OMBUDSMAN'S REPORT

2021

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 YEAR OF CHALLENGES AND RECORDS"

The challenges faced by the Ombudsman's Office in 2021 involved responding to two phenomena observed by the AMF. First, 1.6 million French people had been active in equity markets, i.e. there were more than one million new investors in three years. Second, the valuation of the CAC 40 increased by 30%, arousing the risk appetite of younger investors. The consequence of this was a further spectacular increase in the number of disputes and hence of case referrals for mediation. We noted an increase of 33% in cases received in 2021, amounting to around 2,000 case referrals, i.e. 500 more complaints than the previous year, and a 44% increase in the number of cases processed within the Ombudsman's jurisdiction.

Persisting low interest rates, lockdowns and teleworking led French retail investors, who had consumed less, to turn to products for which the prospective returns seem far more attractive.

Clearly, however, the new investors in the stock market did not always have thorough knowledge of these financial instruments. Complaints relating to stock exchange orders, which had already been multiplied fivefold in 2020 at the time of the stock market upheavals in the spring, doubled once again in 2021, to more than 200 complaints.

Admittedly, these new investors are younger, more proactive and more mobile, and are also more demanding. But sometimes they also display an ignorance which, although understandable, is worrying.

In 2021, there was a sharp increase in the number of corporate actions, which are tricky and complex: mergers or split-ups of companies or banks, public offers (takeovers, swaps, mixed), squeeze-outs, stock split or reverse split operations, and capital increases accompanied by preferential subscription rights. Regarding stock exchange orders, suspensions of trading sometimes held unpleasant surprises in store for investors who had not opted for a limit order. Further examples of ignorance could be seen when securities were governed by foreign legislation enabling, for example, collective holding in a single pooled account of the sub-custodian (so-called omnibus accounts). A major study has therefore been devoted to corporate actions.

Often, in these cases, the Ombudsman's decision entails above all giving advice and explanations, after an investigation, of course, to verify that that there has been no fault or error by the firm which might have caused damage for which the Ombudsman will propose reparation. This advice is all the more readily accepted since it is given by a third party, independent of the firm involved. In this report you will find the main detailed lessons that the Ombudsman has been able to draw regarding corporate actions and stock exchange orders, and which have already been published in the Ombudsman's Online Diary in some cases. The audience of this Diary doubled again in 2021, posting around 10,000 visits each month (ten times more than when it was launched in 2014), not counting repetitions in the press.

In 2021, and this is another record, there was a 51% increase in decisions issued: 763 decisions were issued by the Ombudsman (versus 505 in 2020). Unfavourable decisions, which accounted for 47% of the total, were disputed in only 7% of cases. Favourable and partially favourable decisions were rejected in only 2% of cases.

The other sectors traditionally handled by the Ombudsman's Office include employee savings schemes and personal equity savings plans (PEA). For the first time, the employee savings sector lost its No. 1 position as a percentage of the total number of cases processed, and that is very good news. The number of complaints received for one of the main participants on the Paris marketplace even decreased by half this year. It is confirmed that good cooperation developed over many years with the Ombudsman's Office, improved information – which has become more readily available on websites – and earlier settlement of disputes contributed to this. The remaining cases to be processed usually concern fairness.

On the other hand, the number of complaints received regarding PEA plans increased sharply. They more than doubled, to 329, versus 154 in 2020. The complaints mainly concerned the time taken for the transfer of securities accounts or PEA plans between two management firms. Regarding this, I noted a mass dispute related to the acquisition of one firm by another, partly due to the lack of links between their respective information systems. My main objective was to obtain finalisation of the transfers more swiftly, including reimbursement of the costs related to the operation and, far more rarely, a commercial gesture due to the loss of opportunity, since, as a general rule, in the current state of positive law, the client does not provide proof of such damage during this period.

I intend to make a recommendation so that, in future, the management firms in charge of the transfer of the PEA plan communicate more precisely as to whether or not clients can buy or sell securities during the transfer period and, whenever possible, regarding the consequences (deferral or suspension of said transfer). To this effect, contacts have been made with the Financial Sector Advisory Committee (CCSF). Other subjects relating to the PEA plan, such as the new regulations on the capping of charges for the PEA investment wrapper and the questions that it raises, are also dealt with in this annual report.

While some disputes have decreased, thanks to the strong authentication technique and alerts by the firms, such as those regarding employee savings schemes or endeavours to establish banks' liability in the case of investment scams, other disputes have appeared in new sectors. A good example is that of digital asset service providers (DASPs, namely crypto-assets).

The European regulations on reverse solicitation could lead the AMF Ombudsman to decide that cases are irregular, and this should lead investors to be more vigilant. In particular, it is only if they have been solicited by a trading venue to acquire such crypto-assets, and not if they have themselves taken the initiative to acquire them, that the question of the legality of the "provision" of such services will arise.

Regarding fraud, forex now represents only 3% of complaints, notably due to the application of the European passport rule in the case of the free provision of services. Only the regulator of the home country, usually that of Cyprus, and hence its ombudsman, are deemed competent to handle such disputes. In 2021, the AMF Ombudsman applied this rule strictly. There were therefore a greater number of declarations of geographic inadmissibility. Moreover, as I suggested in my annual report last year, in 2021 the AMF carried out a wide-ranging study on FCPI innovation venture capital funds which exceeded the maximum time limits for the reimbursement of venture capital investments in innovative sectors.

The problem is known by firms as "bottoms of tank", and it was revealed that almost half of the funds were unable to comply with these time limits. Accordingly, a marketplace consultation was requested by the AMF Board at the end of 2021, within the framework of a working group that was set up recently to draw up proposals to improve the regulatory framework for the future.

The last subject discussed in this report concerns the complexity of succession-related mediation disputes; a few examples will be given of settled cases.

As you can see, the diversity of financial dispute topics mentioned in this editorial shows how French financial regulations, which change frequently, in line with the rapidly changing European legislation, have become more technical and more complex over the years. Issues concerning the scope of supervision of the regulators, and hence the jurisdiction of the Ombudsman, have also become more tricky, notably due to this reverse solicitation rule.

However, I am delighted that the percentage of inadmissible cases relating mainly to banking and insurance-related disputes is always two times lower when the investor refers the case to the Ombudsman's Office via the form available on the AMF website, rather than by postal mail (25% versus 50% previously). The system of filtering by questions asked on the website is effective, and investors who choose this channel continue to account for around 60% of requests since the start of the health crisis, versus 30% in previous years.

There remains the issue of the dematerialisation of processes between clients and their bank. Admittedly, this can often simplify operations and facilitate alerts, but it can also disconcert investors who know less about these new tools, or even irritate them when the extra security measures are not sufficiently well explained, such as strong authentication to combat money laundering.

The constant challenge facing the Ombudsman's Office is to reconcile preservation of the recognised quality of case investigation by the AMF Ombudsman within tight deadlines, and limited public resources.

The team at the Ombudsman's Office saw the arrival of a new experienced legal expert at the end of 2021, who was more than welcome. But the pressure of the workload is still extremely high. Despite the 51% increase in decisions issued, **processing times deteriorated, going from five and a half months on average to six months, and the backlog of cases waiting for processing again increased significantly,** although this increase is smaller than what could have been feared during the year.

At this start of 2022, I would simply like to end this editorial by saying that I am honoured and happy to have had my appointment as AMF Ombudsman renewed on 12 November 2021 for a further three-year term of office. And I know I can count on a renewed great team of qualified legal experts, led by my deputy François Denis du Péage, who manages it efficiently.

The following few lines, under the title "Ten years already", outline the ground covered by the AMF Ombudsman's Office since my first appointment, in November 2011.

Marielle Cohen-Branche,
11 March 2022

TEN YEARS ALREADY...
MAJOR MILESTONES OF THE AMF OMBUDSMAN'S OFFICE

When I arrived, in November 2011, I found that the cases received and processed by the Ombudsman's Office did not give rise to recommendations.

My first objective was "nothing but mediation, but thorough mediation", leaving consultations to the competent information department of the AMF (AMF Épargne Info Service), which had been created recently, and taking the initiative (this was a Copernican revolution at the time) of issuing recommendations in each case that was handled, in light of the asymmetry of the relationship between the firm and the retail investor. About 400 proposals were accordingly issued in 2013. These proposals only became a legal obligation in 2016.

In 2012 came a second milestone: banking, finance and insurance firms were required, by industry regulations established by the regulators (the AMF and ACPR), to indicate that it was possible to refer to an ombudsman free of charge in the event of a persisting dispute, especially in correspondence replying to complaints by their clients,. Growth in the number of case referrals soon became significant.

The third major milestone began in May 2014, when I took the initiative of publishing the explanatory review of a case each month on the AMF website. General lessons could thus be drawn that would be useful to all the parties, spreading the benefits while respecting the anonymity of the litigating parties.

When the consumer mediation scheme came into force throughout the European Union in 2016, implying that all ombudsmen should be authorised and evaluated in each country by a national authority, and that they should issue proposals in each case, the AMF Ombudsman's Office completed its transformation. This role is now devolved to an individual independent of the AMF, and no longer to the institution itself. It was then confirmed that the term of office of the public consumer ombudsman, appointed by the chairman after consulting the Board, would be three years, renewable, in accordance with amended Article L. 621-19 of the Monetary and Financial Code.

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1 2021 KEY FIGURES

VERY SHARP INCREASE IN CASE VOLUMES

The number of requests received increased by 33% to 1,964, compared with 1,479 in 2020. Such an acceleration is unprecedented. Requests received coming within the jurisdiction of the Ombudsman increased by 31%, to 1,263 requests, compared with 966 in 2020 (and 762 in 2019).

Case referrals to the Ombudsman's Office using the online form for mediation requests confirmed their predominance over postal mail: 58% of case referrals were received via the form, as in 2020.

Requests received via the form are proportionally more relevant, in particular thanks to filtering by a series of questions which enable plaintiffs to route their request more effectively to the ombudsman having jurisdiction. In 2021, 27.5% of the requests received via the form were outside the AMF Ombudsman's jurisdiction, versus 48% of the case referrals received by postal mail.

With the health crisis, the use of postal mail decreased sharply. The very great majority of exchanges between the Ombudsman's Office and the parties to disputes take place by email. Since a very large part of 2021 involved teleworking, the use of conventional mail made communications longer and more difficult. It must be regretted that some plaintiffs 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, or credit)?

Has your dispute been reviewed by another ombudsman? By a court?

Have you filed a complaint?

Have you submitted a prior written complaint to the relevant institution? On what date?

A VERY SHARP INCREASE ALSO IN CASES PROCESSED AND CLOSED

1,867 cases were processed and closed, versus 1,327 in 2020. 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 2021, the backlog of open cases was 545 compared with 451 a year earlier, which represents a 21% increase. This further worrying growth is the result of an accelerating increase in the number of case referrals compared with admittedly very high – but slower – growth in case closures.

CONSTANTLY MORE CASES COMING WITHIN THE JURISDICTION OF THE AMF OMBUDSMAN

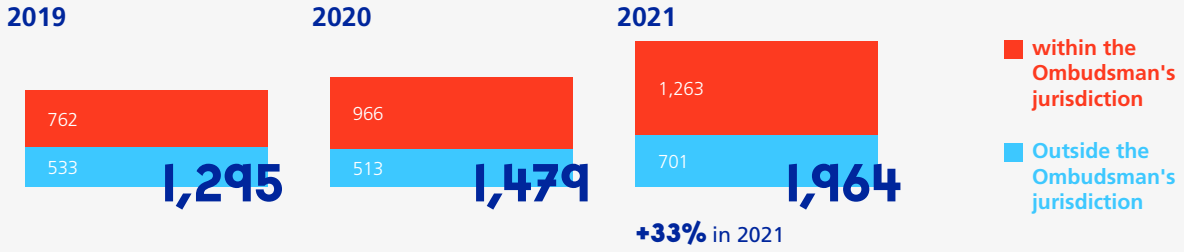
On arriving, the cases received are examined for their admissibility. Some are then closed on various grounds: a dispute not coming within the jurisdiction of the AMF Ombudsman, absence of prior complaint, late case referral (when the prior complaint was made more than one year ago), case referred to another ombudsman (a case cannot be referred to two ombudsmen at the same time or following the same dispute), legal proceedings (when legal action has been taken, it can no longer give rise to mediation), or a request that proves to be a consultation or else an alert and not a mediation request.

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 703 cases outside the Ombudsman's jurisdiction that were processed and closed in 2021 (compared with 518 in 2020), 353 (i.e. 50%) concerned the banking sector.

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, 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.

CHART 1

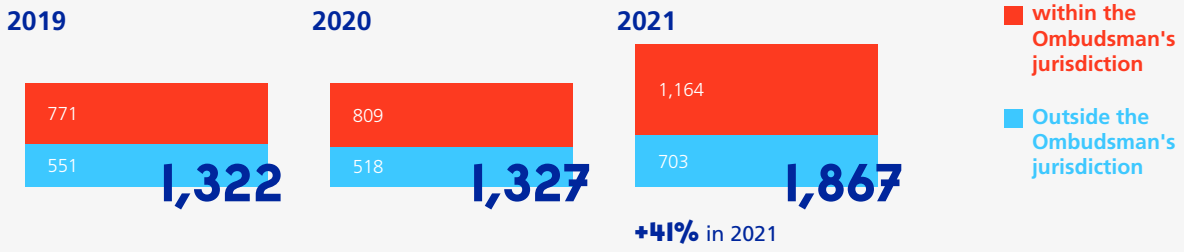
NUMBER OF CASES RECEIVED



+33% in 2021

CHART 2

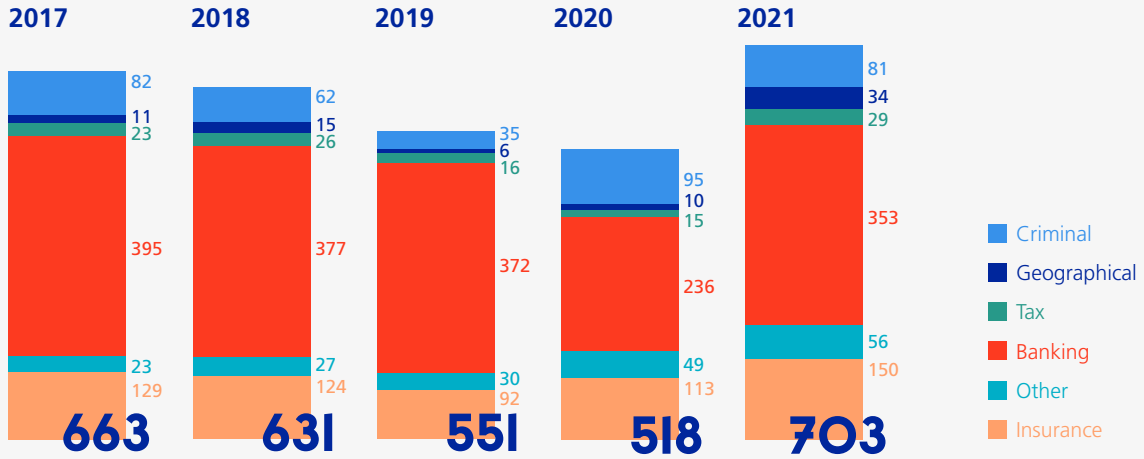
NUMBER OF CASES PROCESSED



+41% in 2021

CHART 3

DETAILS OF LACK OF JURISDICTION PROCESSED



Cases in the banking sector also include case referrals by retail investors who are victims of online bank card scams, which appear to have exploded since the health crisis, disputes related to funds transfers, means of payment, credit, etc. Case referrals concerning retirement savings contracts under the insurance regime (PERP, Madelin, "Art. 83"), mutual health funds and non-life insurance (fire, accidents and miscellaneous risks), for their part, come within the insurance sector.

Regarding digital asset service providers (DASPs), e.g. for Bitcoin, the Ombudsman's Office may be referred to by a consumer only if the firm has been registered with the AMF. Regarding investment service providers, the AMF does not have jurisdiction when a financial institution is located in a European country and operates under the free provision of services in France (without being established in a stable manner in France). In that case, the AMF Ombudsman refers the plaintiffs to the

CHART 4

REASONS FOR CLOSING THE 1,867 CASES PROCESSED IN 2021 COMPARED WITH 2020

1,867
CASES PROCESSED IN 2021

+41% COMPARED WITH 2020 (1,327)

703
cases processed outside the Ombudsman's jurisdiction

Lack of jurisdiction type	No. of lack of jurisdiction cases processed
Banking	353
Life insurance	150
Criminal	81
Geographic	34
Tax	29
Other	56

1,164
CASES PROCESSED WITHIN THE OMBUDSMAN'S JURISDICTION IN 2021

+44% COMPARED WITH 2020 (809)

259
cases not processed on their merits

Reasons for closing	No. of cases closed
Premature request	169
Request reclassified as consultation	15
Request reclassified as alert	27
Late request	2
Legal proceedings	9
Submitted to another Ombudsman	10
Not able to be processed	15
Other	12

905
MEDIATION PROCEDURES INITIATED IN 2021

+56% COMPARED WITH 2020 (580)

142
cases suspended

Reasons for closing	No. of cases closed
Abandoned by the applicant	102
Mediation procedures rejected or abandoned by the firm (of which 13 by the same asset management company)	40

763
OPINIONS ISSUED IN 2021

+51% COMPARED WITH 2020 (505)

ombudsman provided for in the provisions of the contract – usually the ombudsmen of the financial institution's home country. With regard to DASPs and firms under Freedom to Provide Services, see page 46.

However, 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).

Disputes concerning a professional plaintiff do not come under consumer mediation. Conventionally, the AMF Ombudsman's Office agrees to investigate disputes brought by legal entities, such as real estate companies ("SCIs"), non-profit organisation and pension funds when the subject of the dispute concerns a financial investment.

For cases outside the Ombudsman's jurisdiction for which the dispute reveals a strong suspicion of a criminal offence, mediation with a view to a friendly settlement cannot be entered into. Moreover, a request which is not entitled to mediation is therefore not covered by confidentiality. The most serious cases are therefore sent to the Public Prosecutor (69 cases out of 81 in 2021) by the AMF Legal Affairs Directorate pursuant to Article L. 621-20-1 of the Monetary and Financial Code.

