OMBUDSMAN'S REPORT

AUTORITÉ
DES MARCHÉS FINANCIERS
AMF

2022

THE OMBUDSMAN'S EDITORIAL:

THREE AMBITIOUS CHALLENGES MET SUCCESSFULLY IN AN UNCERTAIN ENVIRONMENT

In a year marked by a series of crises and uncertainties of all kinds, mediation requests remained at a very high level of 1,900 in 2022. This year again, there were about 500 more cases than the requests received annually before the health crisis. 2021 was therefore not a temporary peak.

But the real record posted this year concerns the number of opinion proposals that I issued: 1,014 opinions compared with 763, 505 and 451 opinions issued in 2021, 2020 and 2019, respectively.

These figures testify to the intense activity of the entire team in the AMF Ombudsman's Office, assisted by backup staff during this period to achieve such a performance.

This surge in the number of requests noted since 2021, with the advent of one and a half million new shareholders, therefore continues. In 2022, the AMF Ombudsman's Office set itself an ambitious threefold objective.

First, reduce the backlog of these cases that had arrived since 2021, which had grown enormously; to this effect, the number of opinions issued had to exceed the number of cases received. This backlog has now been reduced substantially and is returning to less worrying volumes.

Next, make sure that mediation times are not excessively harmed by this due to the automatic cumulative effect of closing old cases. But, although the average time for processing cases has become slightly longer, the median time has improved, here again reflecting the increased productivity of this public service.

Last but not least, preserve the recognised quality of the AMF Ombudsman's investigation.

The challenge has been met successfully, judging by the stability of the rate of retail investors' objections to unfavourable opinions issued, at the very low level of 4%, while the rate of favourable opinions not disputed by the professionals is also stable, at 95% in 2022.

And then, of course, the last major statistic awaited with regard to efficiency, constant growth (+25% in 2022) in the audience for the Ombudsman's "cases of the month" on the AMF website, which analyses disputes from which more general lessons can be drawn via anonymised case studies. In addition to the 12,400 readers on average on the website each month, other very important aspects are also their dissemination in the press and their recognition as policy by major professional market participants and consumer associations.

2022 was also the year when, following the Ombudsman's alert before the AMF Board when presenting her 2021 report, faced with the large number of disputes related to the PEA plan (which remains, in 2022, the leading subject of the cases processed), the AMF decided to set up an institutional working group which met very actively from the last quarter of 2022, based on the Ombudsman's observations and proposals. A brief summary of this is given in this Report. In 2023, it will be possible to determine the more concrete follow-up action that could be derived from this by the AMF.

After falling sharply for two years, the number of requests in the area of employee savings picked up again slightly, although without regaining its position as the main sector handled by the Ombudsman's Office. Moreover, new types of disputes are arising, related to the new techniques for acquisition of the primary residence (for example, the "bail réel solidaire" leasing arrangement of the Alur Act) or to methods for enlargement of the primary residence as a result of changing life styles of the family circle. Given these new aspects, there must, in my opinion, be an awareness of the need for updating the regulations of the Labour Code. This legislation, need we reiterate, concerned 12 million employees and around €162 billion in investments in 2022.

Regarding the stock market directly, the number of disputes remained stable in 2022 after being multiplied by five between 2019 and 2021 for execution of stock exchange orders and by three for corporate actions. I again noted numerous examples of ignorance or misunderstanding on the part of these new shareholders, who are definitely more daring or foolhardy. In particular, I would like to stress the major lack of understanding concerning what are preferential subscription rights (PSRs), which I observe in cases relating to capital increases. Buying such rights is not equivalent to buying shares: they must still be exercised or sold within a short period of time, or else these PSRs are no longer valid after a few days. There is also the question of the exercise or sale period, which may legally be shortened by the account-keepers, compared with that announced in the prospectus. On the recommendation of the Ombudsman in February 2023, the AMF stipulated that the summary of future prospectuses for a capital increase with PSRs should mention this explicitly.

