsman obtain compensation for binary options and Forex, if the company is authorised	**01/04/2015**
	Virtual gains but real losses: if extraordinarily the Forex trading reveals gains, when it comes to withdrawing them from the account everything gets complicated…	**02/09/2015**
	Binary options and training in telephone trading: how you can lose all your savings	**03/11/2016**

STOCK MARKET ORDER	A stock market order and an abnormally long execution time	**21/05/2014**
	Execution of stock market orders at the end of the year: beware of the tax implications!	**01/12/2014**
	The detachment of a dividend may have consequences on your stock market orders	**06/01/2015**
	Note that one stock exchange order may hide another: what about the priority order execution rules?	**04/05/2015**
	Poor execution of a stock exchange order: when the actual harm to the complainant is not what he considers…	**02/10/2015**
	"Best execution" of orders or the primacy of the total cost paid by the client	**02/12/2016**
	"Penny stock" and "market" orders: note the possible price lag when placing an order on shares with a very low value	**03/05/2017**
	Stock market order executed at an "aberrant price": Euronext may cancel the transaction in exceptional cases	**03/10/2017**
	Prohibition of short selling: who had to ensure compliance with this ban, and for which securities?	**02/06/2020**
	In the event of an incomplete questionnaire, the bank must alert its client but transmit their stock exchange orders	**01/10/2020**
	Full community of property regime: What are the consequences of the death of a spouse holding securities?	**02/11/2020**
	Stock exchange orders: precautions to be taken so that transactions may be registered before 31 December	**01/12/2020**
OBLIGATION TO INFORM	Subscription to a formula fund when the commercial brochure of a product is not sufficiently clear	**28/08/2014**
	US taxpayer "US Person" status: what are the respective obligations of the bank and the client related to the extraterritoriality of US tax regulations?	**02/03/2015**
	The bank must be able to prove that it has provided the prospectus to its client before he/she subscribes to a UCITS	**02/12/2015**
	The account-keeping institution is not required to provide the agent holding a general power of attorney with the information or alerts intended for the account holder, unless stipulated in a specific clause	**08/03/2018**
	The KIID: a document that must be provided and read before any subscription	**03/05/2019**

COLLECTIVE INVESTMENTS	The older a dispute is, the more difficult it is to obtain compensation: the media example of a formula fund	**30/06/2014**
	On what basis should a delayed redemption of SICAV shares be regularised?	**06/07/2015**
	Deadline for centralising orders on UCITS: beware of confusion!	**02/02/2016**
	Why is the request to redeem mutual fund units on the basis of "known price" unfounded?	**04/07/2017**
	Failure by a firm to update the address of its clients can be costly	**01/09/2017**
	Note that in the event of a merger of mutual funds, the fee-free exit is the only right available to unitholders	**01/12/2017**
	The Ombudsman's monthly case - Attention: the possible lockup period for your assets placed in an FCPI	**04/05/2018**
	Why it is necessary to read the Key Investor Information Document (KIID) carefully in the event of a dispute about the fees charged on UCITS	**01/07/2020**
PEAs	Investing an ineligible security in a "traditional" Equity Savings Scheme (PEA) – who is responsible?	**02/02/2015**
	Disposal of unlisted securities held in a PEA: do not forget to pay the proceeds from the disposal into the cash account of your plan and inform your bank!	**04/04/2016**
	The transfer of an Equity Savings Scheme (PEA) to another bank: still an obstacle course	**08/11/2017**
	Transfer from a bank PEA to an insurance PEA: note the special conditions	**03/09/2018**
	A specific point worth knowing when selling unlisted securities in an equity savings plan: what to do in the case of a deferred payment?	**01/07/2019**
	Can an account-keeping institution be held liable for the ineligibility of securities held in a PEA after subscription?	**07/10/2019**
	A "PEA" (personal equity savings plan) must be closed on the holder's death, but its closure is not equivalent to a liquidation order	**03/03/2020**
SECURITIES ACCOUNTS	Estates: What are the rights of the beneficial owner of a securities portfolio?	**01/06/2016**
	Ordinary securities account: when the transfer is hindered by holding securities of companies placed into court-ordered administration.	**31/03/2017**
	Note that while investors have the right to possess deposit accounts, this is not the case for securities accounts	**04/02/2019**
	Opening a securities account: what are the bank's anti-money laundering obligations?	**02/12/2019**
	Stock market: each holder of a joint securities account must be able to place a purchase order in the case of an Open Price Offering (OPO)	**04/05/2020**

INVESTMENT ADVICE	Be aware of certain financial arrangements, clearly not consistent with client needs	**02/09/2016**
	If the client does not provide the information in the MiFID questionnaire, the bank must refrain from providing an investment advisory service	**01/02/2018**
	The challenge of recommending a suitable financial product for the client's specific situation	**02/09/2019**
	Deferred Settlement Service (SRD): when duly warned clients invest at their own risk	**04/02/2020**
SECURITIES TRANSACTIONS	Ordinary securities account: when the transfer is hindered by holding securities of companies placed into court-ordered administration	**03/10/2016**
	Preferential subscription rights (PSRs): note the shortening of the subscription period	**03/03/2017**
	On what date is the status of shareholder assessed in order for him/her to benefit from the associated right to a dividend?	**03/04/2018**
	Beware of the five-year limitation period for dividends	**01/06/2018**
	The need to use the AMF Ombudsman's Office properly: neither too early nor too late…	**01/10/2018**
	Capital Increase: Note that a share subscription on a "reducible" basis is only possible if the shareholder has previously subscribed to them on an "irreducible" basis	**05/12/2018**
	Regarding bond purchases and redemptions: what exactly does "par" mean?	**01/04/2019**