1,164 CASES PROCESSED WITHIN THE AMF OMBUDSMAN'S JURISDICTION

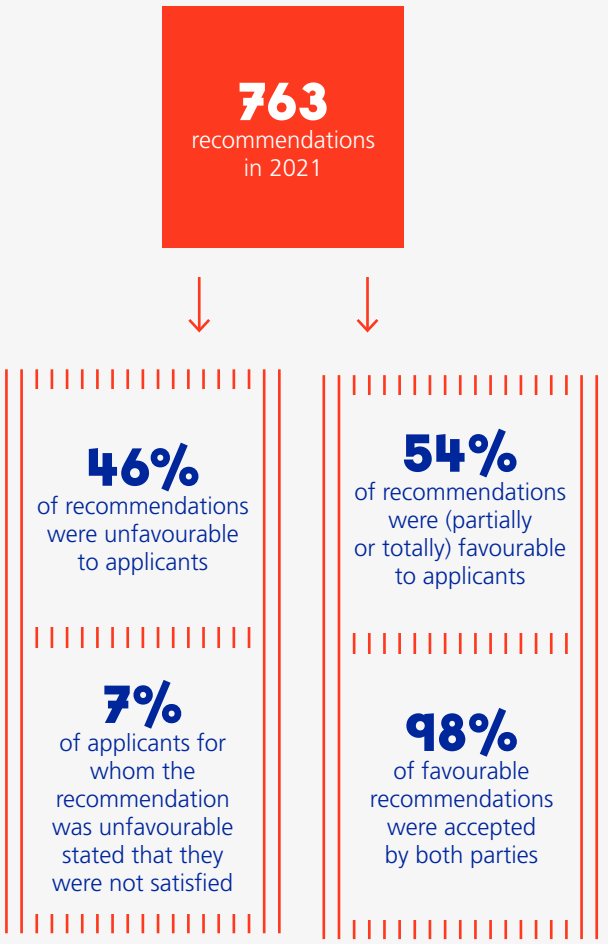
Of these cases, 401 were processed without a decision having been proposed:

- **169** 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;
- **15** cases were closed because they could not be processed;
- **9** because they were the subject of legal proceedings incompatible with mediation, which is an amicable process;
- **10** 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 competent AMF staff for monitoring;
- **15** cases were reclassified as consultations, as they raised questions for the Ombudsman but no dispute was referred;
- **102** cases were closed because they were abandoned by the plaintiff, 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;
- **2** were rejected for late case referral, because the prior complaint was made more than a year ago, which provides grounds for inadmissibility;
- In **40** cases, mediation was refused by the firms, versus 17 cases in 2020. As a reminder, the confidentiality governing mediation protects only those parties entering into mediation and not those which refuse to do so. When the exercise of this occasional right, of which the AMF staff are informed, becomes systematic, the Ombudsman considers that said firm no longer guarantees effective recourse to a consumer mediation system, as per its legal obligation under Article L. 612-1 of the French Consumer Code. The Ombudsman mentions the firm by name in her annual report, as was the case for Nestadio in 2020;
- **12** cases for other reasons.

The sharp increase in mediation rejections compared with 2020 (40 versus 17) is chiefly due to forex type cases (20 cases) and various financial investment advisers (16 cases).

CHART 5

BREAKDOWN AND ACCEPTANCE OF OPINIONS ISSUED IN 2021



763 OPINION PROPOSALS

These 763 opinion proposals, also called "Ombudsman's proposals" to comply with the specific regulations of the French Consumer Code, were favourable to the plaintiff in 415 cases (i.e. 54%) and unfavourable in 358 cases (i.e. 46%). A high rate of favourable recommendations cannot be an objective in itself, since the nature of the proposal depends on the intrinsic characteristics of the case, i.e. the merits of the request.

In 2021, the cases processed and closed concerned 362 different firms (294 in 2020):

Investment service providers, financial investment advisers, market operators, unregulated service providers, listed companies, asset management companies, and digital asset service providers. The vast majority of cases (82%) were related to investment service providers.

The rate of compliance with the Ombudsman's proposals is expressed in two ways. On the one hand, 98% of the proposals, when they are favourable to the investor, are complied with by both parties. On the other hand, only 7% of the proposals unfavourable to investors are disputed 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. In the event of persisting disagreement, however, 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, throughout the mediation period, the prescriptive period is suspended.

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 2021, like in previous years, the top two categories of complaints represented 90% of mediation cases processed. Mismanagement accounted for only 5%.

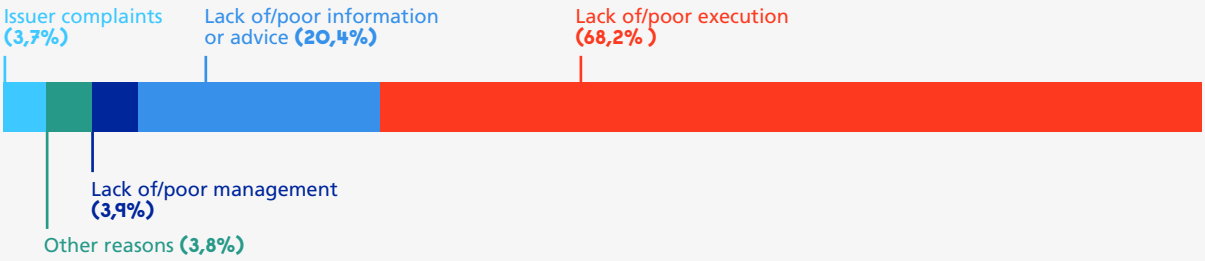
Each year, the topics addressed differ widely, as illustrated by the Ombudsman's Online Diary, which is published monthly on the AMF website (see Annex 4 to the report, page 55).

MAJOR TRENDS BY SECTOR IN 2021

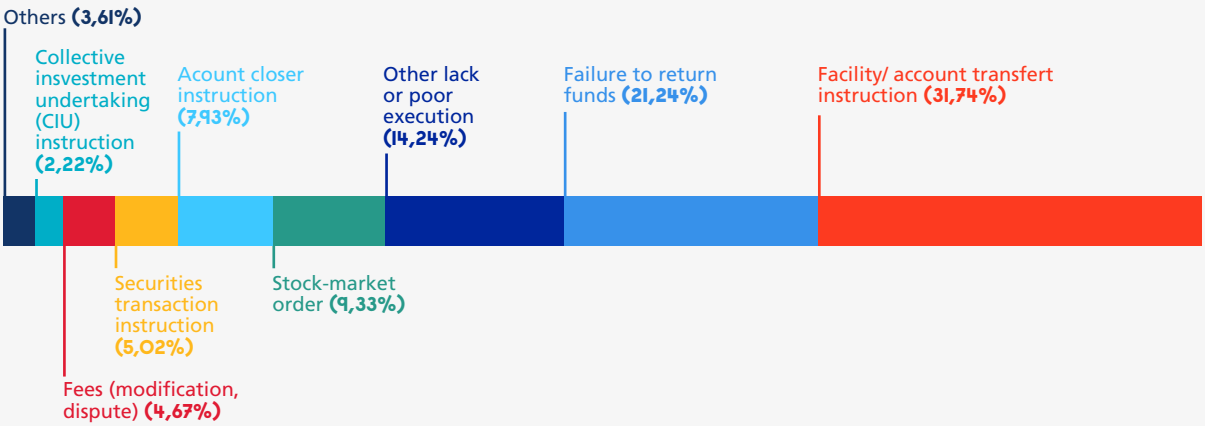
- Cases concerning "PEA" personal equity savings plans, especially the length of time for requested transfers, have become the main reason for disputes;
- There are many serious misunderstandings concerning corporate actions: procedures and consequences;
- Many cases again concerned problems of order execution in the stock market and net asset values of UCITS;
- Case referrals relating to employee savings schemes decreased for the first time and are no longer the main subject of dispute;
- Relatively few crypto-asset cases come within the jurisdiction of the AMF Ombudsman.

CHART 6

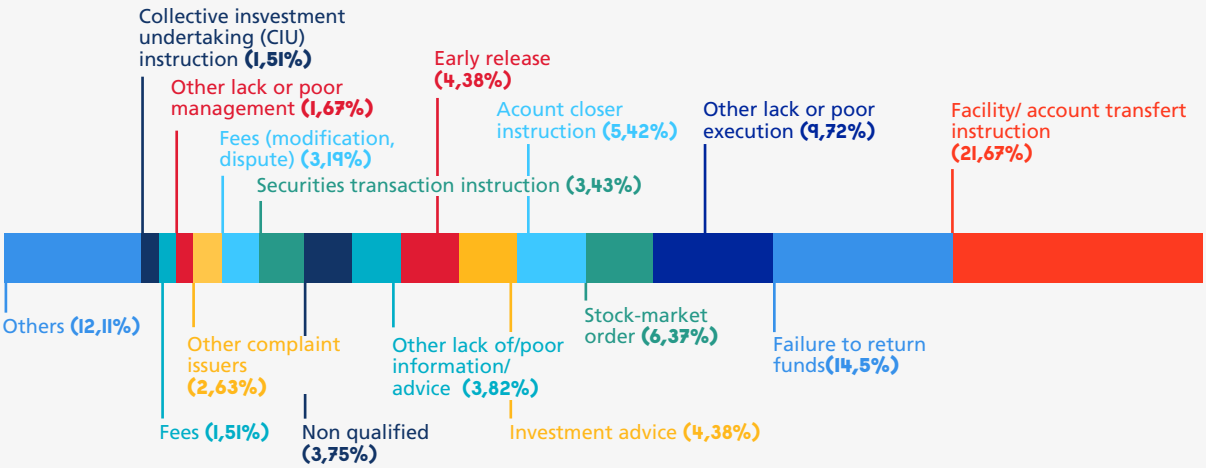
REASON FOR COMPLAINT IS NOT EMPTY



REASON FOR COMPLAINT IS LACK OF/POOR EXECUTION IN 2021



REASON FOR COMPLAINT IS LACK OF/ INFORMATION OR ADVICE IN 2021



DURATION OF MEDIATION

In accordance with Articles R. 612-2 and R. 612-5 of the French Consumer Code, 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 that this period begins when the ombudsman has received the documents on which the request is based, i.e. all the documents necessary to carry out the procedure. The AMF Ombudsman's charter, in the spirit of the European legislation, reiterates that once the Ombudsman has received all the relevant information from all parties, she has 90 days to issue her decision. 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.

Given the time needed to obtain a full reply from the firm (a time which is limited neither by the legislation nor by a professional obligation, which could be regrettable), the period following case referral to the Ombudsman may be longer than 90 days, especially when the case is complex. Hence, in 2021 the process as a whole – i.e. until the date of issue of the Ombudsman's decision which marks the end of mediation – lasted six months on average, with a median of four and a half months.

Processing times have deteriorated by comparison with 2020, which can be explained by the spectacular increase in the number of cases received and processed. Despite the efforts made by the AMF Ombudsman, which allowed an exceptional increase in the number of decisions issued (+51%) and cases processed in 2021, this extra workload led to an increase in the backlog, which cannot fail to have consequences for completion times in the near future.

In the event of a favourable decision, the Ombudsman will wait for the reply from the investor, who generally has 30 days for this purpose. Upon request, and exceptionally, the Ombudsman may, over and above her duties which are legally completed, 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.

In 2021, average processing times resulting in a decision from the Ombudsman were as follows:

4 months: between receipt of the complainant's case and when it was complete, with a median of two and a half 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 being less proactive than others.

6 months: between receipt of the complainant's case and the issuance of the Ombudsman's decision, with a median of about four and a half months.

60 days: between completion of the case and issuance of the Ombudsman's decision, with a median of 28 days. The AMF Ombudsman's Office is therefore well within the time frame imposed by European regulations, which must be less than 90 days.

In cases of inadmissibility, and in accordance with Article L. 612-2 of the French Consumer Code, consumers shall be informed by the Ombudsman within a period of three weeks after receiving their case. In 2021, notice of inadmissible mediation requests was given to the plaintiffs within 26 days on average, with a median of 11 days.

The increase in the workload also increased the length of this period, but admittedly, in some cases, the conclusion of inadmissibility may prove complex and tricky, e.g. in cross-border cases because of the applicable law and the Ombudsman's jurisdiction.

RESULTS ACHIEVED BY MEDIATION IN 2021

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

- either **to obtain execution of an instruction** (61% of favourable decisions accepted);
- or **to obtain reparation for the loss through compensation** (39% of favourable decisions accepted). In 2021, the total amount of compensation obtained was €555,273, compared with €533,562 in 2020.

Out of all cases closed in 2021, 415 favourable recommendations were made, including 161 financial recommendations. For those 161 financial recommendations, goodwill gestures ranged from €33 to €49,000, with an average of €3,537 and a median of €460.

Of the forex cases closed in 2021, 3 favourable recommendations were made, including 2 financial recommendations. For those two financial recommendations, the goodwill gestures were €3,000 and €27,260.

Of the employee savings scheme cases closed in 2021, 66 favourable recommendations were issued, including 30 financial recommendations.

For those 30 financial recommendations, goodwill gestures ranged from €47 to €44,543, with an average of €3,682 and a median of €176.

François Denis du Péage, Deputy Ombudsman

2 A YEAR RICH IN CORPORATE ACTIONS (CAS) WHICH RESULTED IN INCREASED DISPUTES

In 2021 the number of corporate actions increased on the back of the booming stock market: for example, about forty public offers were lodged with the AMF, more than 30 new issuers made initial public offerings on Euronext and Euronext Growth, and the pace of capital increases remained sustained. This dynamic naturally resulted in a sharp increase in mediation requests relating to this subject, illustrating the variety of issues that can occur on the occasion of a corporate action. Accordingly, cases received by the Ombudsman relating to a corporate action doubled between 2020 and 2021.

Takeover bids, mergers, squeeze-outs, spin-offs, capital increases, dividend payments, etc. are all operations that can take place within the life of a security. Accordingly, given the diversity of corporate actions, it is easy to imagine the difficulties retail investors have understanding them, as they do not necessarily have expertise regarding the specific features of each of them.

As a reminder, there are two main categories of corporate action, distribution CAs and reorganisation CAs: these two categories can sometimes be combined in one single corporate action. While it is true that the disputes referred to Ombudsman mostly concerned reorganisation corporate actions, she has also had to investigate mediation requests concerning certain distribution corporate actions.

DISPUTES RELATING TO A REORGANISATION CORPORATE ACTION

A reorganisation is an event during which the original securities may be replaced by securities and/or cash. These actions may be mandatory, mandatory with options or voluntary, i.e. for the holders to decide. They are sometimes accompanied by a distribution.

Retail investors' misunderstanding of the mandatory nature of certain corporate actions

When a reorganisation CA is of a mandatory nature, i.e. when it has a direct impact on the security subjected to the corporate action, the shareholders, for whom there was no possible choice, very often express their misunderstanding or even indignation.

That was the case this year for many shareholders of Natixis, whose securities were subjected to a squeeze-out in July 2021, following a simplified takeover bid. More than fifty of them accordingly referred the case to the Ombudsman in order to dispute this corporate action carried out without their consent.

While the main complaint of these plaintiffs of course concerned the unilateral and forced nature of the share retirement and the amount of the compensation, considered far below their expectations, in some cases the underlying objection concerned the marketing of Natixis shares at the time of the initial public offering in 2006. The Ombudsman was unable to give any favourable response to all the requests received, whatever the complaint made. Regarding the failure to inform and advise claimed by certain investors, the Ombudsman explained the statute of limitations rules in this respect, concluding that in light of the five-year limitation period of Article 2224 of the French Code of Civil Law[1],which governs personal legal actions on securities, i.e. efforts to involve the liability of the financial intermediary, she considered that this limitation period had expired long ago.

With regard to the objection to the simplified takeover bid, followed by the squeeze-out of Natixis shares, the Ombudsman was led to explain precisely the legal basis of these operations and the process of investigation of the bid's compliance performed by the AMF. In particular, she gave a reminder that in this case, the AMF had examined the arguments presented by the minority shareholders of Natixis and had noted that the valuation methods used and the price at which the public offer was made, taking into account the squeeze-out planned by the initiator if the conditions were met, were in compliance with the principles laid down by the legislator, by the General Regulation and by established legal precedents.

Regarding the squeeze-out, the Ombudsman indicated to the plaintiffs that pursuant to Articles 237-1 et seq. of the AMF General Regulation, insofar as, on completion of the simplified takeover bid the minority shareholders represented no more than 10% of the capital and voting rights of Natixis, BPCE had implemented a squeeze-out procedure so as to obtain the transfer to it of the Natixis shares not offered in response to the bid, in return for compensation of the shareholders equal to the bid price, i.e. €4 per share, ex-dividend.

The Ombudsman frequently had to give a reminder in these various cases that although a choice was indeed open to the shareholders and it was possible for them not to offer their shares in response to the bid at the stage of the simplified takeover bid, on the other hand they could in no case elude the squeeze-out procedure which followed.

She then told each plaintiff that she could easily understand that the terms of the bid were deeply disappointing, but that this bid nevertheless complied with the applicable rules.

Investors' misunderstanding is also evident when a share consolidation operation takes place, which involves reducing the number of shares outstanding without altering the registered capital of the issuer company. In this corporate action, an exchange parity is set based on which the old shares are exchanged for new shares. But it is precisely this exchange that is disputed by shareholders when they observe that, following the corporate action, they own fewer shares.

Thus, in a case which was submitted to her, the Ombudsman had to explain to the plaintiff that a share consolidation had no impact on the value of the shareholder's portfolio. Indeed, the shareholder owns fewer shares but the value of each share has increased, as the share price increases in proportion to the reduction in the number of shares outstanding. To back up her argument, the Ombudsman gave a demonstration based on a comparative analysis of the plaintiff's portfolio before and after the consolidation. In the case in point, the ratio being 1 new share for 25 old shares, the plaintiff who owned 800 shares had obtained 32 new shares (800÷25) and the share price, on the day of the consolidation, had accordingly been multiplied by 25:

	Before consolidation	After consolidation
Number of shares	800	32
Share price	0,19099	4,77475
Total amount	USD 152,792	USD 152,792

The Ombudsman therefore gave explanations why she could not respond favourably to the investor's request.