This investor curiosity also concerns securities outside the European Union, especially US securities, and may also become somewhat problematic. Indeed, it means the investor is subject to foreign rules that may be completely unknown: disputes concerning mini-tenders mediatised by account-keepers or penny stocks that US brokers no longer want to trade following alerts by the US financial regulator, the SEC, are just some examples that will be found in this report.

At the same time, it must be recognised that financial regulations are becoming increasingly complex and meticulous, while nevertheless leaving gaps which allow some actors to imagine solutions to get around the problem on the unfair basis of reverse solicitation. This enables trading venues to maintain that they do not have to obey a given regulation on the grounds that it is the client who came to them, and they have the client recognise, in a standard clause of their general conditions, that it is not they who actively solicited him or her. These venues therefore maintain that they did not "market" this service. The European Securities and Markets Authority (ESMA) even had to intervene at the time of Brexit to prevent such standard clauses that it pointed out as being unfair. The AMF, to its merit, also occasionally condemned the practice by certain financial investment advisers (FIAs). This practice is now starting to be reported in the area of crypto-assets.

> **“THE INTENSE ACTIVITY OF THE ENTIRE TEAM IN THE AMF OMBUDSMAN’S OFFICE”**

This report contains an analysis of the type of disputes increasingly received in this completely new sector of crypto-assets, which should be examined bearing in mind that the Ombudsman's jurisdiction is still limited and that the proportion of inadmissible requests is high (70%).

Finally, the last field to which I should like to draw attention in this report is one that has been growing regularly for some years now, namely successions involving financial instruments. At the crossroads between civil law, the law of marriage settlement and regulations on financial products and services, they prove extremely complex. This complexity is not always understood, even by the specialist departments of account-keepers. But notarial liability can also occasionally be involved, and it is up to the Ombudsman’s Office to try to delicately sort out what, in its opinion, is attributable to each party.

I wish you pleasant reading!

Marielle Cohen-Branche, 20 March 2023

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 2021 for 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 bank ombudsmen (2003-2012);
- a member of the World Bank Sanctions Board responsible for anti-corruption (2007-2013).

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

Since 15 October 2013, in parallel with her duties as AMF Ombudsman, Ms Cohen-Branche has been a member of the International World Bank Administrative Tribunal. Her five-year term has been renewed and, since November 2019, she has become its Vice-Chair.

At the same time, since 3 December 2022 Marielle Cohen-Branche has been a member of the Administrative Tribunal of the European Bank for Reconstruction and Development (EBRD), serving a renewable three-year term.

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

As Ombudsman, she is supported by a team of six legal experts who work for her exclusively. This team is led by François Denis du Péage, Deputy Ombudsman in the AMF’s Retail Investor Relations Directorate.