APPENDIX 5

A point of law to be aware of especially with regard to a foreign Ombudsman who has sole jurisdiction in a specific case

In 2020 the AMF Ombudsman, in consultation with the AMF Legal Affairs Directorate, was able to clarify for a client the scope of the Enforcement Committee's decisions with regard to a British Ombudsman who had sole jurisdiction based on the account agreement.

In the case of disputes in which a foreign financial Ombudsman is referred to, he may choose not to take into account the decisions of the AMF Enforcement Committee because it does not constitute a court. It is useful for investors to know this before subscribing to a contract providing for the jurisdiction of a foreign Ombudsman.

A retail investor referred a dispute to the British counterpart of the AMF Ombudsman, the Financial Ombudsman (FOS), citing a decision of the AMF Enforcement Committee sanctioning a British financial institution which had chosen, in its account agreement, the jurisdiction of the FOS in the event of a dispute. The British Ombudsman, ruling on equitable and not on legal principles, had nevertheless concluded that this institution had not infringed the rules of the Financial Conduct Authority (the UK regulator), contrary to the decision handed down by the AMF Enforcement Committee.

On the force of res judicata of the AMF Enforcement Committee's decision

Regarding the force of res judicata, which was the first argument that this investor represented to my counterpart to have him adopt the sentence of the Enforcement Committee, it should be remembered that the definitive nature of a decision must not be confused with the force of res judicata pertaining thereto. Although the AMF Enforcement Committee's decision handed down with respect to the financial institution became definitive because it was not appealed before the Council of State, it nevertheless does not have the force of res judicata.

The AMF Enforcement Committee is not a court within the meaning of French law, as confirmed by the Council of State's ruling of 4 February 2005 (cf. No. 269001: *"Considering that the Enforcement Committee of the Autorité des Marchés Financiers is not a court based on national law"*), even if it is considered a tribunal within the meaning of Article 6 § 1 of the European Convention on Human Rights, which entails compliance with numerous requirements arising from the right to fair trial.

Now, by virtue of Article 1355 of the French Code of Civil Law, *"the force of res judicata applies only with regard to the subject of the ruling. The subject of the petition must be the same; the petition must be based on the same cause; the petition must be between the same parties and lodged by or against them in the same capacity."*.

Since the AMF Enforcement Committee is not a court, it therefore cannot issue judgments which would have the force of res judicata. That is why, moreover, the Enforcement Committee is said to hand down decisions and not judgments.

This interpretation is, moreover, clearly reiterated on the French public website "Vie publique": *"[…] AAIs (independent administrative authorities) and APIs (independent public authorities) are often vested with a power of decision: they can not only send warning notices or injunctions, but they also sometimes have the power to penalise financially (like the AMF) or impose bans (like the CSA). And yet, the AAIs are by no means real courts: their decisions do not have the force of res judicata and they are always subject to the control of the judge. Furthermore, AAIs can be abolished by a mere law, and they do not have their own budget. Lastly, the regulation role which is entrusted to them is oriented more towards prevention than the role incumbent on the justice system."* (cf. https://www.vie-publique.fr/fiches/268648-quelles-sont-les-competences-des-aai-et-api-en-matiere-de-justice).

On EU recognition of the decisions of the AMF Enforcement Committee

On the European level, the Enforcement Committee is considered as a tribunal within the meaning of Article 6 § 1 of the European Convention on Human Rights only for the purpose of the procedural guarantees arising from the right to fair trial (such as the application of the rights of the defence, the right to participation of both parties, the reasonable period or again the non bis in idem principle). Thus, this term of tribunal within the European meaning has no consequences for the recognition of French judgments outside France.

That, moreover, is why European Union law organises the recognition within the EU of the jurisdictional decisions issued in civil and commercial cases, by means of the so-called Brussels I regulation (Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

However, the scope of this regulation is limited: on the one hand, because it applies only to jurisdictional decisions handed down in civil or commercial cases. Now, as outlined earlier, the decisions of the AMF Enforcement Committee come under criminal law. Second, this regulation applies to *"any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court."* (Article 2 b) of the Brussels I regulation). But, as explained earlier, the AMF Enforcement Committee is not a jurisdiction.

As a consequence, the decisions of the Enforcement Committee do not come within the scope of the Brussels I European Regulation and therefore cannot benefit from its mechanism of recognition within the EU.