In another case, following the split-up between Merck & Co and Organon & Co, the plaintiff, a shareholder owning Merck & Co securities listed on Euronext Paris, found himself owning Organon & Co shares listed on the NYSE. Having noted that the brokerage fees were higher on the NYSE, he considered that his account-keeper ought to have allowed him a choice to avoid finding himself with three Organon shares for which he would have to pay 50 euros to divest. The Ombudsman therefore reminded him that a split-up is a reorganisation corporate action which the shareholder cannot oppose and that his intermediary was, indeed, required to inform him of this but did not have to propose an alternative for him given that it was not an optional corporate action with a choice for the investor.

Moreover, the Ombudsman detected that subsequent to the corporate action, Merck's share price had remained roughly unchanged, and indicated this to the plaintiff when rejecting his request. The plaintiff having kept in the portfolio his Merck shares, whose valuation had not declined following the corporate action, he now also owned three Organon shares, worth 90 euros.

The traditional problem of information prior to a corporate action

For some years now, the Ombudsman has been referred to regularly for disputes relating to the information provided to clients prior to a corporate action. Most of these cases concern capital increases and in particular the time limit to take part in them. Reforms in this area, together with the possibility for account-keepers to shorten this time for reasons of administrative processing of subscriptions, have undoubtedly contributed to a certain confusion on the part of investors.

[1] Article 2224 of the French Code of Civil Law: *"Legal actions in personal and securities cases are statute-barred by five-year periods from the day when the owner of a right knew or ought to have known the events enabling him to exercise said right."*

WORTH KNOWING

A capital increase is a mandatory reorganisation CA with options, possibly preceded by a rights distribution. On this occasion, the shareholders of the company in question are awarded preferential subscription rights (PSRs) in proportion to their equity stake.

They may then, at their convenience, either exercise these rights, i.e. subscribe for new shares at a lower price before the end of the subscription period, or sell them on the market throughout the rights trading period (listing period), since the preferential subscription rights are themselves listed on the stock market.

The preferential subscription rights not exercised may therefore be traded on the stock market and acquired by investors, who may then take part in the capital increase by exercising these rights and thus become shareholders in the company.

Lysiane Flobert, Assistant Ombudsman

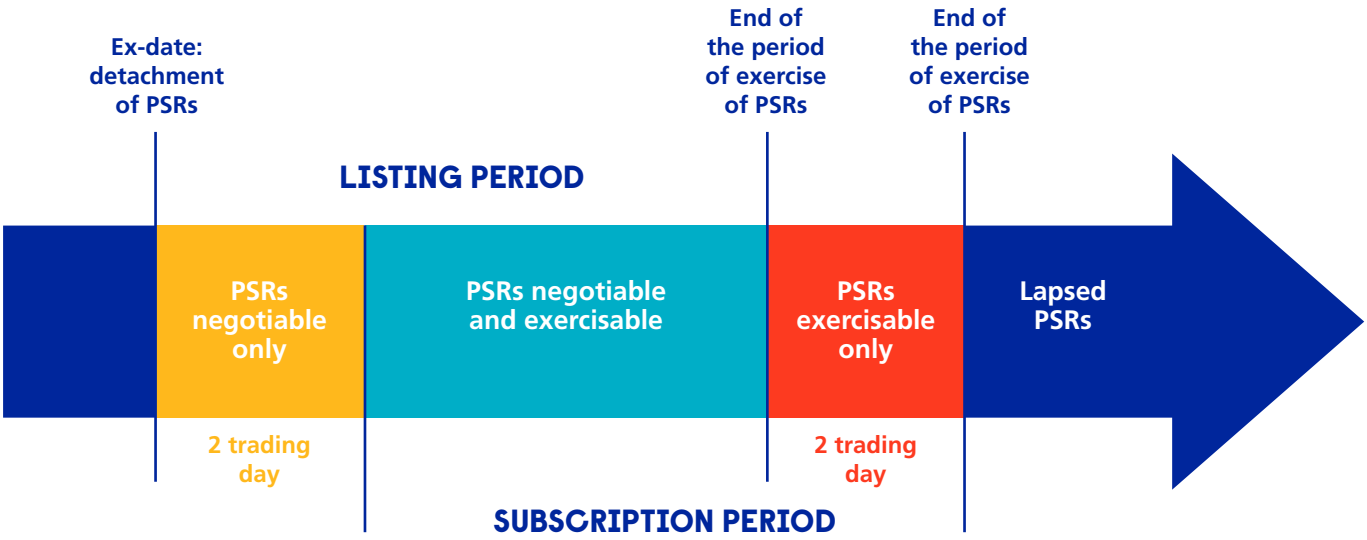
In these cases, investors generally claim that they did not receive prior information, or did receive information that was evidently not clear about the deadlines or the procedures for participation.

Regarding the lack of prior information: in a case received in 2021, the plaintiff stated that he received the notice of corporate action after the deadline, i.e. the letter informing him that a capital increase was initiated by the company in which he was a shareholder. He specified that this information had been sent by post, and received when the corporate action was closed. Disputing the delay in sending the notice of corporate action and the absence of alternative means of communication, he requested a rectification of the situation. In reply to the Ombudsman's request, the account-keeper stated that it had informed the plaintiff prior to the capital increase giving rise to the dispute, by posted letter, by pop-ups on the equity data sheets and by two emails informing him that a notice of corporate action was available from the customer area on its website. The Ombudsman therefore reminded the plaintiff that the account-keeper must effectively inform the investor of the capital increase, of the awarding of preferential subscription rights to them, of the various options available to them and of the timing of the corporate action (in particular the deadlines for trading and exercise of the rights). This information must be universally available and not user-specific: this means that the information must not only be available in the customer area, but that it must be delivered to the customer personally and directly.

The Ombudsman noted that in addition to the pop-ups appearing on the equity data sheet for both the security and the preferential subscription right (information available to the clients), the firm, in accordance with Article 322-12 II of the AMF General Regulation, had sent to the plaintiff personally and directly information relating to the capital increase of the company in which he was a shareholder. She therefore issued an unfavourable decision to the plaintiff.

In another case, the investor wanted to take part in a capital increase by buying preferential subscription rights on the market and accused his intermediary of not having informed him of the timing of the corporate action. Since he was not a shareholder prior to the corporate action, this investor had obviously not received a notice of corporate action. The Ombudsman observed that the account-keeper had nevertheless put in place an alert window which opened automatically whenever the data sheet for the security in question was consulted, and considered that this was a good practice allowing anyone interested in buying the preferential subscription rights to immediately have access to the information, notably as regards the timing and the deadline for exercising their rights. She therefore issued an unfavourable decision to the plaintiff.

→ See the Case of the Month, March 2021: *Preferential subscription right: investors, even non-shareholders, must be properly informed*



Regarding the content of the information: as the Ombudsman has already had occasion to mention in certain Cases of the Month or in a previous annual report (see the 2017 Ombudsman's Report, pages 32-35), Article L. 225-132 of the French Commercial Code, as amended by the Ordinance of 31 July 2014, stipulates that the trading period for preferential subscription rights opens two days before the subscription period and therefore also ends two days earlier.

Now it can happen that the information sent to clients by the account-keepers is not sufficiently clear regarding the time limits for the exercise and trading of their preferential subscription rights. This was so in a case received in 2021 where the date mentioned for exercising preferential subscription rights, while buying the lacking PSRs needed to subscribe to a whole number of new shares, did not take into account the fact that the trading period for said rights ended two days before the end of the subscription period. The shareholder whose instructions had arrived after the deadline, had, as a consequence of this information error, been served to the next lower unit, since they had not been able to acquire the rights they lacked in the market. Recognising its error, the institution involved agreed to rectify the situation for this shareholder: the firm therefore acquired the three missing new shares at its own expense and, as a commercial gesture, repaid to the client the amount paid for the purchase of the six preferential subscription rights which, in principle, should have been able to be exercised for this purpose.

It can also happen that the time is shortened by the financial intermediary itself, given the material and logistic formalities that it has to perform. In this case, the timing of the corporate action published by the issuer is no longer sufficient, and investors must also check the timing required by their own account-keeper. The same holds in the case of a safeguard clause, contained in the securities account agreement and/or sometimes in the notice of corporate action, which stipulates that in the absence of instructions given by the investor before the expiry of the periods mentioned in the notice of corporate action, the account-keeper may, in accordance with certain general provisions of the securities account, carry out a sale of the rights, generally on the last day of trading (which reduces this period de facto), in order to at least protect the rights of clients which would otherwise become no longer valid.

In another case, this time concerning a combined public offer, the lack of details did not concern the time limits but the channel to be used to send the instructions. The plaintiff, who had received the notice informing him of this corporate action by email, had sent his instructions by replying directly to the email received, without receiving a notification of non-delivery or of a failure of submission to the recipient. His instructions had not been taken into account on the grounds that the notice of corporate action had been sent in "no-reply" mode and that he ought not have replied to that address. The Ombudsman then observed that this stipulation did not appear in said email and that it was not possible to detect that the address was in "no-reply" mode. Recognising that the notice of corporate action lacked clarity regarding the channel that could be used to reply, the firm agreed to rectify the plaintiff's situation and informed the Ombudsman that in future it planned to change the content of the emails sent to its clients concerned by corporate actions in order to avoid this type of dispute.

→ See the Case of the Month, September 2021: *Securities transactions: the importance of providing information about the possible reply procedures*

A “gradual” corporate action: the exercise of equity warrants

Certain corporate actions are said to be gradual: in the issue agreement the issuer defines one or more periods of exercise not comprising one single deadline for the corporate action but for which requests are made gradually by the holders. This notably covers the exercise of equity warrants which contribute to a gradual capital increase and which concerned one case submitted to the Ombudsman in 2021.

The plaintiff, a shareholder of company M, stated that he had received a free issue of equity warrants in January 2020, amounting to 1 warrant for 1 existing share held – 10 equity warrants then making it possible to subscribe to one new ordinary share at a price of €2.70. But a few months later, the plaintiff realised that the 600 equity warrants that had been awarded to him had expired without him being able to exercise them. He therefore considered he was the victim of a lack of information from his account-keeper, which had deprived him of the possibility of subscribing to 60 new shares at an attractive price. He based his claim on a phone call to customer service during which his attention was not drawn to the coming expiration of his warrants.

The account-keeper expressed its observations and stated that an email, providing information on the conditions of participation in the corporate action and specifying the date of expiry of the equity warrants, on 18 May 2020, had been sent to the plaintiff as of 21 January 2020, as attested by its reporting statement, a copy of which was forwarded to the Ombudsman. In addition, the account-keeper also forwarded the recording of the calls made by the plaintiff to the customer service. Now, the Ombudsman listened to these telephone recordings, which showed that the first call, prior to the deadline for exercise of the equity warrants, concerned neither their date of expiry nor the procedures for exercising them, and that the second call admittedly addressed this question but was dated 22 June 2020 when the plaintiff had already exceeded the deadline for exercising his warrants. The Ombudsman therefore considered that no lack of information was established in this case.

The specific feature of foreign corporate actions: the issue of delegation of custody

Although retail investors prefer to invest in domestic assets, a growing number of them are investing in securities listed outside France. This desire to diversify their portfolio is highly commendable, but the specific features, and even difficulties, relating to an investment in a company listed on a foreign stock market should not be ignored by these investors. In addition to the possible language barrier and exposure to currency risk (for securities outside the European Union), there are specific legal features, notably with regard to share custody.

In a case received in 2021, the plaintiff was a shareholder in an American company, who called into question the time for delivery of the new shares attributable to him following a merger with another issuer, which had listed on the NYSE as of 2 October 2020 at a price of 44 dollars. However, due to a delay that he considered attributable to his account-keeper, his new shares had been recorded on his account only on 8 October, with a 35% discount. Considering that he had been deprived of the possibility of selling his shares at a more favourable price, the plaintiff requested compensation for the amount of his lost earnings.

Eloïse Senkur, Legal Advisor

When questioned by the Ombudsman, the account-keeper stated that it had delegated custody of foreign shares to a service provider itself using the services of a service provider based in New York, which inevitably entailed longer processing times compared with those of securities for which the central depository is Euroclear. Moreover, it added that it had recorded the shares on the plaintiff’s securities account as soon as it received the notices of processing by its service provider substantiating receipt of the new shares. The Ombudsman noted that 2 October 2020, the first trading day post-merger, was a Friday. Therefore, eliminating Saturday 3 and Sunday 4 October, it appeared that a period of four days had been needed to record the new shares on the plaintiff’s securities account. Now, in the case of foreign securities outside the Euroclear scope, the Ombudsman pointed out that, given the custody circuit in which numerous entities take part, she did not find it abnormal that the customary times for processing a corporate action should be inevitably longer, and the time noted in this case was not excessive, moreover.

In another case processed this year, the Ombudsman examined a completely novel issue: the use of a pooled account known as an omnibus account.

The plaintiff, a shareholder in company W, stated that the company’s annual general meeting had decided on a mandatory buyback at US$1.48 per share from shareholders owning less than 1,000 shares.

The plaintiff, who owned 999 shares, had contacted his account-keeper to make sure that the corporate action would be carried out and that he would receive $1.48 per share held. After a positive reply was given to him initially, the account-keeper finally told him that it was not able to make the expected payment to the cash balance of his securities account since the W shares held by all its clients were held on a pooled account with its custodian. Thus, given that, as account-keeper, its overall position in W shares exceeded the threshold of 999 shares, the plaintiff was not eligible for payment in cash. Disputing this decision and considering that he had been deprived of the possibility of taking part in this corporate action, the latter requested compensation for the amount of €1.48 per share.

Questioned by the Ombudsman, the firm maintained its decision, based on a provision of its general conditions which specified that *"the client's financial instruments may be held on a pooled account and the firm could make use of sub-depositories, which could be established outside the EU, subject to a legal system other than that of a Member State, and having an influence on the rights related to those financial instruments, and in particular a right of shared co-ownership, at the expense of a right of personal ownership"*. It added that this was the case with regard to the stock W for which it used a sub-custodian.

After a thorough investigation of the case, the Ombudsman returned to the firm and asserted her analysis. She told it in particular that although it was true that when national legal systems so authorise, holding by a third party, sub-custodian, of a foreign security acquired by a client in a pooled ("omnibus account") is possible, it is nevertheless incumbent on the investment firm to inform the client of this by displaying a warning notice regarding the risks this entails very clearly, as set out in Article 49 of European Delegated Regulation 2017-565.

Now, according to the Ombudsman, the fact that this firm mentions this risk (moreover, only in a very general way) only in one of the articles of the general conditions did not seem to her sufficient to comply with this particular requirement, even though the right of personal ownership can be greatly affected by this rule.

In the case in point, the Ombudsman considered that the client, even though he was notified, had effectively lost a chance not to enter into a contract, if his attention was not drawn specifically, at the time of subscription, to this mechanism which adversely affected his right of ownership over the shares acquired. The Ombudsman therefore asked the firm if it would agree to reconsider its decision. The firm in question told her that it agreed to make improvements in terms of information for the clients on this precise point and that it agreed to compensate the client for the difference between the price proposed within the framework of the corporate action and the price at which he could have sold his shares.

OMNIBUS ACCOUNT AND SEGREGATION OF ASSETS

An omnibus account, also called "pooled account", is an account on which the financial instruments of several clients are grouped together in a single account, opened with a sub-depository. This grouping together without distinction can raise questions with regard to the principle of segregation of accounts.

The segregation of accounts is an accounting technique which enables a financial intermediary to separate the assets that it holds on its own account from those that it holds on behalf of its clients when these assets are held in custody by a third party (central depository or sub-custodian) and to separate the assets that it holds on behalf of its clients in accounts identified for this purpose. In the case of a custody chain, this obligation of segregation of accounts applies to all levels of the chain, whenever the depository or the sub-depository is established in the European Union.

However, as illustrated by the case processed in 2021, when a client's financial instruments are held by a sub-depository established outside the European Union, they could be registered in a pooled account of the sub-depository making it impossible to separate the client's assets. As a result, due to the local legislation, the latter may be unable to identify the client's financial instruments separately, not only from those of other clients, but also from its own assets. In such a case, apart from the issue of the individual rights attached to the capacity of shareholder (participation in a corporate action, exercise of the voting right, etc.), the client's right of ownership may not be protected, especially in the case of insolvency of the sub-depository.

DISPUTES RELATING TO A DISTRIBUTION CORPORATE ACTION

Distribution CAs concern the events by which the issuer of a security presents the holders with a product (e.g. cash, securities, rights, etc.) which does not affect the security giving entitlement to a distribution. These events may be mandatory or mandatory with options, but are never decided by the holder.

Regarding this category of corporate actions, the disputes submitted to the Ombudsman usually concern the detachment of a dividend. In 2021, however, many shareholders (in different companies) referred the case to her following a distribution of bonus shares, not understanding the accounting transactions taking place on their securities account or PEA plan, the origin of which proved to be a tax deduction.

The condition of eligibility for the dividend: having acquired shares no later than two days before the record date, which is something that investors sometimes ignore

As the Ombudsman had occasion to clarify in her Case of the Month of April 2018, if the investor buys shares subsequent to detachment of the dividend, the purchased shares do not entitle them to the distribution. It is this principle that the Ombudsman had to recall in a case received in 2021 in which the plaintiff complained that he had not received the dividend distributed by the company in which he had acquired shares. Now, in light of some answers provided by his account-keeper and after analysing the conditions of this distribution, the Ombudsman confirmed to the plaintiff that he was not eligible for it. The Ombudsman reminded him that cash distributions are enjoyed only by those shareholders registered at the end of the day on the record date. However, given the relevant time for settlement and transfer of ownership no later than D+2 (D being the date of the trade), the last day on which the security is traded with a right to distribution is therefore two trading days before said record date, and the securities trade ex-right, i.e. without entitlement to the dividend distribution, from the start of the following day (ex-date or detachment date). In the case in point, the plaintiff had bought his shares on the day of the record date and subsequent to the date of detachment of the dividend. The Ombudsman nevertheless stressed that his buying price had been lower insofar as, on the day of detachment, the share price in question was automatically reduced by the amount of the dividend.

→ See the Case of the Month, April 2018 : *Identifying the date on which shareholder status grants the right to receive associated dividends*

Wrongful application by a firm of the default option in the case of an optional dividend

In other, more frequent cases, the dispute concerns the processing of the client's instructions by the bank, especially in the case of a distribution offering a choice to the shareholder. It is not uncommon for issuers to propose to their shareholders to opt for payment in cash and/or in shares. The treatment of an optional dividend was, for example, the subject of a mediation request received in 2021, where the shareholder said he had opted for a scrip dividend but had received cash. Although he had sent his instructions within the required time limits, the default option had been applied in his case, namely a cash payment.