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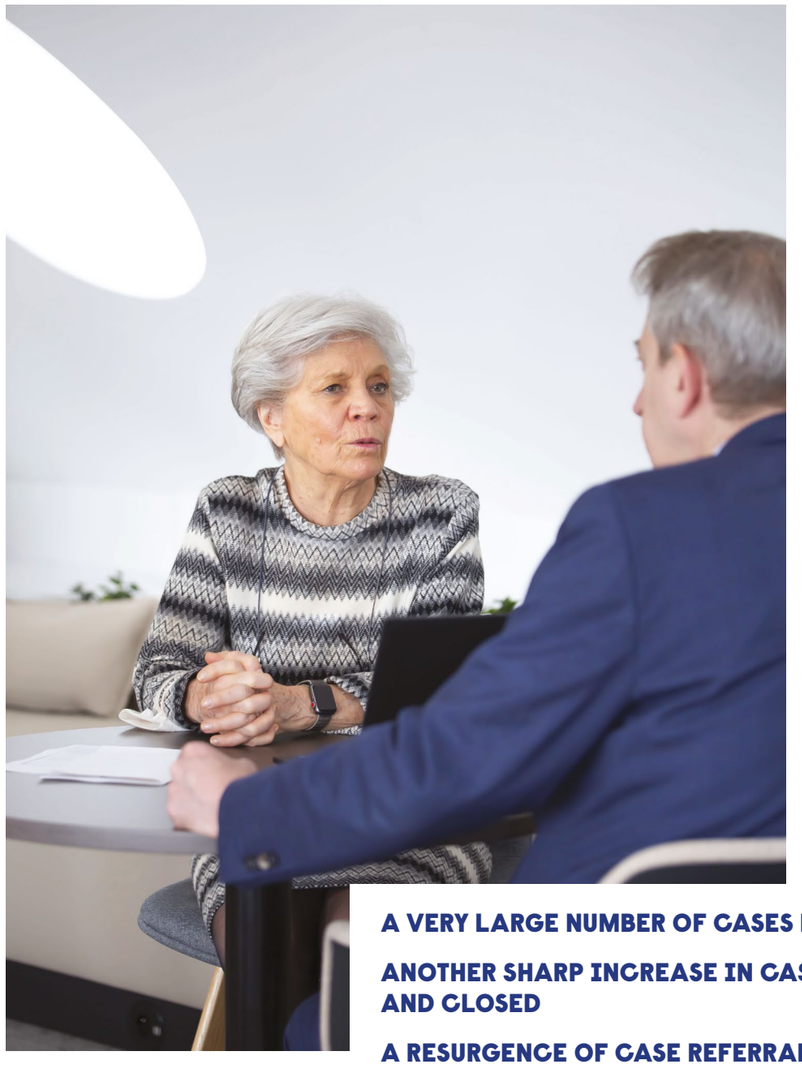


A VERY LARGE NUMBER OF CASES PROCESSED

The number of requests received amounted to 1,900, roughly the same as in 2021 (-3%). However, this level is still very high and should be compared with 1,479 requests received in 2020 and 1,295 received in 2019.

Considering only the requests received in 2022 within the Ombudsman's jurisdiction, the decline was by 9% to 1,152 requests. This is because the number of requests received in 2022 outside the jurisdiction increased by 7% (748 versus 701 in 2021).

The use of the mediation request form as a channel for case referrals to the Ombudsman's Office, which had reached 58% of requests received in 2020 and 2021, fell back in 2022 to the same level as postal mail. The requests received via the form are proportionally more relevant, however, in particular thanks to filtering by a series of questions enabling applicants to better route their requests to the ombudsman having jurisdiction. In 2022, 25% of the requests received via the form were outside the AMF Ombudsman's jurisdiction, whereas 50% of case referrals received by postal mail were so.

It must be regretted that some plaintiffs who refer their case by postal mail indicate neither an email address nor even a phone number. Effectively, the very great majority of exchanges between the Ombudsman's Office and the parties to disputes take place by email. The use of conventional postal mail makes exchanges longer and more problematic.

On the AMF website, the questions asked of retail investors when filling in the mediation application form, supported by actual examples, are as follows:

- What is the nature of your dispute (banking - e.g.: bank cards, interest rates, credit, life insurance or tax)?
- Has your dispute been reviewed by another ombudsman? By a court?
- Have you filed a complaint?
- Have you submitted a prior written complaint to the firm concerned? On what date?

ANOTHER SHARP INCREASE IN CASES PROCESSED AND CLOSED

Like in 2021, the number of cases processed and closed in 2022 increased very sharply, to 2,089 cases, versus 1,867 in 2021 and 1,327 in 2020. This very substantial increase in case closures in 2022 significantly reduced the backlog of cases, i.e. the cases in course of investigation at the end of the year.

Now, 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. At 31 December 2022, the backlog of open cases was 358 compared with 545 at 31 December 2021, i.e. 35% fewer.

When they are received, the cases are examined regarding their admissibility. Some are then closed on various grounds: outside the jurisdiction of the Ombudsman's Office, absence of prior complaint, late case referral (when the prior complaint was made more than one year ago), case referred to another ombudsman (the same dispute cannot be referred to two ombudsmen at the same time or one after the other), legal proceedings (legal action has been taken), or a request that in fact resembles a legal enquiry or an alert and not a mediation request.

Accordingly, services related to order execution, financial advice, custody-account keeping or account transfers are matters for the AMF Ombudsman.