On the legal basis for the decision given by the Financial Ombudsman

Based on the British rules governing the functioning of the UK Financial Ombudsman, the latter has to give his decision (and not simply proposals as in French law) with reference to what he believed right and fair in the circumstances of the matter. Thus, his decision is based on the facts of the case, the laws and regulations, rules, guidelines and standards of the regulatory authorities, codes of good practice and marketplace practices at the time of the facts (cf. XVI of the Financial Services and Markets acts, Schedule 17 of the Financial Services and Markets acts, FCA Handbook).

Therefore, the British Ombudsman is free to refer to the decision of a foreign regulatory authority or not. In other words, the Financial Ombudsman is not bound by the decision of the AMF Enforcement Committee.

Thus, if this investor wanted to attack the decision given by the Financial Ombudsman, the appeal against the latter will be subject to the rules of British law, for which the AMF has no jurisdiction for interpretation.

APPENDIX 6

How to avoid a risk of confusion regarding changes in the financial regulations

It is well known that European law has become an indispensable source of financial law. Moreover, having chosen full harmonisation of Directive 2014/65/EU of 23 June 2016 on markets in financial instruments, the Member States have had to adapt their domestic legislation in line with the adopted text during its transposition into national law, with no possibility of adapting or maintaining different rules, or even more protective rules for investors. But in particular, increasing use is now made of European Regulations which are, for their part, directly applicable, without even needing, like a directive, to be transposed into national law.

In terms of harmonisation, this clearly represents progress by avoiding divergences in regulations from one State to another. However, it may result in a situation in which the disappearance of an article, or even part of an article, from the Monetary and Financial Code or the AMF General Regulation may sometimes create some confusion. It is important to be able to check whether this involves not the disappearance of an obligation but merely its transfer into a European Regulation since it now appears directly therein. The reflex of acquiring knowledge of European Regulations and consulting them, especially with regard to the conduct-of-business rules of investment service providers, then becomes salutary.

This year again, the Ombudsman's attention was attracted to a case on a problem arising from a client's refusal to fill in the so-called MiFID II questionnaire making it possible to determine his investor profile when opening a PEA plan online, accordingly making it impossible to classify the client[8]. For this type of dispute one must be attentive to the provisions of both MiFID II and the Delegated Regulation (EU 2017/565).

Example: the consequences of a client's refusal to answer the so-called MiFID questionnaires on the occasion of an investment advisory service

When the client refuses to answer said questionnaire, which is his right, this nevertheless entails significant consequences for the investment service provider. One provision which appeared in the very text of Article L.533-13 of the Monetary and Financial Code until 31 December 2017 has quite simply disappeared: a duty to refrain from providing advice. But this duty to refrain is completely understandable, because the client does not intend to give information concerning his experience, his objectives, his knowledge or his risk aversion or, finally, his ability to bear losses.

But has this duty to refrain really disappeared? No, it appears in its existing form in the Delegated Regulation itself. For some people, however, this may not be easy to guess or find.

This duty to refrain is clearly maintained and now appears in point 8 of Article 54 of the Commission Delegated Regulation (EU 2017/565) of 25 April 2016 which came into force on 1 January 2018.

"Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 25(2) of Directive 2014/65/EU, the firm shall not recommend investment services or financial instruments to the client or potential client."

For its part, the AMF, aware of the difficulties that this change may cause for professionals and stakeholders, was concerned, in its General Regulation, which is also a source of major obligations, to indicate a guideline heading making it possible to easily access the European regulations that should be consulted additionally. Below we show the example of Chapter IV – Conduct of business rules.

Chapter IV - Conduct of business rules
Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. Section 1 – General provisions, Article 314-1.

It might be hoped that the legislator itself plans to do likewise in the articles of the Monetary and Financial Code which have undergone such a transfer…

[8] Case of the month, October 2020: In the event of an incomplete questionnaire, the bank must alert its client but transmit their stock exchange orders.

APPENDIX 7

For further information on mediation

FIN NET (Network of European Financial Ombudsmen) website:
https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net_en

INFO (International Network of Financial Services Ombudsman) website:
http://www.networkfso.org/

Club of Public Services Mediators:
https://clubdesmediateurs.fr/en

European Directive 2013/11/EU on the alternative resolution of consumer disputes:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0011

European Regulation No. 524/2013 on the online resolution of consumer disputes:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0524

Executive Order No. 2015-1033 of 20 August 2015 on the alternative resolution of consumer disputes (in French only):
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031070940&fastPos=1&fastReqId=679142069&categorieLien=cid&oldAction=rechTexte

Decree No. 2015-1382 of 30 October 2015 on the mediation of consumer disputes (in French only):
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031400977&fastPos=1&fastReqId=225702787&categorieLien=cid&oldAction=rechTexte

Consumer Code, legislative part, Book VI, "Dispute Resolution", Title I, Mediation (in French only):
https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000032224815&idSectionTA=LEGISCTA000032224817&cidTexte=LEGITEXT000006069565&dateTexte=20200706

REFER A CASE TO THE AMF OMBUDSMAN

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

In writing: The Ombudsman – Autorité des Marchés Financiers – 17, place de la Bourse 75082 Paris Cedex 02 – France

Where applicable, make sure to give your email and telephone contact details.

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

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