In this case, the firm admitted a dysfunction in its handling of the instructions of this client and agreed to buy the 127 shares initially wanted, and to debit the cash account of the PEA plan for a total amount corresponding to the subscription price set for the shares in the case of the optional dividend and to pay for the difference in price.

A lack of payment of a dividend in 2020 justified by the recommendations of the ECB

When investigating a case relating to the squeeze-out on Natixis shares, it was found that the plaintiff also claimed that he had not received a dividend in 2020 for the Natixis shares that he owned. Regarding this point, the firm specified that in 2020 Natixis had not paid a dividend on the 2019 earnings, in response to the request by the European Central Bank (ECB) to suspend all dividend payments.

After analysis, the Ombudsman confirmed to the plaintiff that it was perfectly true that, on 30 March 2020, the European Central Bank had published Recommendation ECB/2020/19 relating to dividend distribution policies during the Covid-19 pandemic.

Through this Recommendation, the European Central Bank ruled it advisable for major credit institutions to abstain from distributing dividends and carrying out share buybacks to remunerate shareholders during the period of the Covid-related economic shock. This recommendation was extended until 1 January 2021 through the adoption of Recommendation ECB/2020/35.

The Ombudsman added that these recommendations were a result of the health situation faced by us since the start of 2020 and that to enable credit institutions to continue to perform their role of providing financing, it seemed necessary for these institutions to conserve as much shareholders' funds as possible to maintain their ability to support the economy in a context of heightened uncertainty caused by the pandemic.

In light of these prudential rules, the Ombudsman said that she had no means of taking useful action with the firm regarding this complaint.

Processing a share distribution: application of the tax treatment of dividends often not known by investors

Many retail investors referred to the Ombudsman following a share distribution, very often made in the context of reorganisation corporate actions such as a merger or split-up, for which they disputed the tax treatment. While the Ombudsman does not have jurisdiction on tax matters (and it is important to remember this), it may happen, given the complexity of this type of question and the difficulties faced in obtaining answers, that she questions the firm for information in order to receive explanations that she passes on to the investor concerned. Apart from the pure tax issue, the aim is also to inform the plaintiff, who very often does not understand the accounting movements appearing on his account.

In 2021, the Ombudsman was referred to by a shareholder who, following the TechnipFMC share split, had received one Technip Energies share in return for five TechnipFMC shares but had been debited 30% of the amount (i.e. €1,778.40). He considered that his account-keeper had regarded this corporate action as a dividend payment and had (wrongly) debited the tax applicable in that case. The account-keeper, when questioned, confirmed that it noted no error in this case. The Ombudsman, for her part, told the plaintiff that the prospectus for the corporate action indicated clearly that the distribution of Technip Energies shares took place in accordance with the tax regulations applicable to dividend distributions whenever the TechnipFMC shareholders had their tax residence in France, and that the distribution was therefore liable to a flat-rate tax deduction, not constituting discharge, of 12.8% and various social security taxes amounting to 17.2%, giving a total tax deduction of 30% of the amount distributed. The Ombudsman added that a FAQ available on the company's website precisely discussed this point, which concerns corporate actions both of European issuers (examples in 2021: Vivendi/Universal Music Group, Stellantis/Faurecia, etc.) and of extra-European issuers (Merck & Co/Organon & Co, IBM/Kyndryl, etc.). And it should be noted that other corporate actions of this kind are announced by numerous issuers such as General Electric and Johnson & Johnson.

Virginie Lavolé, Legal Advisor

In another case processed in 2021, the plaintiff had not correctly anticipated the effects produced by a merger affecting the securities that he owned. He disputed, more precisely, a debit performed on his cash account, without his consent, and for which he did not understand the reasons. When questioned, the account-keeper said that the award of shares in the context of this merger was subject to the general tax treatment for dividend distributions, i.e. 30%. However, since the plaintiff did not have sufficient cash on his account to pay the tax-related costs of the corporate action, the firm had alerted him by several means, on his customer area, that his account had been debited and he had 48 hours to put matters right. When there was no rectification by the client, the firm, in accordance with its general conditions, intervened on the securities account to rectify the situation. In light of the information and evidence provided by the firm, the Ombudsman told the plaintiff that she could not issue a favourable decision concerning his request.

→ See the Case of the Month, December 2021: *What are the obligations of the account keeper and its client when a securities transaction results in a debit cash balance?*

3 STOCK EXCHANGE ORDERS AND ERRORS THAT COULD BE AVOIDED

The Ombudsman is still regularly referred to for disputes resulting from poor knowledge or a poor understanding of the characteristics of the orders and services chosen by investors, even those who consider themselves sophisticated.

The 2020 Ombudsman's Annual Report had already stressed the risks related to each type of buy order, and especially the three types of orders in which the investor has no control over the price at which the order will be executed, aiming only at having priority (market orders at the best limit, stop orders). Other risks are related to the channel of transmission of instructions or else the margins in terms of the time or amount. The Ombudsman therefore had to give explanations regarding mishaps resulting from halts in trading or the suspension of trading for several hours (see the *2020 Ombudsman's Report*, page 22).

Stella Alessandrini, Trainee Legal Advisor

IN 2021, ONCE AGAIN, INVESTOR MISUNDERSTANDINGS FACED WITH THE EFFECTS OF SUSPENSIONS OR HALTS IN TRADING

In 2021, some investors again blamed their broker for the difference of value, thinking that a malfunction had affected the placing of their orders. They therefore turned to the Ombudsman.

As an illustration, one investor entered and confirmed a sell order during a suspension of trading. He blamed the firm because the transaction had been closed at a price very different from his investment objective. After investigating this case, the Ombudsman observed that the contentious order was able to be validly sent to the market operator, Euronext, because on this market, during the suspension period, orders can continue to be recorded, modified or cancelled without being able to be executed until resumption of the listing. The contentious sell order was therefore validly recorded in the central order book, pending the reopening of trading to be executed.

Because the investor had chosen to place a best limit order, it was duly executed in priority, after market orders, when the listing resumed. Note that, if the listing resumes the same day, the order book is effectively not purged. It is purged only if resumption does not take place on the same day. In this specific case, the Ombudsman explained to the investor that the execution of his order could not be considered abnormal and that it would have been unreasonable to blame his broker for execution of the sale transaction at a price that he had not set when determining the characteristics of the order.

→ See the Case of the Month, July 2021: *Stock market orders: when a trading curb holds some surprises…*

THE DEFERRED SETTLEMENT SERVICE (SRD): ITS CONDITIONS OF ACCESS AND ITS POTENTIAL RISKS INTHE EVENT OF INSUFFICIENT COLLATERAL

Access to the SRD

In cases involving the Deferred Settlement Service (SRD), the Ombudsman always analyses the client's profiling by the investment services provider to ensure the suitability of the service, or at the very least the client's knowledge of the risks incurred. This is because, in the event of a disagreement, clients will be unable to object against the firm the unsuitability of the service, provided they have been informed of the risks.

In 2021, the Ombudsman had the opportunity of assessing the entire alert system implemented in the case of an unsophisticated client. First, based on the replies given by the client to the "MiFID II questionnaire", which can determine[2] an investor's profile, the institution sent him alerts regarding the risks of the SRD, notably due to his inexperience and available financial resources: the service was not suitable for his profile. Next, the client passed a test of his specific knowledge. Following that, the financial service provider sent him a message containing alerts regarding possible inconsistencies between his profile and the SRD.

If the investor decides to disregard this, despite the personalised alerts that are delivered to him, he should be aware that the consequences of his decision to invest on the SRD may not, in case of dispute, entail a failing by the financial service provider in its duty to advise and warn, based on the unsuitability of the service provided.

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

FOCUS ON THE DEFERRED SETTLEMENT SERVICE (SRD)

This service allows sophisticated investors to execute a transaction on equities listed on Euronext Paris, taking advantage of deferred settlement and delivery in return for the payment of a special commission and the provision of collateral in the form of cash or securities.

Beware of its leverage effect! This speculative service allows investors to invest a sum which may represent up to five times the amount of the liquid assets available on their account when the collateral consists of cash.

The SRD entails high risks, because while the associated leverage effect multiplies the potential gains, it also vastly increases the risks of losses.

Among the salient financial events of 2021, trading in the shares of Solutions30 was suspended by a decision of Euronext Paris from 14 to 21 May. When its listing resumed, the stock fell by 70%. During this period, some investors who had long positions on the SRD on Solutions30 shares were alerted of the occurrence of a collateral incident: as they did not have enough cash on their SRD account, their collateral had become negative. In this case, the financial service providers are obliged to liquidate clients' short positions whenever they are unable to provide additional collateral.

So, having made heavy financial losses, investors called on the Ombudsman to intervene. They accused the financial service providers of unwinding the positions by market sell orders, executed at unfavourable prices, according to the complaints put forward by the plaintiffs.

However, as the Ombudsman mentioned, pursuant to Article 315-19 of the AMF General Regulation, the SRD is strictly regulated and in the case in question the firms were obliged to take action.

Moreover, in the cases relating to Solutions30 shares, the Ombudsman considered that the duration of suspension (long and without any reason indicated) ought to have alerted those holding long positions regarding the risk of a potential major price variation when listing resumed.

[2] Article L. 533-13 II 2° of the Monetary and Financial Code.

PAY ATTENTION TO THE EXECUTION VENUE FOR A STOCK EXCHANGE ORDER

Investors should be very attentive to the execution venues for their stock exchange orders. Investment service providers are required to establish a best execution policy in which should appear, in particular, the execution venues chosen by that entity. The execution venue designates the various trading systems on which an investment service provider could produce an order on behalf of a client.

THE SPECIFIC NATURE OF ORDERS PLACED ON FOREIGN MARKETS

Identification of the execution venue and trading times

In 2021, a case was referred to the Ombudsman concerning Wirecard, a security traded on Xetra (eXchange Electronic TRAding), an electronic trading system run by a German market operator, Deutsche Börse.

In this case, the plaintiff had placed a sell order at the best limit, at 17h 34 min. 38 s, with a limit at €39.50. The closing price for the security in this trading session was €39.90. Given the investment service provider's best execution obligation, he considered that his order was below the closing price and that it ought to have been executed, which had not been the case. The order was placed on hold until the opening of the following trading session.

The investigation of this case showed that the investment service provider had clearly indicated in its order execution policy that the trading times on Xetra were between 9.00 am and 5.30 pm. Having examined the facts of the case, the Ombudsman found that the contentious order could not have been executed in the trading session wanted because it had been placed 4 min. 38 s after the close of the session and 22 seconds from the closing auction. The security had therefore been held overnight and the contentious order had of course been unable to be executed.

→ See the Case of the Month, December 2016:
"Best execution" of orders or the relative importance of the total cost paid by the client

Calculation of the provision and staggered trading hours

An investor who had placed a market buy order on a security listed on the Nasdaq disputed its execution, because the cash balance on his securities account was not sufficiently provisioned. Moreover, the plaintiff considered that his broker should not have authorised the transmission of this order, which was also affected by a so-called "fat finger" operator error.

The investigation of this case by the Ombudsman showed the complexity of checking provisions for orders on a security listed on a foreign market.

First, the Ombudsman noted that the investor could view the share price in real time at the time of placing the order, when a recap window allowed the client to verify the characteristics of his order: requested quantity and defined price. Accordingly, the latter could not be unaware of the amount of capital committed by his typing error, that he could, at this stage, have possibly corrected.

Secondly, it was found that the covering unit was in this case a foreign-based outside service provider and that its provision check was carried out on its last known closing price: namely, the closing price on the previous day. Based on this price, even considering the "fat finger error", the provision established was sufficient.

Therefore, in the event of major price fluctuations from one trading session to another, the provision check performed at routing of the order by the covering unit could not protect the investor against his own counterparty risk.

Taking into account both the data entry error and the difficulties caused by the different prices adopted for the provision check, in this case the Ombudsman proposed shared responsibility to the parties.

Moreover, the investment service provider, which admitted that the provision check for marketplaces with staggered trading hours could be improved, subsequently specified that it had prohibited types of orders not allowing control of the execution price (market orders, stop orders or best limit orders) for markets where the prices used for the provision check are not in real time.

As a reminder, whenever an order is executed, it is the responsibility of each counterparty to fulfil its obligations, and the investor could therefore not, in any case, avoid payment of the securities purchased, despite the debit balance resulting from this transaction.

→ See the Case of the Month, November 2021:
A stock exchange order must be able to be cancelled or altered as long as it has not been executed

4 THE THREE TRADITIONAL PROBLEMS OF THE AMF OMBUDSMAN'S OFFICE: THE PEA PLAN, EMPLOYEE SAVINGS SCHEMES AND SUCCESSIONS

THE PEA PLAN

Doubling of the number of disputes related to transfer times

The advantageous tax treatment of the "PEA" personal equity savings plan justifies the monitoring and supervisory measures in response to strict regulations, and this is therefore a major cause of disputes.

This sharp increase can be explained by the fact that, of the 211 transfer cases processed, almost half (101 precisely) concerned a mass dispute related to the acquisition of one firm by another, due to the lack of links between the two information systems, which significantly lengthened the transfer times.

Against this backdrop, the numerous cases received by the Ombudsman's Office this year highlighted recurring issues and others that are more occasional.

One of the recurring issues concerns the difficulties related to transfers of PEA plans, and more specifically whether or not clients can continue to buy or sell securities during the transfer, and the information provided by the firms on this subject.

The question of compensation for damages mentioned by the plaintiffs in cases relating to PEA plans also appeared as a recurring issue, through several applications of the concept of loss of opportunity.

Finally, a number of cases illustrated more occasional investor concerns. One of them is related to the new regulations on the capping of charges for the PEA wrapper, while another concerns the problems entailed by British securities contained in the PEA, as a result of Brexit.

THE PEA PLAN IN 2021...

- This year the PEA plan was the primary cause of disputes processed by the Ombudsman's Office, ahead of employee savings schemes, with 329 cases closed (versus 154 in 2020).
- The difficulties encountered during transfers account for 64% of the cases closed relating to PEA plans.

Transfers of PEA plans and the ambiguity of the possibility of arbitrage

Although the capping of transfer charges has not, by itself, had any real impact on transfer intentions, the Ombudsman has nevertheless noted exponential growth in such disputes in the past few years.

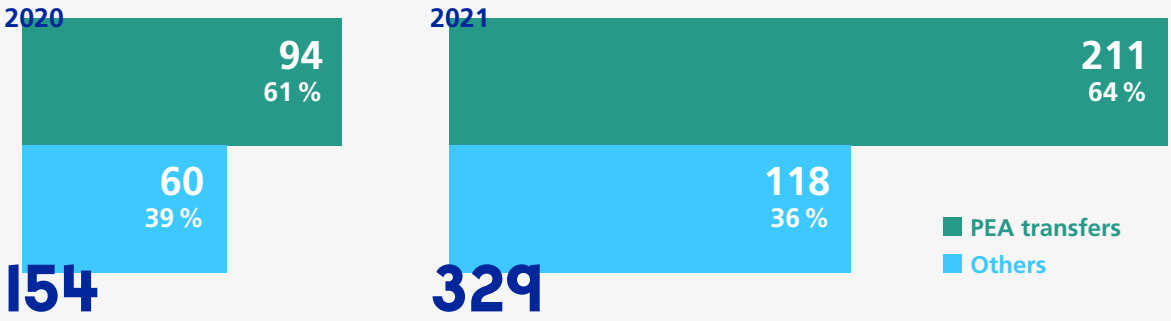
This year again, the Ombudsman noted a worrying lengthening of transfer times.

Regarding this, it should be remembered that there is no regulatory deadline for transfer and that it would also be difficult to establish one, since a large number of factors can influence the transfer. This is especially true since these deadlines may depend not only on the original investment manager, but also on the receiving manager or else the client himself.

These various causes, which may also be cumulative, result in transfer times which may sometimes be as much as 3, 6, 9 or even 12 months.

CHART 7

COMPARISON OF "PEA" CASES BETWEEN 2020 AND 2021



This phenomenon was exacerbated by the health crisis and the disorganisation of the various departments of financial institutions during the lockdown periods.

Moreover, as was stressed in the Ombudsman's editorial, the abnormal transfer times noted this year in a large number of cases could have been explained (and not justified) by a restructuring operation between two financial institutions. Due to incompatible IT systems between the acquiring and acquired entities, this operation resulted in blockages paralysing transfers to the new management firm, because of a failure to have anticipated certain technical and IT problems, and difficulties related to the change of custodian, i.e. the financial institution in charge of custody and administration of the securities registered on the PEA plan. Investors' lack of trust in the new firm may also have encouraged an increase in transfer requests. The fact remains that longer transfer times can be the result of a large number of different causes, which may be due either to the originating bank or the receiving bank, or else the client himself.

The diverse causes of longer transfer times

These various observations lead us to examine the reasons that could increase the time for the transfer of PEA plans.

- **An insufficient cash balance to cover transfer charges –** To satisfactorily complete a transfer operation, one of the essential prerequisites for the transfer applicant is to have a sufficient amount for prior settlement of the transfer charges on the cash balance of their PEA plan.

Numerous mediation cases highlight the fact that the firms do not always inform their clients of this reason for blockage. Thus, the lack of a sufficient balance may, in some cases, constitute a reason for a longer transfer time, which may last several weeks, until the client asks his account-keeper and learns of this. Admittedly, some firms have made provision in their general conditions for the possibility of being authorised by the client to debit the deposit account in order to credit this cash account, but this is never an obligation. Moreover, this possibility only applies to retail banks in whose books the clients may hold current accounts, and not to brokers.

- **Demanding and restrictive transfer procedures –** The procedure for transfer of a PEA plan is restrictive and requires, in particular, that on behalf of its new client the firm receiving the plan must solicit the originating firm so that the latter may initiate the various operations necessary for the transfer. Now it frequently occurs that the transfer request is sent by the receiving firm to an incorrect email address or that it contains an inaccurate PEA number, or again that the client discovers much later that a mere electronic signature is not accepted.

▪ **The presence of specific securities slowing the transfer –** The presence of certain specific securities housed in the PEA plan can also slow down the transfer considerably. This is the case, in particular, for certain foreign securities, for the securities of companies in insolvency proceedings, for securities ineligible for the PEA plan not detected when opening the PEA plan (or which became ineligible during the life of the PEA plan), for unlisted securities, or else for certain membership shares, for which the buyback procedure can only take place many months later and under certain conditions. For example, in the latter case, the Ombudsman observed that the transfer of the PEA plan implied the prior buyback of the membership shares of the firm that the client held in his capacity of member, a buyback which could only take place once a year.