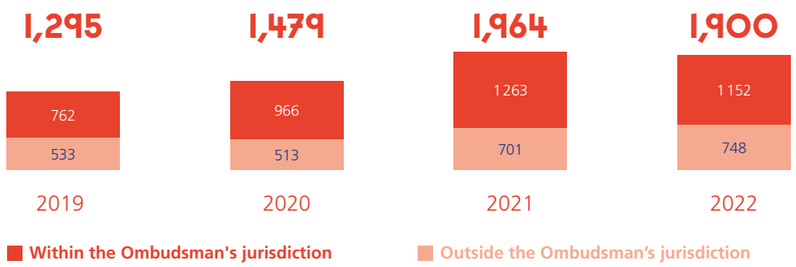
The AMF Ombudsman cannot be called on for a dispute with a firm operating in France within the framework of the freedom to provide services, i.e. which is established in another European country and is supervised by a regulator other than the AMF. In this situation, the plaintiff must comply with the complaints procedure normally shown on the firm's website.

WORTH KNOWING

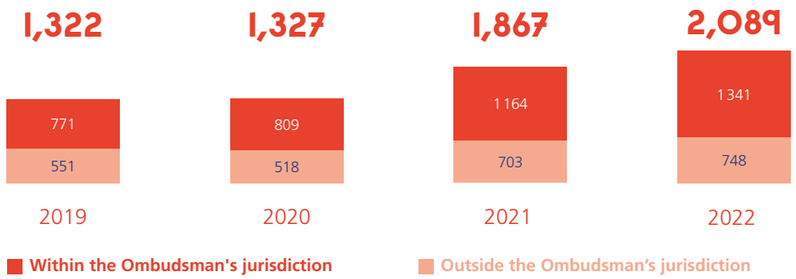
In accordance with Article L. 624-19 of the Monetary and Financial Code, the AMF Ombudsman can intervene in any financial dispute that comes within the AMF's jurisdiction. In accordance with Articles L. 611-1 et seq. of the French Consumer Code, any consumer or "non-professional" within the meaning of the introductory article of the Consumer Code is entitled to contact the Ombudsman with regard to a financial dispute of an individual nature falling within the jurisdiction of the AMF.

CHART I, 2 ET 3

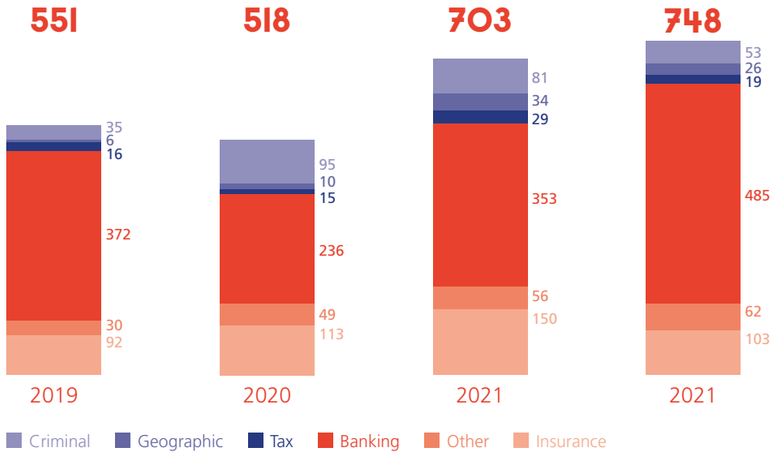
NUMBER OF CASES RECEIVED



NUMBER OF CASES PROCESSED



DETAILS OF LACK OF JURISDICTION PROCESSED



A RESURGENCE OF CASE REFERRALS OUTSIDE THE OMBUDSMAN'S JURISDICTION

Cases received outside the Ombudsman's jurisdiction are redirected quickly, indicating, whenever possible, which ombudsman has jurisdiction. Of the 748 cases outside the Ombudsman's jurisdiction that were processed and closed in 2022 (compared with 703 in 2021), 485 concerned the banking sector, i.e. 65% (versus 50% in 2021).