▪ **Major difficulties due to inaccuracy of the tax information slip –** It is also essential to emphasise that, in order to finalise a PEA transfer, it is essential that the originating firm send the receiving firm a complete and accurate tax information slip which can alone allow activation of the PEA plan in the new firm.

This key document traces the complete history of the PEA plan and makes it possible to calculate the tax rights and obligations of the plan holder. This information is legally and technically necessary for the new firm to be able to retain the appropriate evidence to justify the exemption from any capital gains (after holding the securities for five years), which is the main advantage of the PEA plan.

However, numerous disputes brought before the Ombudsman mention a failure to receive this document or else its inaccuracy, which is a significant cause of longer transfer times.

Eva Lasla-Bortolussi, Legal Advisor

The transfer procedure and the possibility of arbitrage on the PEA plan: very widespread ignorance

Observations – Apart from the various causes of longer transfer times, the Ombudsman noted that clients often believe that their PEA plan is paralysed during the entire transfer process, which may last several months, whereas in fact, based on numerous accounts received by the Ombudsman's Office, it appears that clients can often continue to buy and sell securities, but for an unknown period of time. However, it is important to remember that although arbitrage is possible, it will cause a suspension, or even an interruption of the transfer request.

In light of the cases received in 2021, the Ombudsman regrets clients' lack of knowledge during the period of transfer of their PEA plan. Many investors wonder about the possibility of performing arbitrage operations, of buying or selling securities and of the potential consequences of this (i.e. a longer transfer time, or even its suspension), without being able to obtain a clear answer.

Usually, the firms' answers to these questions are ambiguous, or even non-existent, and the websites of the PEA management firms and their general conditions very often contain no information on this subject.

And yet, this issue is the main subject of the disputes currently processed by the Ombudsman's Office with regard to PEA plans. More than half of the cases concern the impossibility of obtaining finalisation of the requested transfer.

During discussions on the cases, one firm agreed to ensure that the registration of the transfer request does not, by itself, cause the elimination of access to the PEA plan throughout the transfer period, but only during the phase of processing and establishment of the tax information slip.

This operator plans, in particular, to eventually provide its clients with information on its website concerning the time when the relevant department takes charge of the transfer request and when the account becomes inaccessible for the client. The firm in question also proposed providing its clients with explanations regarding the process related to outward transfers, giving a reminder that the client can continue to perform arbitrage operations until receipt of the information indicating inaccessibility of the account, but nevertheless drawing clients' attention to the fact that such initiatives will inevitably entail deferral of that transfer.

These guidelines for improvement could be supplemented by training for telemarketing consultants, so that they can act on the front line to raise clients' awareness of their room for initiative during the transfer procedure. Additionally, it seems that the insertion of an information banner on the home page of the customer area mentioning, for example, "transactions possible" or "transactions impossible (transfer in progress)", would enable clients to be perfectly informed.

Some applications of the concept of loss of opportunity in the processing of PEA cases

The concept of loss of opportunity

In mediation cases relating to PEA plans, the Ombudsman analyses the potential damage mentioned in light of a concept that is well known but very often poorly understood: the loss of opportunity.

As a reminder, the loss of opportunity consists of the factual and certain disappearance of a favourable possibility. It is characterised precisely as being the forfeiture of a reasonable probability of the occurrence of a positive event or the non-occurrence of a negative event. The loss of opportunity is therefore midway between certain damage, which is liable for compensation, and uncertain damage, which, for its part, is not liable for compensation.

However, to be repairable, and therefore liable for compensation, the loss of opportunity must not be merely hypothetical. On the contrary, it must be evidenced by numerous precise indicators that must be provided by the investor. Above all, it must be measured by the probability that the event which occurred (or which did not occur) would itself have been profitable to the plaintiff. Finally, it can never be equal to the expected reward.

These very restrictive conditions partly explain why all the information making it possible to characterise the loss of opportunity is seldom brought together in PEA transfer cases.

The loss of opportunity of arbitrage in the case of PEA transfers, a loss of opportunity that is seldom accepted in the absence of sufficient evidence

The Ombudsman regularly applies the concept of loss of opportunity in PEA transfer cases. This is because, in transfers, the plaintiffs often cite the tie-up of their assets, preventing them from executing transactions, and for this reason they frequently make a request for compensation based on the loss of enjoyment. This request must therefore be analysed based on its nature, namely the loss of opportunity.

But the existence of such a loss of opportunity implies, for the plaintiff client, that he provide evidence or, at the very least, sufficient indicators testifying to his intention of placing precise orders and, moreover, that the latter be favourable to him, based on a number of factors to be taken into consideration (investment frequency, probability of the intention to sell or buy certain shares, number of arbitrage operations performed on the portfolio in the past, possibility of offsetting, length of time held, etc.).

Generally, the case evidence does not make it possible to justify or quantify such damage, so that the loss of opportunity then becomes hypothetical and, accordingly, not liable to compensation.

In this type of case, the purpose of the Ombudsman's intervention is therefore usually to accelerate and facilitate finalisation of the transfer operations.

In specific cases, where the circumstances justify it, if the loss of opportunity is not accepted, the Ombudsman can obtain reimbursement of the transfer charges.

ARBITRAGE OPERATIONS DURING PEA TRANSFERS: CHANGES TO BE CONSIDERED

In light of the various observations, it seems to the Ombudsman highly advisable that, in future, the PEA management firms be required to provide clients with clear information as to whether or not they can buy or sell securities during the transfer period and regarding the consequences this entails (deferral or suspension of the transfer procedure).

This recommendation forms part of a more general recommendation on this subject: that the firm in charge of the transfer should provide its client with information enabling them to measure their risk during this period.

The period during which arbitrage operations are possible should be known and understood by investors.

Furthermore, the client should be clearly alerted of the time from which he is no longer able to buy and sell securities, notably so that the tax information slip may be drawn up and submitted to the counterparty.

The Ombudsman therefore recommends a clarification and standardisation of information practices, which are at present highly disparate from one firm to another, so that the PEA plan may remain an attractive investment vehicle. For this purpose, in February 2022 initial contacts were made with the Financial Sector Advisory Committee (CCSF).

Moreover, these new practices would be in line with the PACTE Law which tends to encourage the investment of savings in financial securities.

Mathilda Bloquet, Trainee Legal Advisor

A recognised error by the firm in putting in place a purchase of unlisted securities in a PEA plan: an error which deserves a revision of the legislation instead of being restricted to the loss of opportunity

Another problem relating to the PEA plan which, in the current state of positive law, does not appear to be resolved satisfactorily, concerns the fact that when a financial institution commits and recognises an error in implementing a purchase of unlisted securities in a PEA plan, a rectification of the error is not possible.

In a mediation case, the AMF Ombudsman was referred to for a dispute concerning a loan of €101,000 granted by a bank to enable its client to purchase unlisted securities of a pharmaceutical company within her PEA plan. As a result of a dysfunction acknowledged by the financial institution in question, the purchase took place by debiting the client's current account and not by debiting her cash account within the PEA plan. This unfortunate transaction proved to be irrevocable.

Being unable to reincorporate these securities in the PEA plan, the investigation on reparation of the damage sustained by the client had to be confined to the sole aspect of a loss of opportunity.

Hence, in the mediation case mentioned above, although the damage was proved, endeavours to determine the amount of compensation, necessary for classification of the loss of opportunity, proved extraordinarily complex and not very satisfactory, to say the least. More specifically, the damage, by its nature, constituted a loss of opportunity: that of being excluded from a possible capital gain, which could only be verified several years later, depending on the length of time for which the securities were held and on achievement of the objectives of the pharmaceutical company's business plan.

In future, in the case of unlisted securities, it would therefore be highly advisable for there to be a radical alternative to the loss of opportunity, by creating the possibility in the legislation on the PEA plan for the firm to correct its error – within a time limit to be agreed – in particular by enabling reconstitution of the securities purchase within the PEA plan.

Capping of PEA charges: new complex legislation

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, transactions, and transfer and closing of the plan). This decree came into effect on 1 July 2020.

A second decree, No. 2021-925 of 13 July 2021, announced by the French Treasury Department (Direction Générale du Trésor) as an endeavour to clarify the application of this new regime, and applicable since 15 July 2021, specified various issues such as the caps applicable to unlisted securities.

The first cases received by the AMF Ombudsman after the coming into effect of the first decree, and for which decisions were issued before the second decree came into effect, related to the interpretation of one of its provisions which stipulated that the charges relating to transactions could not exceed 0.5% of the amount of the transaction, in the case of transactions performed by a dematerialised process, and 1.2% for transactions performed by any other means (telephone, postal mail, etc.).

In particular, the Ombudsman received a complaint from an investor who complained of having been debited fees for the redemption of unlisted securities at a rate of 2% of the transaction, despite the entry into force of said decree. He demanded application of the 0.5% rate, on the grounds that he had given his redemption order by email. Analysis of this case showed that the mere circumstance that the order was given by email was not sufficient to characterise a transaction executed by a dematerialised process. Indeed, the transaction must be performed entirely by a dematerialised process. However, given the nature of the unlisted securities, the transaction could in no case be performed by a dematerialised process.

A FEW RECOMMENDATIONS IN THE CASE OF A PEA TRANSFER

- Before initiating the transfer, check that you have a sufficient amount on the PEA cash account in order to be able to pay the transfer charges (leave at least €150).

Be aware that the transfer will not take place in a few weeks and that it could take several months. Moreover, it should be borne in mind that there is no regulatory deadline for transfer of the PEA plan and that the presence of unlisted securities, foreign securities or membership shares will inevitably make the transfer longer.

- On the occasion of the transfer, check that the receiving firm accepts unlisted securities in PEA plans.

- Be aware that although some firms allow you to continue to perform transactions on the PEA plan during the phase when the transfer is registered but not yet processed, this will inevitably have the effect of correspondingly deferring (or suspending) the transfer, especially if the maturity dates of the transactions are distant.

- Avoid asking for a PEA transfer when you are aware of a coming corporate action concerning securities held in the PEA plan (receipt of dividends, share split or consolidation, takeover bids, public exchange or buyout offers, etc.).

- Carefully choose the time of the transfer request if the PEA plan contains membership shares of the originating firm, which often can be sold only once a year.

- Watch out for the fact that if you perform a cash withdrawal before the PEA plan has five years' anteriority for tax purposes, that will inevitably entail closing of the plan.

- Make sure, if possible, that the established tax information slip contains no inconsistencies.

A new problem that has arisen with the capping of charges stipulated by the aforementioned decree is due to the reluctance of certain firms to propose the unlisted securities service in PEA plans. It is true that the management and supervision of unlisted securities in PEA plans are especially complex given the numerous specific rules provided for by the Bulletin officiel des Finances publiques-Impôts (Bofip-Impôts) as necessary conditions to benefit from exemption from income tax. The creation of these caps, although commendable in principle, could therefore, ultimately, limit the incentive for certain firms to continue to propose the unlisted securities service.

The coming into effect of the capping of charges within the PEA plan could also have led some investors to raise questions concerning the links between fees related to UCITS and those related to the PEA plan. In particular, a complaint was referred to the Ombudsman by a retail investor who, after having subscribed to several UCITS fund units in his PEA plan, disputed the calculation of the charges that were invoiced to him at the time of this subscription, and the account management fees debited for the PEA plan, which exceeded the stipulated legal caps, in his opinion.

The study of this case showed that a clear distinction should be made between charges related to the PEA plan as an investment wrapper, capped by the PACTE Law, and entry fees and management fees which are related to the financial instruments, which are excluded from this cap, even if they are held via a PEA plan. Hence, pursuant to Article D. 221-111-1 of the Monetary and Financial Code, UCITS are excluded from this cap, provided that they give rise to the debit of no other charges than entry fees. The latter rule is bound to apply even if the entry fees for subscription to UCITS fund units are partly retroceded by the asset management company to the account-keeper in its capacity as distributor. As regards retrocessions, only transparency obligations are required, pursuant to the European MiFID directive, and not capping as provided for in the PACTE Law.

In other words, the entry fees debited by the asset management company for UCITS fund units are outside the scope of the 1.2% cap. On the other hand, the account-keeper may charge fees capped at 1.2% at subscription if there is no entry right debited by the fund management company (or if there are only rights retained by the fund). Note that this rule laid down by the first decree is still valid after the entry into force of the second decree.

The consequences of Brexit for the PEA plan: the information provided by the account-keeper must be complete and accurate

In the context of Brexit, Article 3 of Ordinance No. 2020-1595 of 16 December 2020, drawing the consequences from the UK's withdrawal from the European Union with regard to insurance policies, collective investment schemes and personal equity savings plans, and Article 1 of the "Arrêté" (official order) of 22 December 2020 defining the transition period mentioned in the aforementioned Ordinance, stipulated that securities whose issuer has their headquarters in the United Kingdom and similar securities would remain eligible for the PEA plan during a period of nine months running from 1 January 2021, i.e. until 30 September 2021.

To benefit from these transition measures, the securities would have to have been purchased or subscribed to by the plan holder before the end of the transition period, i.e. 31 December 2020 at the latest.

During the defined transition period, the plan holder had several possibilities:

- either sell the securities within the framework of their PEA plan, with a risk of capital loss, this option being neutral for tax purposes;
- or withdraw them from the plan and transfer them to an ordinary securities account, with two possible options:

– within two months from the withdrawal, the PEA holder could make an offsetting payment for a value equal to the value of the securities on the day of their withdrawal from the PEA plan, not included in the cap on payments. Under these conditions, the PEA plan was maintained without any tax implications;

– barring an offsetting payment, this was treated as a withdrawal, entailing closing of the plan if the plan was opened less than five years ago, and tax contributions would be payable immediately.

At the end of the nine-month period, the presence of UK and similar securities on the plan would entail its closing.

In 2021 the Ombudsman received several cases related to Brexit, for some of which the PEA transfer had been slowed considerably, as some receiving firms were not prepared to accept a PEA plan containing UK and similar securities, even though the eligibility of the securities had been extended until 30 September 2021 and they could be sold once the PEA plan had been transferred.

Florence Miller, Legal Advisor

SUMMARY OF THE CAPPING OF PEA CHARGES UNDER THE REGIME OF SECOND DECREE NO. 2021-925 OF 13 JULY 2021

OPENING FEES (NOTABLY ADMINISTRATIVE COSTS)	**Capped at €10**
CUSTODY FEES – ACCOUNT MANAGEMENT FEES	**Capped at 0.4% of the value of the securities held.** These fees may be increased by fixed costs limited to €5 per line for listed securities and €25 per line for unlisted securities.
TRANSACTION FEES	**Capped at 0.5% of the amount of the transaction if it is executed by a dematerialised process and at 1.2% if it is executed by any other means (telephone, postal mail, etc.).** This cap does not apply to transactions relating to securities admitted to trading on a trading venue of a State that is not a member of the European Union nor of the European Economic Area.
TRANSFER AND CLOSING CHARGES	For each line transferred, these charges may not exceed: ▪ €15 for listed securities; ▪ €50 for un listed securities. **Total charges are capped at €150.**

The account-keeper's obligation of information

Article 1 V of the official order of 22 December 2020 defining the transition period specifies that: *"The account-keeper shall individually inform the plan holder, before 1 May 2021, in the event of loss of eligibility of the security held. The account-keeper shall specify the date of the loss of eligibility of the securities and shall inform the plan holder of the consequences of this loss of eligibility for their plan, and the procedures by which he could maintain it."*

It appears that some financial institutions sent late, incomplete or even erroneous information to their clients concerning the aforementioned transition measures and the options available to the holders of UK and similar securities on their PEA plan.

For example, the Ombudsman received a complaint from one retail investor who complained that her account-keeper had indicated to her a deadline for selling her securities, prior to 30 September 2021, and had therefore not applied the grace period provided for by the aforementioned official order. This caused her a twofold prejudice: early sale of the securities at a lower price and taxation of the capital gain generated by the sale, which was credited to her ordinary securities account and not to the PEA cash account. The Ombudsman contacted the firm, which agreed to compensate this twofold prejudice.

The Ombudsman was also referred to by several investors whose PEA plan had been closed at the end of the transition period because it contained ineligible securities. They complained that they had received incomplete or insufficiently clear information from their account-keeper. These cases were investigated individually to check this.

The issue of the treatment of ineligible securities

The problems relating to Brexit illustrate in fact the difficulties that can arise when a PEA plan contains securities that become ineligible during the life of the plan.

In accordance with the provisions of Article 1765 of the French General Tax Code (CGI), holding securities in the PEA plan when they no longer meet the conditions of eligibility, defined in particular in Article L. 221 31 of the Monetary and Financial Code, entails in theory the closing of the plan from the date of the infringement.

This problem arises frequently in the case of unlisted securities, i.e. securities (equities, corporate investment certificates, stakes in an "SARL" limited liability company or companies having an equivalent status) which are not admitted to trading on a regulated or organised market. These securities are therefore necessarily "registered" securities, held as "pure registered shares", i.e. their holder exercises the rights personally with the issuer company.

The "pure registered" status makes it far more difficult to hold the securities in a PEA plan, because all the obligations relating to the PEA must be complied with even though the bank does not have access to the securities. This is a very complicated form of investment management in which the investor (or the issuer company) must keep the bank informed of any change (transfer, purchase, etc.) while complying with certain formalities.

This need of formalities and these reporting requirements sometimes elude investors who, following a lack of diligence, may face closing of their PEA plan.

Mathilde Le Mélédo, Legal Advisor

The Ombudsman's Office dealt in particular with the case of a retail investor who, several years ago, transferred unlisted shares of a company A to a company B, in exchange for new unlisted shares of company B.

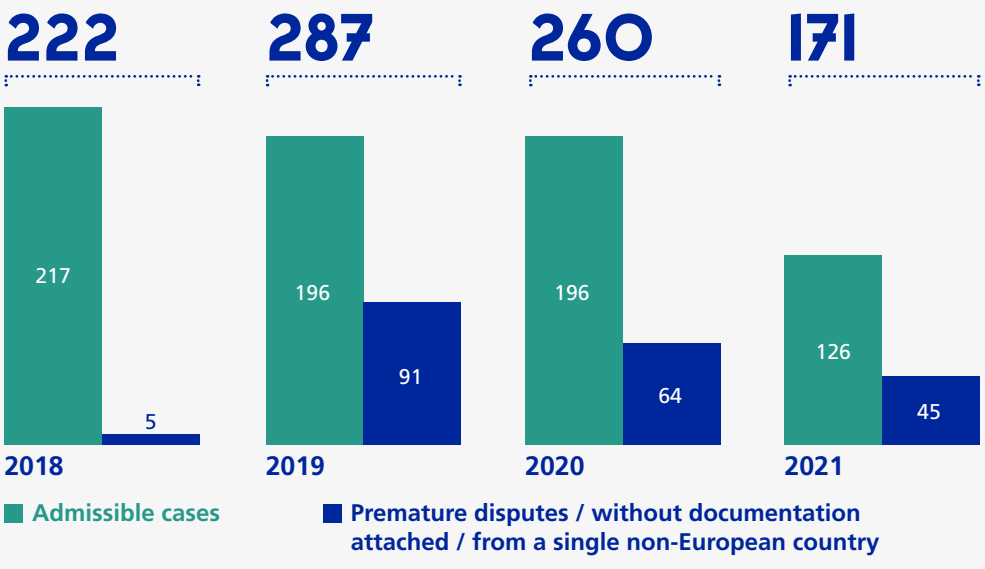
Since the shares of company A were recorded on his PEA plan, the investor deduced from this that the new shares in B would be automatically recorded on his PEA plan, which was not the case because this transaction required that the client provide information to his account-keeper.

Thus, when the investor requested that the proceeds of the sale be housed in his PEA plan, his manager replied to him that his shares in B were not housed in his PEA plan and that he could therefore not transfer to it the proceeds of this sale. His PEA plan was therefore irregular from a tax viewpoint and had to be closed. The other securities housed in this PEA plan had to be placed on an ordinary securities account.

After processing this case, although it proved that the "reinstatement" of the proceeds from the sale of securities that had never been housed in the PEA could not be rectified legally, the account-keeper agreed to re-open the investor's PEA plan, taking effect retroactively, so that the other lines of securities held could benefit from the age of the PEA plan and so that the error, committed in good faith, might not be too severely punished. However, this solution remains exceptional.

CHART 8

CHANGE IN NUMBER OF EMPLOYEE SAVINGS SCHEMES CASES RECEIVED 2021



EMPLOYEE SAVINGS SCHEMES

Employee savings: a marked decline in the number of case referrals

The reasons for this are encouraging. Employee savings schemes, whose mechanism may seem extremely complex to the beneficiary employees, were the subject of a sharply increasing number of case referrals for mediation between 2012 and 2019, and even represented the most significant issue.

This increase stabilised in 2019 before the volume of cases started decreasing in 2020.

The main reasons for this decrease

For the first time in several years, and significantly, in 2021 employee savings was no longer the Ombudsman's main scope of operation. The number of mediation requests received in 2021 was 171, versus 260 in 2020.

Mathilde Nourmamod, Trainee Legal Advisor

Questioned on the subject, one of the major account-keepers for employee savings schemes noted a reduction by half in the number of complaints processed during the year. It confirmed the four main encouraging reasons for this decrease. According to it, this decline can be explained both by operational reasons (better internal processing of complaints and good practices of the account-keepers resulting, in some cases, from the Ombudsman's general recommendations) and by regulatory changes (increased information for the beneficiary and right to error regarding default allocation).

The principle of consumer mediation is based on the following premise: a disagreement persists even when a thorough investigation has been carried out by the firm, after which a reasoned reply has been given to the client. Now it has been seen in the past that mediation was sometimes initiated without having performed effective processing of the complaint, or even to counter the silence kept by the firm involved. It is only at the mediation stage that some firms really took the time to look into the dispute in question, even though its solution seemed obvious in some cases.

The reduction in the number of employee savings cases can be explained first of all by the fact that the senior managements of several employee savings account-keeping institutions (gradually) became aware of the fact that it is in their best interest to deal swiftly and efficiently with complaints through their customer service. In this respect, one of the account-keepers questioned confirmed that quality audits are performed regularly so that a maximum of disputes may be processed internally, whenever possible.

This decrease is also due to the growing number of good practices observed by the account-keepers, derived, in particular, from the information learned in the Ombudsman's Online Diary and through taking into consideration the general recommendations that she has had occasion to express in recent years.

As an illustration, following the Ombudsman's intervention, the National Directorate of Labour had – as of 2017 – given permission to reconsider the date of the obligating event giving entitlement to release of the sums invested in an employee savings scheme, after resolving the conditions precedent of said obligating event.

Most firms now note that it is indeed from the time of fulfilment of these conditions (for example, from the acceptance of a mortgage loan offer) that the six-month period for presenting a request starts to run.

The decline in the number of case referrals regarding employee savings schemes is also a result of the recent strengthening of the obligation for account-keepers to inform the beneficiary employees.

We should first welcome the entry into force in 2021 of a more complete version of the much-vaunted annual statement of position. Decree No. 2019-862 of 20 August 2019 (enacted pursuant to the PACTE Law) made it possible to revise this essential document that the account-keepers must submit to all the beneficiaries of an employee savings plan in the first quarter of the following year. This new statement, the first copies of which were sent to retail investors in early 2021 for the year 2020, now contains, notably and mandatorily, the total amount of rights and assets, their dates of availability and a summary of the charges payable by the investor[3]. The major market participant questioned confirmed that this new format has caused a significant reduction in complaints concerning the lack of information on the debiting of account management fees.

It is also likely that the effects of the so-called Macron Act are being felt permanently. As a reminder, following an intervention by the AMF Ombudsman a few years ago, there had been obtained from the legislator an obligation for the employer to inform employees, when their employment contract ends, that the charges pertaining to employee savings schemes would now be payable exclusively by the employee.

Moreover, the right to error concerning default allocation is possibly not unrelated to the decline in the number of employee savings scheme cases.

In 2015, the same Macron Act had recognised an initial right to error for retail investors whose incentive bonuses had been invested by default in a company savings plan (PEE plan). This possibility had a proactive purpose for the investor, whose assets could, for the first time, be allocated by default to an investment locked in for five years and not paid into their current account as usual. Following a two-year transition period, this right of retraction was cancelled on 1 January 2018.

At the same time, the law stipulated that, barring instructions from the employee, half of the incentive bonuses, for their part, would be paid into the PEE plan and half into the collective retirement savings plan (PERCO). Now, it so happens that the conditions for withdrawing assets invested in a retirement savings scheme are far more restrictive than those applicable to the PEE plan.

The Ombudsman therefore had occasion to give a decision in favour of a right to error regarding the allocation of incentive bonuses performed in this context. Moreover, the principal account-keeper interviewed says that, in accordance with the Ombudsman's recommendation, it displays a warning pop-up on screen if an investor were to interrupt data entry in their online customer area before having recorded their choice of allocation.

Ultimately, the PACTE Law consecrated the awaited system by establishing a specific right of retraction for incentive schemes, which is also permanent[4]. Regarding this, most account-keepers are also proving to be flexible concerning compliance with the deadline for exercising this right of retraction (in principle one month following the allocation by default). That undoubtedly explains why, in 2021, and contrary to what might have been feared, case referrals to the Ombudsman on this theme are practically non-existent.

Furthermore, it should be stressed that the PACTE Law, one of the objectives of which was to simplify and harmonise employee savings schemes while ensuring better control by savers and bolstering their protection, put an end to another source of disputes.

Whereas, for a number of years, the legislation in force enabled an employee to allocate – exclusively or not – the amounts received for the special profit-sharing reserve to a frozen current account ("CCB") held by the employer, the PACTE Law put a much-awaited stop to this by prohibiting new profit-sharing agreements from providing for allocation to a "CCB" account, except for some rare exceptions.

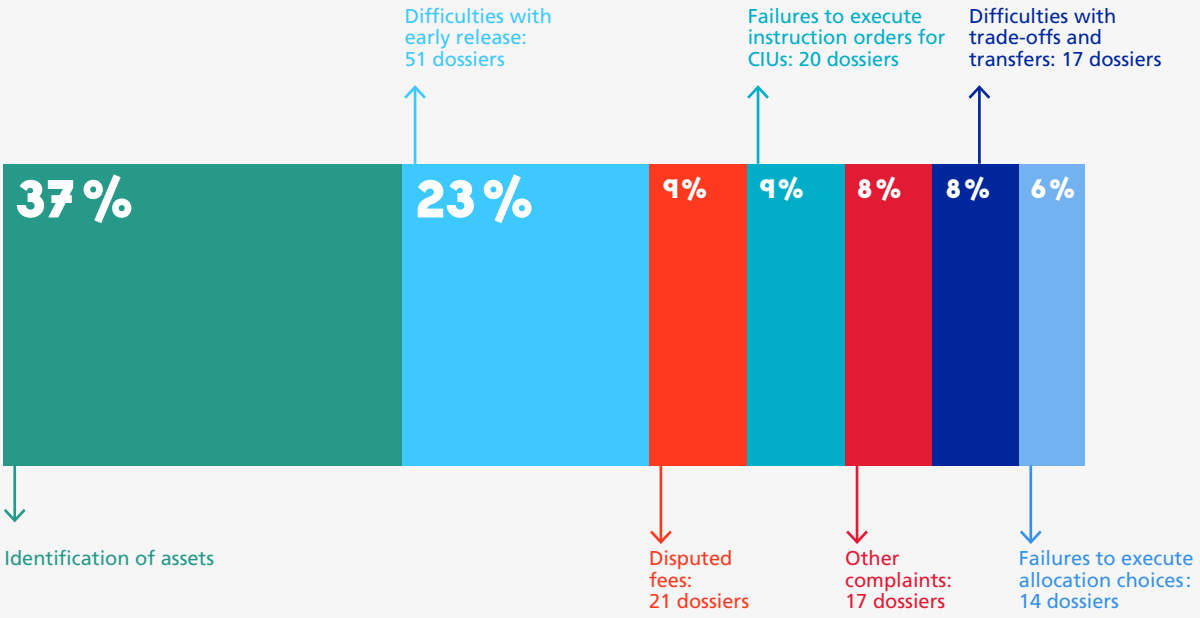
By opting for investment on a "CCB" account, the employee more or less granted a loan to their employer, who could then devote those amounts to various investments. In a low-interest-rate environment, however, this investment practice has petered out over the years. Due to a certain lack of separation between the company's assets and those of the employee, the profit-sharing rights invested on a "CCB" account could, effectively, be lost if the company faced economic distress (court-ordered receivership or liquidation).

[3] Article D. 3332-16-1 of the French Labour Code.

[4] Article L. 224-20 para. 3 of the Monetary and Financial Code: *"When a payment corresponding to money coming from profit sharing is allocated to a corporate collective retirement savings plan under the conditions provided for in Article L. 3324-12 of the French Labour Code, the account holder may, as an exception to Article L. 224-4, request the liquidation or redemption of the rights corresponding to this payment within a period of one month from the date of notification of its allocation to the plan. The corresponding rights are valued as at the date of the request for liquidation or redemption by the account holder."*

CHART 9

PROBLEMS ENCOUNTERED IN EMPLOYEES SAVINGS SCHEMES IN 2021 (223 CASES)



The end of this system had been anticipated in practice, since in the end it no longer offered any benefits but merely dangers for savers. These dangers were unfortunately illustrated in 2021, in a mediation case in which assets invested on a "CCB" account were lost as a result of insolvency proceedings for the employer company.

In the end, good practices and the growing regulatory framework show that most of the firms are on the whole working to improve the performance of their obligation of information by various actions in favour of investor protection (revamping of explanatory pages on websites, creation of warning pop-ups, etc.).

The reduction in the number of cases does not mean they have disappeared: a few examples of disputes processed by the Ombudsman's Office deserve to be mentioned for lessons to be drawn.

First, regarding the scope of the information on questions of legal early release of funds, an investor had requested the reimbursement of his savings in order to buy a primary residence via an off-plan sale. In such cases, either the signature of the reservation agreement or the signature of the off-plan sale agreement or the date of delivery of the building can justify the release of funds upon the production of substantiating documents specific to each of these events. But several months can separate the occurrence of these different obligating events, and therefore the amount of the savings to be released may be very different. In the case in question, it was considered that the firm had not warned the saver sufficiently of the consequences of submitting one substantiating document rather than another with regard to the amount that would ultimately be paid to him. Following the mediation, the firm agreed to release additional funds, because it was clear from the circumstances that if the saver had been duly informed, he would have submitted the substantiating document enabling him to release all of his assets locked in at the date of signature of the official deed.

In another case, a saver reported that, at the end of her employment contract, she had requested the full reimbursement of the amounts shown on her company savings plan (PEE). A monthly instalment had been arranged to fund this scheme. The saver was convinced that once her assets had been withdrawn, her account would be closed and, moreover, the automatic instalments would be terminated. But this was not the case

This case illustrates a well-known problem, due to the distinction between the complete liquidation of a plan and its closing, since the first operation does not automatically entail the second one. To avoid any disappointment, the saver should be fully informed of this distinction. In this specific case the Ombudsman considered that, barring information to the contrary, the saver could legitimately have believed that her account would be closed, so that the firm agreed to refund to her the automatic instalments executed after liquidation of the plan.

Refusals of early release of funds are the main subject of case referrals with regard to employee savings schemes, after the identification of assets.

In 2021, the Ombudsman frequently had occasion to adopt a position on the procedures and conditions for the reimbursement of savers. For example, her analysis of the deferral of the starting point for the six-month period (see page 37) found new significance for assessment of the amount of savings to be released. Indeed, in one case, the Ombudsman managed to have the firm take into account the amounts saved until the resolution of the conditions precedent to assess the total amount of savings to be released.

This solution may have a significant impact to the extent that many savers decide, at a time very close to their application for release, to "boost" their employee savings scheme through additional contributions, making various voluntary contributions or allocating amounts based, for example, on a time counter, which was precisely the case here.

FAIRNESS IN MEDIATION

Fairness is a major issue in employee savings schemes. The applicable regulations are dense and extremely complex. The recent series of regulatory changes have unfortunately not made them easier to read. Moreover, the *Guide de l'épargne salariale*, written by the government departments concerned (Direction Générale du Travail, Direction Générale du Trésor, Inspection Générale des Affaires Sociales, Sécurité Sociale), a real regulatory tool for operational application, has not been updated since 2014 and is therefore rather out of line with positive law and the socio-economic environment.

It is against this backdrop that a certain flexibility, accentuated in the wake of the health crisis, has often been observed by firms in the processing of clients' complaints when the particular situation and common sense require extensive interpretation of the legislation in force. Moreover, if the firm has not done so before, it is in the power of the AMF Ombudsman to submit proposals in pure fairness when she believes that the strict application of the law would create an extremely unfair situation.

A case processed in 2021 identified an extremely unfair situation following a refusal to release employee savings on grounds of termination of the employment contract. In such cases, you must have exhausted your rights to unemployment insurance in order to make a request for early redemption. Now, the saver had left France after her redundancy, so that she could not claim national aid measures. Therefore, since she could never find herself in the situation required by the applicable regulations, the saver was condemned to wait until retirement age to unlock her savings (next potential event giving entitlement), even though her redundancy had placed her in great financial distress. Upon the recommendation of the Ombudsman, the firm agreed, in pure fairness and exceptionally, to release her funds.

In another case, early release of funds was granted on the grounds of the beneficiary's disability, even though the latter had not obtained recognition of any disability rate but merely the status of disabled worker (RQTH handicap status) and their chances of a return to and retention in employment were very limited. In this specific case, even though the conditions were not met and the substantiating documents stipulated by the regulations could not be produced, it was considered – by assimilation – that the specific situation of the plaintiff should equitably justify early release of funds on grounds of the employee's disability.

UNCLAIMED ASSETS: A RECURRING PROBLEM

Despite the reporting requirements regarding inactive accounts incumbent on the account-keepers, heightened since the Eckert Law, a large number of cases are still referred to the Ombudsman concerning unclaimed assets.

Frequently, a saver rediscovers an old bank statement showing the employee savings scheme from which he may have benefited by virtue of a previous employment contract.

The beneficiaries then try to obtain information about what has happened to their assets.

But unfortunately, for the most modest savings, it can occur that the assets may have practically disappeared as a result of the debiting of annual account management fees.

That is why it is essential that the account-keepers should comply scrupulously with the obligation imposed by Article L. 312 20 of the Monetary and Financial Code by informing, six months before the expiry of the ten-year inactivity period, by all means, the account holder, their legal representative, the person empowered by them or, where applicable, their legal beneficiaries known to the firm, of the imminent transfer of the assets to Caisse des Dépôts et Consignations.

It should be specified in this regard that, although the legislative article refers to information by "all means", Article R. 312-19 I of the same Code requires that *"firms shall keep a record on a durable medium of the evidence substantiating the dates and procedures for the delivery of this information"*.

An analysis by the Ombudsman leads to the opinion, shared by the AMF Legal Affairs Directorate, that the "delivery" of this information clearly indicates that it must be handed over and not merely sent. Therefore, the obligation of information can only be fulfilled by sending a registered letter.

However, one observes a very great disparity of practices in the marketplace concerning the procedures for sending this notification. However, here it is a question of delivering information that is extremely important, because it precedes the automatic liquidation of clients' positions and the transfer of the assets without their consent to Caisse des Dépôts et Consignations. The damage therefore justifies the firm's making sure that the client has indeed received the information and not merely being satisfied with sending it.

That is why the AMF Ombudsman, who submitted a memorandum along these lines to the ACPR-AMF Joint Unit, encourages firms preferably to choose at the least a registered letter to perform their obligation of information.

However, there are cases where, despite taking active measures to contact their clients or, where applicable, their legal beneficiaries, firms are unable to inform them of the coming liquidation of their assets. This is the case, for example, when the client's contact details have not been regularly updated.

It is therefore also the client's responsibility to monitor their savings throughout their life by notifying their employer or the management institution of any change of address. It should be remembered, moreover, that a mere login to the Personal Space is sufficient to demonstrate the activity of an account and can thereby avoid the mishap of one's assets being transferred to Caisse des Dépôts et Consignations, or even the state.

SUCCESSIONS: DISPUTES THAT ARE ALWAYS DIFFICULT

In 2021, 36 disputes related to succession processing concerning securities accounts were submitted to the Ombudsman, versus 20 in 2020. The Ombudsman issued twice as many favourable decisions as unfavourable decisions.

Below are a few more general lessons derived from actual dispute cases which were able to be clarified and resolved by the AMF Ombudsman.

It is not incumbent on the account-keeper to check with each heir whether the notary in charge of the succession, when giving an instruction, has indeed obtained the agreement of all the heirs

The Ombudsman received one case in which one of the heirs held liable an account-keeper which had received beforehand from the notary the instruction to sell the securities in a PEA plan of the deceased person, maintaining that he himself had not given the notary his agreement to this effect.

The account-keeping institution is effectively bound to receive instructions from the notary in charge of the succession, on behalf of the undivided estate, regarding what happens to the securities of the deceased person, and potentially instructions to sell. It is not the firm's responsibility to check that the agreement of each heir has been obtained. Since the notary is mandated to represent all the legal beneficiaries, the account-keeper is entitled to presume that the latter has obtained their agreement. In such cases, moreover, many notaries give an explicit reminder of this. An account-keeping institution which executes the notary's instructions in good faith therefore cannot see its liability involved if it turns out subsequently that one of the heirs has not agreed to the sale of the securities. This dispute in fact merely involved the relation between the notary and the heir.

What happens to joint accounts in the case of the successive deaths of the co-holders

What happens to joint securities accounts is different from what happens to personal accounts. Accordingly, following the death of one of the co-holders of a securities account, the account is not frozen and the surviving co-holder can continue to carry out management and disposal activities, it being his or her responsibility to reward the succession for the operations performed.

In a rather difficult mediation case, the notary's instructions giving sell orders for bonds contained in the joint securities account, issued by the two children of the father's first marriage, were only received by the financial institution three years after the father's death, which occurred in June 2017. Now, during those three years, the surviving spouse, co-holder of the joint account, had been able to dispose freely of this account, now a personal account, it being her responsibility to reward the succession for any operations performed, which apparently had not been done.

Of course, the firm therefore could not execute the notary's instruction which was based on the statement of accounts of the first deceased on the day of his death, a failure to execute which the heirs complained of. Furthermore, the spouse having herself died in June 2020, her own legal beneficiaries had already retrieved the funds due to them in the settlement of this second succession. The children of the first marriage could only consider the advisability of legal action to recover assets from the second succession, but the account-keeping institution could not be charged with any fault.

Immediate consequence of the announcement of death: freezing of the deceased person's assets butnot their valuation

Death must be announced without delay by the account-keeping institution, which then freezes all the accounts of the deceased person, except joint accounts, to enable the notary to have a statement and a valuation of the deceased person's assets on the day of their death and to simplify settlement of the succession. NB: the succession merely freezes the composition of the portfolio on the day of death and not the valuation of the securities recorded in it, whose value continues to fluctuate, moving up and down in line with market moves. When the institution receives an instruction to sell, the securities are sold at the market price on the day of the sale and not at the price on the day of death. Valuation divergences are, of course, the subject of disputes in the event of a delay in processing the instructions. In that case, then, one must try to determine the causes and break down the responsibilities.

The choice of matrimonial regime affects the treatment of the deceased person's accounts: in the case of a full community of property regime with full transfer of ownership to the surviving spouse, the succession is not opened

Thus, the surviving spouse, even when there are children, receives all the joint assets without needing to open the succession, since the couple's children will receive their share only on the death of the surviving spouse. Only legal action taken by the children of a first marriage to recover assets from the succession could be considered.

In one mediation case, the account-keeper had to be reminded of this rule in order not to put off any longer the instruction for transfer of a securities account to the surviving spouse, even though the notary had previously communicated the couple's option for this regime, recorded several years earlier and now definitive. Execution of the instruction was therefore obtained.

5 THE DEVELOPMENT OF A LACK OF GEOGRAPHIC JURISDICTION FOR THE OMBUDSMAN AS A RESULT OF THE FREEDOM TO PROVIDE SERVICES (FPS) UNDER THE EUROPEAN PASSPORT

THE NECESSARY DISTINCTION BETWEEN FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT

In 2021, the Ombudsman also received requests for mediation concerning implicated parties benefiting from the European passport for the free provision of services (FPS) in France.

The rule of Freedom to Provide Services (FPS), which should be distinguished from the Freedom of Establishment rule, refers to the right, for an authorised company of a Member State of the European Economic Area (EEA)[5], to sell its services on the territory of another Member State without being established there permanently, for example, by a branch office and without having to apply for a separate approval to the competent authority of the host Member State in which the services are provided.

In 2021, these disputes received in the Ombudsman's Office involved an average loss of €19,000 per plaintiff, with losses of up to €80,000 for certain investors.

Since European law is no longer applicable in the United Kingdom since 1 January 2021, UK entities no longer have the right to offer their services in France under FPS. Firms authorised in the United Kingdom and not having a permanent establishment in France can now therefore no longer be classified as beneficiaries of a European passport by virtue of their home country's status as member of the EEA.

Despite that, requests to the Ombudsman's Office concerning the FPS, observed by comparison with 2020, have increased 50% (45 cases in 2021). This increase can be explained by the growing pace of digitalisation of financial services, allowing the supply of services without a physical presence in the host Member State.

It is found that 60% of these cases concerned Cypriot entities and that the trading of contracts for difference (CFDs) and forex trades remained the source of significant losses for a majority of plaintiffs (60% of disputes concerning market participants operating on an FPS basis).

However, despite this upward trend, the AMF Ombudsman can only intervene in cases where the financial dispute comes within the jurisdiction of the AMF. Now, the possibility of providing services in France, in accordance with the FPS, does not give the French regulator power to supervise or sanction the professional entity which benefits from this. These tasks come under the jurisdiction of the authority of the home Member State, i.e. the Member State in which the statutory headquarters or the head office of the legal entity is located[6]. The AMF Ombudsman can therefore not accede to these requests, for reasons of lack of geographic jurisdiction. The plaintiffs concerned are directed towards the competent ombudsman.

Conversely, if the European passport is the result of freedom of establishment, i.e. of a situation in which a firm from an EEA country has a permanent establishment in France, e.g. a branch office, the Ombudsman can process the case because, in that case, the AMF is the competent authority of the host country. Accordingly, the AMF Enforcement Committee, by a decision of 8 November 2021, sanctioned a company registered in Poland which had a branch office in France, the AMF having responsibility for supervising the operations performed by a branch office on the territory of the Member State where it is established.

In the past, the AMF Ombudsman agreed in some cases to examine disputes regarding FPS for various reasons:

- the arrangements of the "Sapin II Law" of 2016 had regulated marketing communications on binary options, CFDs and forex contracts which are the cause of significant losses for a majority of European investors, who are very often victims of the aggressive marketing techniques of entities benefiting from FPS;
- in accordance with Article 40 of the European Markets in Financial Instruments Regulation (MiFIR), the European financial supervisor ESMA had imposed a temporary restriction in 2018 on the marketing, distribution and sale of CFDs to retail clients and a ban on binary options;
- these so-called product intervention measures had been perpetuated in 2019 by the AMF on the basis of Article 42 of MiFIR which grants the competent national authorities power of intervention concerning the products, but more permanently than the power conferred on ESMA by Article 40 of said document;
- some countries, including Cyprus, did not and do not yet have members in the FIN-NET network. This network was set up by the European Commission in 2001 in order to promote cooperation between national ombudsmen in the area of financial services, which are subject to the principles laid down in Directive 2013/11/EU;
- if the entities benefiting from FPS provide their services in France using the French language, the ombudsmen of the home country's authorities, competent to examine the disputes, do not authorise the lodging of complaints in the French language. Many investors expressed, and still express, their misunderstanding of local rules and of the observations sent by the competent dispute resolution organisation.

Examination of these cases individually by the AMF Ombudsman made it possible to consolidate and refine significantly the AMF's observation that the current breakdown of jurisdiction between the authority of the home Member State and the authority of the host Member State is far from practical and must be perfected, especially with regard to the mechanisms of coordination.

The AMF has long noted that the understanding by the host country's supervisory authority of the language, local regulations and specific features of the local market make it more capable of identifying any problems related to the practices of the investment firms within its jurisdiction.

The AMF would like to upgrade the regulations in order to strengthen investor protection, and is carrying out work alongside its European counterparts.

At present, however, since positive law does not allow the AMF Ombudsman to declare herself competent and issue a proposal concerning market participants under FPS, investors can only be invited to deal with these entities of the home countries, suffering the difficulties caused by the current regulations, in case of dispute.

IN CASE OF SUSPICION OF A CRIMINAL OFFENCE: REFERRAL TO THE PUBLIC PROSECUTOR

In 2021, the Ombudsman received 78 cases which she considered involved a scam, versus 95 cases in 2020. However, it should be remembered that the year 2020 had been marked by a mass dispute, with about sixty cases received concerning a single professional, Laurent Chenot.

By comparison, in 2019 the Ombudsman had received only 35 cases for which she had declared herself incompetent due to their criminal nature. There has therefore been a 124% increase since 2019.

The large number of cases clearly involving scams received in 2021 can be explained notably by a conducive environment (surplus liquid savings, emergence of new investors as a result of the health crisis and various lockdowns, low returns from "conventional" savings products, etc.).

The losses sustained by investors range from €169 to €337,000.

Like in previous years, the Ombudsman noted that it is not possible to define a typical profile of scam victims. The cases received in the Ombudsman's Office show that the investor victims are aged between 23 and 85 (with a median age of 43 years).

They break down almost equally between pensioners (17%), tradesmen, shopkeepers and company managers (20%), senior executives (15%), office workers (18%) and people with no occupation (18%), which suggests that nearly all socio-professional categories are affected by this phenomenon. The intermediate occupations seem the least concerned (10%).

→See *The AMF publishes a study of complaints from French clients of European investment firms operating under the freedom to provide services*

[5] Decree enacting the provisions of Act No. 2019-486 of 22 May 2019 on business growth and transformation with regard to employee savings schemes and employee share ownership.

[6] When the competent authority of the host Member State has clear and demonstrable reasons to believe that an undertaking operating under the FPS regime is acting in a manner that is clearly detrimental to the interests of the investors of the host Member State, it shall notify the competent authority of the home Member State of this.

The Ombudsman also notes that the investment vehicles for these scams remain highly varied in 2021. The fraudsters are not lacking imagination to snare their victims: pseudo "passbook savings accounts", "capitalisation contracts" or else "enjoyment rights" the nature of which is of course not specified, fraudulent investments in cryptocurrencies, in SCPI fund units, in rooms in elderly care homes, in parking spaces or else via fake trading venues. The Ombudsman also occasionally received cases relating to dubious training courses in trading.

The reconversion of fraudsters from forex to crypto-assets observed in the previous years was clearly confirmed this year. One-quarter of the cases received in 2021 relate to fraudulent investments in cryptocurrencies (compared with about 6% of the cases received in 2020) or else investments in derivatives of crypto-assets. Moreover, one-quarter of the cases received concerned investments executed on trading venues domiciled in exotic countries, or even perfectly fictitious countries.

The growing sophistication of scams was also confirmed in 2021. In a number of cases, the Ombudsman noted that the proposed returns were high but plausible, that the contracts were written correctly, referred to legal concepts (management mandate, power of attorney, etc.), or even cited the applicable regulations. The Ombudsman also noted that investors could have access to fake online interfaces that could seem genuine, from where they could consult their supposed investments and alleged capital gains generated.

The large-scale use of masquerading as investment service providers authorised in France or in another European Union Member State, designed to make people think that the fraudster's company has the necessary authorisations, concerned about 15% of the cases received in the Ombudsman's Office in 2021.

Travesty of the principle of freedom to provide services by unscrupulous brokers

As in previous years, the Ombudsman notes that certain investment service providers authorised in another European Union Member State and authorised, under the Freedom to Provide Services, to provide a restrictive list of services in France, have practices which are similar to those of unregulated companies, that could be regarded as crimes.

In a great majority of cases, these are brokers registered in Cyprus, operating trading venues and regulated by the Cypriot regulator, CYSEC. These brokers are characterised by commercial practices that are very aggressive (repetitive soliciting), or even illegal (direct marketing, particularly to vulnerable people)[7].

The business of these brokers is based on a network of pseudo-advisers or coaches using very sophisticated psychological manipulation techniques. Initially appearing reassuring and likeable in order to gain the trust of the often non-expert investors with whom they are in close contact, these advisers urge them to invest always more on the trading venue, by promising large gains, and then to plough in more funds once the losses have built up, in the hope of saving the situation. Some investors, who seem to be under influence, lose in a few weeks the savings of a lifetime, or even take out loans to be able to keep on investing.

It frequently occurs that these pseudo-advisers illegally provide investment advisory services[8], when the broker is authorised solely for order receipt and transmission services.

In response to the deviations observed in the context of the freedom to provide services, ESMA had taken intervention measures (product intervention, see page 43).

Faced with these new legal constraints, unscrupulous brokers have developed ways of getting round the product intervention measures that are now incorporated in the national law of most European Union Member States. The Ombudsman has noted, in particular, a technique consisting of proposing to consumers, or even urging them, to declare themselves professionals, by activating an option, presented as a measure for flexibility enabling them to use greater leverage but depriving them of the protection reserved for European retail investors. Moreover, in 2021 the Ombudsman observed the frequent use of a mechanism redirecting investors to subsidiaries of the broker established outside the European Union[9], thereby evading European regulation.

REMINDER: OMBUDSMAN'S LACK OF JURISDICTION IN CASE OF SUSPICION OF AN OFFENCE

The Ombudsman reiterates that she cannot initiate a mediation procedure if the acts of which the investor considers himself a victim could be defined as criminal offences and/or if the entity with which the investor has had relations is not registered or authorised in France.

In cases of a criminal offence or suspicion of offence, the Ombudsman sends a letter to the investor to inform him of her lack of jurisdiction and of the apparently fraudulent nature of the investment made, and to indicate to him that he can file a complaint with the competent authorities.

The Ombudsman is also legally required to submit the case to the specialised departments of the AMF, which, in accordance with Article L. 621 20 1 of the Monetary and Financial Code, alert the Public Prosecutor.

The Ombudsman retains jurisdiction if the investor complains of a failing by his account-keeper within the framework of subscription to the contentious investment, because this is then a case of a civil law dispute. Although subject to a duty of non-interference in the affairs of his client, the banker's liability could be involved if it has failed in its obligation of due diligence, by not detecting a conspicuous intellectual anomaly in the transactions initiated by the victim of the scam.

This redirection generally takes place without the client knowing: the client thinks he is opening a trading account with an authorised and regulated market participant. But the client has in fact entered into a contract with a company often having a very similar name, whose head office is situated outside the European Union, generally unregulated (e.g., a company domiciled in Australia, Bermuda, the Seychelles or Saint Vincent and the Grenadines in particular).

These trading venues use a common interface, whereas they are in fact operated by a large number of entities, of which often only one is regulated in Europe, so that it is very hard for an investor to determine who is the other contracting party.

Through this evasion mechanism, the investor loses the protection of European law, and in particular of the aforementioned product intervention measures, especially the limitation of leverage. Investors also find themselves outside the supervision of any regulator and will not be able to appeal to a European ombudsman to settle their dispute by an out-of-court agreement.

The Ombudsman therefore calls on investors to be especially vigilant regarding the entity with which they enter into a contract when they open a trading account, notably with certain brokers based in Cyprus.

A NEW TYPE OF DISPUTE RELATED TO DIGITAL ASSETS: THE OMBUDSMAN HAS JURISDICTION ONLY IF THE FIRM HAS ACTIVELY SOLICITED THE INVESTOR IN FRANCE

The analysis of cases relating to digital assets does not point to a significant socio-professional category or age profile of the plaintiffs, thus demonstrating that these assets attract the interest of a varied public. The average loss per plaintiff is €4,200, with losses of up to €20,000 for some investors.

The AMF Ombudsman draws investors' attention to the fact that disputes concerning digital asset service providers (DASPs) cannot be investigated by it if said financial intermediaries proposing the investment in crypto-assets are not registered with the AMF. The AMF publishes a list of registered and authorised DASPs on its website. At the end of December 2021, 28 DASPs were registered; none is authorised by the AMF. Of the 44 cases received citing a dispute with a DASP, only six cases implicating DASPs registered with the AMF were able to be processed by the Ombudsman's Office.

DASPs: REGISTRATION OR AUTHORISATION, WHAT DIFFERENCE?

DASPs which provide services of custody for third parties or of access to digital assets:
- buying or selling digital assets for legal tender;
- trading digital assets for other digital assets;
- operating a digital-asset trading platform[10];

shall, before carrying out their business, register with the AMF if they are established in France (i.e. if they have a subsidiary or a branch office) or if they provide these services in France on their initiative.

Moreover, only service providers established in France may apply to the AMF for authorisation to provide one or more digital asset services in the ordinary course of business. This authorisation then allows them to perform direct marketing.

The scope of inspection for authorisations, which are optional, is far more wide-ranging and concerns the DASPs' procedures. For registrations, on the other hand, the inspection basically concerns the good repute and competence of the managers, and especially an anti-money laundering examination.

The mandatory nature of registration with the French regulator therefore depends not only on the nature of the service provided, but also on the very definition of the provision of services in France. Article 721-1-1 of the AMF General Regulation specifies that a digital asset service is considered to be provided in France when it is provided by a digital asset service provider having facilities in France or when it is provided at the initiative of the digital asset service provider to customers residing or established in France. The aforementioned article gives a non-exhaustive, non-cumulative list of criteria for considering that a DASP provides a service in France. A particular example of this is promotional communication sent to customers residing or established in France.

[7] These observations of the Ombudsman converge with those of the study carried out by the Retail Investor Relations and Protection Directorate of the AMF, published in March 2021 and entitled "Analysis of 2019-2020 complaints by French retail investors to the AMF public relations centre concerning European financial institutions operating on a free provision of services basis", which notes in particular that out of 221 alerts received from retail investors regarding firms operating in France via the European passport, more than 60% of the complaints and reported losses concerned market participants established in Cyprus.

[8] Defined in Article D. 321-1 of the Monetary and Financial Code as being *"the act of providing personal recommendations to a third party, either at the latter's request or at the initiative of the firm providing the advice, on one or more transactions relating to financial instruments"*.

[9] Mechanism for getting round the product intervention measures identified by ESMA in its public statement of 11 July 2019 *("Statement of ESMA on the application of product intervention measures under Article 40 and 42 of Regulation [EU] No. 600/2014 [MIFIR] by CFD providers").*

[10] This list corresponds to the first four services of Article L. 54-10-2 of the Monetary and Financial Code.

CONDITIONS UNDER WHICH A SERVICE IS DEEMED TO BE PROVIDED IN FRANCE AND THE SPECIFIC CASE OF REVERSE SOLICITATION (OR PASSIVE MARKETING)

In accordance with Article L. 721-1-1 of the AMF General Regulation, a digital asset service is considered to be provided in France when it is provided by a digital asset service provider having facilities in France or when it is provided at the initiative of the digital asset service provider to customers residing or established in France. In particular, a digital asset service provider is considered as providing a service in France when at least one of the following criteria is met:

1 the service provider has business premises or premises intended for the marketing of a service on digital assets in France;

2 the service provider has installed one or more automatic systems that offer digital asset services in France;

3 the service provider sends promotional communication, irrespective of the medium, to clients residing or established in France;

4 the service provider organises the distribution of its products and services through one or more distribution networks to clients residing or established in France;

5 the service provider has a postal address or a telephone number in France;

6 service provider has a .fr extension for the domain name of its website.

This list, although it is non-exhaustive, gives examples of the meaning of the provision of digital-asset services to clients residing or established in France at the initiative of the digital asset service provider. Such provision is considered as being at the initiative of the DASP, especially when the latter sends promotional communication to clients residing or established in France.

On the other hand, if the potential investor has himself contacted the service provider and the latter did not come into contact with the investor first, in other words in the event of passive marketing, the digital-asset service is then not considered as being provided in France.

De facto, if the other criteria making it possible to determine whether the digital-asset service is provided in France are not met, in the case of reverse solicitation (see insert regarding the position of the AMF Enforcement Committee) leading to marketing, including marketing of one of the first four services of Article L. 54-10-2 of the Monetary and Financial Code, then the DASP is not required to register with the AMF. A mediation procedure with the support of the AMF Ombudsman can therefore not be envisaged.

→ **See** *Obtaining a DASP registration/authorisation*

REVERSE SOLICITATION: THE POSITION OF THE AMF ENFORCEMENT COMMITTEE

The AMF Enforcement Committee has a firm position against fraudulent reverse solicitation practices and derivatives of this concept (SAN-2019-14 – Enforcement Committee Decision of 28 October 2019 with regard to Financière Henri IV Société Nouvelle and Tony Csordas and SAN-2021-08 – Enforcement Committee Decision of 30 April 2021 with regard to Sud Conseils Patrimoine and Mr Patrice de Porrata-Doria). In this latter decision against a Financial Investment Adviser, the Enforcement Committee judged that the sole purpose of the standard documents and clauses was to artificially maintain the belief in requests coming from clients whereas they resulted from the advice of the FIA to enable the client to acquire products whose marketing was prohibited in France. Likewise, ESMA was forced to give a reminder, in a public statement of 13 January 2021 (ESMA 35-43-2509), that the standard clauses used by UK platforms post-Brexit, stipulating that the client recognised that it was exclusively on their initiative that they had requested this product, had no legal validity and constituted an attempt to evade the MiFID II rules.

In accordance with the reverse solicitation rule, the Ombudsman had occasion to remind certain plaintiffs that, if they have themselves contacted the service provider of a third country and if that service provider has not contacted them first, in other words in the case of passive marketing ("reverse solicitation"), then the digital asset service provider is not subject to the supervision of the French authority. The DASP implicated (which does not have facilities in France either) is indeed not required to register with the AMF. A mediation procedure with the support of the AMF Ombudsman can therefore not be envisaged in these cases.

Note, moreover, that the illegal exercise of the activity of digital asset service provider consisting of providing a service in France without being registered is therefore liable to be penally sanctioned. Accordingly, in these cases the AMF Ombudsman had to state that by law she was not empowered to arrange a friendly settlement in the event of an offence or suspicion of a criminal offence.

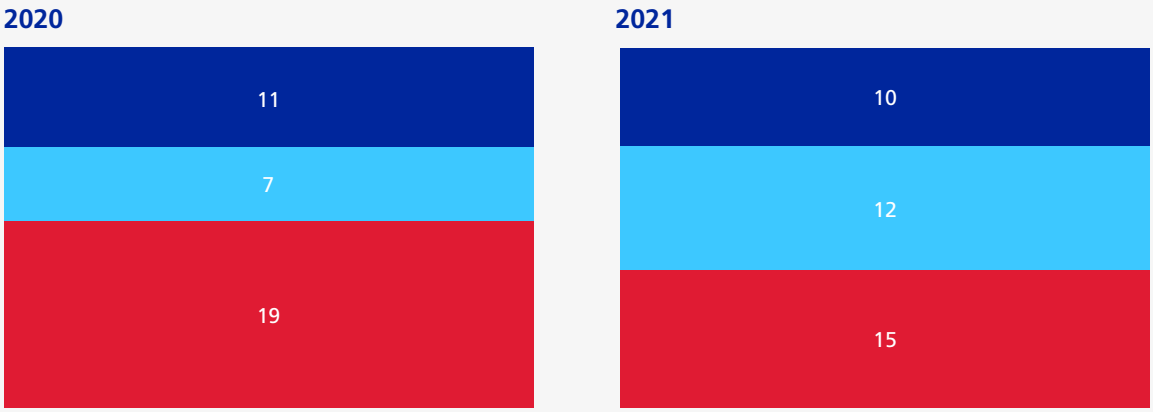
Processing of the 44 cases relating to digital assets that the Ombudsman received in 2021 (processed with lack of jurisdiction or as an acceptable case) showed that the plaintiffs in mediation confused the digital asset service offers listed in Article L. 54-10-2 of the Monetary and Financial Code with the cryptocurrency derivatives offer, or again with the initial coin offering (ICO). Now, for an investor to be able to verify the legal exercise of the activity of digital asset service provider, they must be able to distinguish between these various offers. Additional advice and explanations were therefore needed. Lastly, the Ombudsman observed that some investors seemed to be reassured by the European passport for the free provision of services enjoyed by certain investment service providers which also provided digital-asset services in France. But investors should bear in mind that the use of the European passport in France by a service provider does not authorise the latter to deviate from the rules governing the provision of digital-asset services in France.

With regard to digital-asset services, the Ombudsman was referred to notably for cases in which investors, finding their portfolio of crypto-assets hacked and emptied, found it hard to understand the limits to the liability of the DASP with regard to the security of cryptocurrencies and of their portfolio. As a reminder, the act of proposing technological solutions ensuring the storage of digital keys remaining under the sole control of the client does not constitute a custody service as defined by paragraph 1° of Article D. 54-10-1 of the Monetary and Financial Code. Regarding this point, the Ombudsman had occasion to explain to several plaintiffs that when they hold their digital assets in custody on an external portfolio over which they have control, it is incumbent on them to make sure not to lose or disclose their means of access, or have them stolen. A reminder was also given, in one case, that this strict confidentiality must apply for the master seed, which designates a list of words making it possible to restore the portfolio in the event of the loss, theft or destruction of the medium.

Some investors also express in their request for mediation a lack of understanding of the long list of justificatory documents demanded by the DASPs and the resulting practical difficulties. The Ombudsman therefore provides explanations concerning the obligations regarding anti-money laundering and combating the financing of terrorism (AML/CFT). The scope of the due diligence measures employed by the DASPs should, of course, be adapted to the assessed risks.

CHART 10

FIP/FCPI CASES



- Extension beyond the statutory lifeline of private equity funds
- Unsatisfactory performance
- Other (early redemptions, fees, lack of advice…)

CASES IN WHICH THE LIFE OF FIP AND FCP FUNDS IS EXCEEDED: ACTION SUBSEQUENT TO THE OMBUDSMAN'S RECOMMENDATION

In 2021, the Ombudsman was again referred to in numerous cases in which the statutory life of venture capital funds (FCPRs) was exceeded.

In the Ombudsman's 2020 Report, it was recounted that fundholders who had invested in FCPRs, and especially in innovation venture capital funds (FCPIs) and in local investment funds (FIPs), and who wanted to redeem their units when the fund reached maturity, had then discovered that the assets held by the fund were not fully liquidated.

In such cases, the Ombudsman reminds the fundholders that FIPs and FCPIs are risky undertakings for collective investment, invested mainly in unlisted small innovative or regional companies, for which the growth prospects are uncertain, entailing a risk of loss of capital and weak liquidity of the securities.

Accordingly, in some cases the asset management company may not have been able, before the fund reaches maturity, to sell all the assets held by said fund in optimal conditions, due to the economic situation. The AMF reiterates that it is incumbent on the asset management company to manage the fund's portfolio in conditions making it possible to comply with the constraint of the FCPR's contractual life. However, as indicated in the Enforcement Committee's decision of 14 December 2012 with regard to Company X, formerly called Innoven Partenaires SA, and Messrs Walter Meier, Gilles Thouvenin and Thomas Dicker, 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. Since the Ombudsman has no means of control to determine this, it is incumbent on the fundholder to demonstrate the asset management company's lack of diligence and to prove that this lack of diligence caused them damage, and such proof can be hard to provide.

This risk of exceeding the statutory life of the FIP/FCPI, sometimes ranging up to several years beyond the date of maturity of the fund, is brought to the knowledge of the fundholders only when they are faced with the situation. That is why the Ombudsman expressed her wish for reflection on a comparison of the advantages and disadvantages of improved information, as of the subscription stage, e.g. in the KIID or the investor subscription form, regarding the risk of exceptional circumstances entailing a very long time for winding up their investment.

This appeal by the Ombudsman has been acted on. Reflection has been started in the AMF to deal with the difficult issue of the end-of-life management of private equity funds. However, any reforms resulting from these reflections could, once enacted, only apply to subsequent subscriptions and their effects could therefore only be measured in a few years' time.

6 THE OMBUDSMAN'S NATIONAL AND INTERNATIONAL ACTIVITIES

In 2021, like in 2020, because of the health crisis the bodies in which the Ombudsman customarily takes part mostly held their meetings at a distance.

NATIONAL ACTIVITY

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 became one of its vice-chairs last year.

About thirty important ombudsmen, from various sectors and of very diverse status (public, institutional, sector-specific, corporate ombudsmen, etc.), are members of the Club. They meet several times a year to discuss their practices and any problems they are faced with.

In June 2021 the Club's annual seminar was held, at which Vincent Vigneau, chairman of the Commission des clauses abusives (Unfair Terms Committee) and counsellor in the Court of Cassation, and Élodie Guennec, head of the procedural law and social law office in the Ministry of Justice, spoke about the plan for the creation of the National Mediation Council adopted via an amendment within the framework of the law for trust in the judicial institution.

Moreover, in 2021 the AMF Ombudsman continued to supervise the working group set up in the Club the previous year following the publication of the case law sheets of the CECMC. The group was created to promote discussion between the members concerning the interpretation or contextualisation to be provided for some of these sheets. On 17 November 2021, the Ombudsman was accordingly invited by the CECMC to explain the Club's analysis and its suggestions, and was thus able to help upgrade these sheets, particularly regarding how to usefully process unfavourable decisions.

Also, Marielle Cohen-Branche, Vice-Chair of the Club, proposed and arranged a new training cycle concerning contract law, intended for the ombudsmen of the Club and their collaborators. These thematic workshops, covering several aspects, are run by a specialist, a professor or senior lecturer, and address in a targeted manner a legal concept which forms part of the cycle as a whole. Three workshops have already taken place, devoted to unfair terms, consent to contract and breach of contract. The next workshop, which will be held in May 2022, will deal with the difficult question of contractual damage.

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

INTERNATIONAL AND EUROPEAN ACTIVITIES

Here again, most of the major international conferences were held at a distance, when they were not postponed.

The AMF Ombudsman belongs to the European Network of Financial Ombudsmen (FIN-NET), 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 the 2013 directive on consumer mediation.

On 29 September 2021, the Ombudsman spoke at the annual Alternative Dispute Resolution meeting which brings together around 400 participants, and presented the activity of the AMF Ombudsman. The European Commission had asked six ombudsmen to present one of their successes in a video shown to the participants. In the video selected by the European Commission, the Ombudsman described how the beneficial effects of consumer mediation can be magnified by the creation of an Online Diary.

On the international level, moreover, since January 2013 the AMF Ombudsman has been a member of the International Network of Financial services Ombudsman schemes (INFO Network), 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. Due to the pandemic, however, the network's activities were significantly reduced.

→ **See the** *Sheets on case law defined by the CECMC* (available in French only)

Regular live chronicle on BFM Business TV to expose the case of the month

THE OMBUDSMAN'S COMMUNICATION INITIATIVES

Educational Initiatives

The Online Diary

Once again, in 2021 more and more website visitors consulted the Ombudsman's Online Diary. In the past year, the Online Diary recorded unprecedented traffic: 9,724 visits per month were counted, double the number in 2020 (4,757 visits per month), and the traffic has been multiplied by ten since its launch in 2014.

In 2021, Marielle Cohen-Branche also continued her live monthly digest on the Intégrale Placements TV show on BFM Business, where she discusses, this time speaking live, cases previously covered in the Online Diary.

➜ See the list of all the Cases of the Month, classified by theme in Annex 4

Training provided by the Ombudsman

The educational role of the Ombudsman can also be illustrated by the numerous training courses she organises each year for professionals, ISCMs/CICOs, ombudsmen (IGPDE training, Ombudsmen's Club training course), but also magistrates and, more generally, in the context of several university curricula (Paris-Dauphine University, Cergy-Pontoise University). Like for her national and international activities, the Ombudsman adapted to the context of the health crisis and had to provide most of these training sessions by videoconferencing.

In 2021, the partnership entered into with the Chair of Consumer Law, created by the Foundation of Cergy-Pontoise University, continued. The AMF Ombudsman, with the various 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. She regularly receives on internships students from the Master's course in Consumer Law and Commercial Practices with which the Chair is allied.

Speeches by the Ombudsman in various bodies

In addition to her regular 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. In 2021, for example, the Ombudsman spoke in particular at Cergy-Pontoise University before the Master's 2 class in Finance and Credit Law on the topic of financial mediation, in the course of the seminar run by Professor Johan Prorok.

In addition to these speeches, Marielle Cohen-Branche regularly publishes articles and studies in the specialist press. Notable publications were Marielle Cohen-Branche's review of ten years of mediation (Bulletin Joly Bourse, June 2021) or, more recently, an article entitled "Réflexion sur les arnaques financières" (Financial scams) and "La fabrique du consentement" (Consent) (published in Mélanges AEDBF [European Society for Banking and Financial Law], Volume VIII, January 2022).

Mathilde Casa, Legal Advisor

APPENDICES

APPENDIX I

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

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

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

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

A referral to the AMF Ombudsman shall suspend limitation of any civil or administrative action as from the day on which the referral to the Ombudsman is made, pursuant to Article 2238 of the Civil Code.

Said limitation shall resume for a period that cannot be less than six months when the AMF Ombudsman announces the close of the mediation procedure.

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

The Ombudsman publishes an annual report on his activity.

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

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

APPENDIX 2

Mediation chart as of March, 3rd, 2022

OMBUDSMAN
Marielle Cohen-Branche

CHAIRMAN
Robert Ophèle

MEDIATION UNIT

DEPUTY OMBUDSMAN
François Denis du Péage

ASSISTANT
Lysiane Flobert

LEGAL ADVISORS
Mathilde Casa
Eva Lasla-Bortolussi
Virginie Lavolé
Mathilde Le Mélédo
Florence Miller
Eloïse Senkur

SECRETARY GENERAL
Benoît de Juvigny

DIRECTOR RETAIL INVESTOR RELATIONS AND PROTECTION
Claire Castanet

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 written claim with the professional.

Article 4– APPLICABLE PRINCIPLES

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

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

Voluntary
Both parties should willingly enter into mediation, and they can withdraw from the 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 compares the parties' arguments. The examination is carried out in writing, but the Ombudsman may decide to hear the parties separately or together. The parties may contact the Ombudsman without using an attorney. However, they may be represented or assisted by a third party of their choosing at any stage during the mediation process.

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

Ombudsman's opinion and agreement of the parties
At the end of the process, the Ombudsman issues an opinion grounded in law and in equity. The mediation procedure ends with the delivery of this opinion or the withdrawal of one of the parties. The parties may refuse or agree to follow the opinion of the Ombudsman who, where applicable, ensures the agreement is enforced.

APPENDIX 4

Classification by theme of the AMF Ombudsman's cases of the month since launch (May 2014 to December 2020)

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
	Employee shareholder investment undertakings: be careful of redemption orders with trigger thresholds	01/02/2021
	Employee savings schemes: what starting point for early release of funds on grounds of a marriage abroad?	03/05/2021
FOREX AND BINARY OPTIONS	The risks of believing in the tempting promises of online Forex trading	03/11/2014
	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
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
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 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
	When a corporate action results in a debit cash balance: what are the obligations for the account-keeper and its client?	01/12/2021
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	31/03/2017
	On what date is the status of shareholder assessed in order for him/her to benefit from the associated right to a dividend?	04/02/2019
	Beware of the five-year limitation period for dividends	02/12/2019
	The need to use the AMF Ombudsman's Office properly: neither too early nor too late…	04/05/2020
	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	01/12/2021
	Regarding bond purchases and redemptions: what exactly does "par" mean?	01/04/2019
	Preferential subscription rights: provide good information for investors, even non-shareholders	01/03/2021
	Corporate actions: the importance of information concerning the possible procedures for reply	02/09/2021

APPENDIX 5

For further information on mediation

→ **FIN NET (Network of European Financial Ombudsmen) website**

→ **INFO (International Network of Financial Services Ombudsman) website**

→ **Club of Public Services Mediators**

→ **European Directive 2013/11/EU,** on the alternative resolution of consumer disputes

→ **European Regulation No. 524/2013,** on the online resolution of consumer disputes

→ **Executive Order No. 2015-1033 of 20 August 2015,** on the alternative resolution of consumer disputes (in French only)

→ **Decree No. 2015-1382 of 30 October 2015,** on the mediation of consumer disputes (in French only)

→ **Consumer Code, legislative part,** Book VI, "Dispute Resolution", Title I, Mediation (in French only)

→ **Consumer Code, Regulatory par,** Book VI, "Dispute Resolution", Title 1, Mediation (in French only)

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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