Indeed, case referrals by retail clients who are victims of online bank card frauds and other debits appear to have exploded in recent months. It is likely that the victims turn to the AMF and its Ombudsman because of the AMF's role as regulator. However, these cases, and their regulation, are a matter for the banking sector.

WORTH KNOWING

As a reminder, and without being exhaustive, disputes related to bank transfers, means of payment, credit, bank savings (regulated passbook savings accounts, time deposit accounts), bank charges, insurance (life insurance policies in euros or unit-linked policies, non-life insurance, PERP, Madelin and Art. 83 savings schemes) are not handled by the AMF, unlike financial investments (stock market, CIUs, ETFs, SCPIs, FCPIs, AIFs, PEA plans, etc.).

Regarding digital asset service providers (DASPs), e.g. for Bitcoin, a client may refer the case to the AMF Ombudsman's Office only if the firm has been registered with the AMF.

Regarding service providers that are financial institutions located in a European country and operate under the Freedom to Provide Services in France in accordance with European rules, and which therefore have no establishment located in France, the AMF is not the authority having jurisdiction. In such cases, therefore, the AMF Ombudsman's Office accordingly declines the admissibility of the case referral by referring the plaintiffs to the provisions of the contract in case of dispute, which usually stipulate that the consumer ombudsman of the financial institution's home country has jurisdiction.

The fact remains that, in accordance with the regulations (Article L. 616-1 of the French Consumer Code), it is incumbent on financial institutions to indicate the contact details of the competent ombudsman or ombudsmen by whom they are covered, failing which they incur the risk of an administrative fine of €15,000 (Article L. 641-1 of said Code).

For cases outside the Ombudsman's jurisdiction 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 obvious cases are therefore sent to the Public Prosecutor (46 cases out of 53 in 2022) by the AMF Legal Affairs Directorate pursuant to Article L. 621-20-1 of the Monetary and Financial Code).

Cross-border disputes are either disputes in which the implicated institution is located outside France, and in that case the AMF Ombudsman's Office does in theory not have jurisdiction, or disputes in which the plaintiff resides outside France but the institution is regulated by the AMF (head office or establishment in France). In all, 112 cross-border cases were processed in 2022 and 77 were received in 2022; some of the cases processed in 2022 may have been received earlier. Conversely, all the cross-border cases received in 2022 were not processed and closed in 2022. Of the 112 cases closed, 57 were not admissible and 55 were.

CHART 4

REASONS FOR CLOSING THE 2,089 CASES PROCESSED IN 2022 (COMPARED WITH 2021)

2,089
CASES PROCESSED IN 2022

748
cases processed outside the Ombudsman's jurisdiction

+ 12% COMPARED WITH 2021 (1,867)

Lack of jurisdiction type	No. of lack of jurisdiction cases processed
Banking	485
Life insurance	103
Criminal	53
Geographic	26
Tax	19
Other	62

1,341
CASES PROCESSED WITHIN THE OMBUDSMAN'S JURISDICTION IN 2022

201
cases not processed on their merits

+ 15% COMPARED WITH 2021 (1,164)

Reasons for closing	No. of cases closed
Premature request	114
Request reclassified as consultation	12
Request reclassified as alert	14
Late request	5
Legal proceedings	15
Submitted to another Ombudsman	11
Not able to be processed	11
Other	19

1,140
MEDIATION PROCEDURES INITIATED IN 2022

126
médiations interrompues ou refusées

+ 26% COMPARED WITH 2021 (903)

Reasons for closing	No. of cases closed
Abandoned by the plaintiff	80
Mediation procedures rejected or abandoned by the firm (of which 14 by the same asset management company)	46

1,014
OPINIONS ISSUED IN 2022

+ 33% COMPARED WITH 2021 (763)

1,341 CASES WERE PROCESSED WITHIN THE AMF OMBUDSMAN'S JURISDICTION

Of these cases, 327 were processed without an opinion having been proposed:

- 114 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;
- 11 cases were closed because they could not be processed;
- 15 because they were the subject of legal proceedings incompatible with mediation, which is an amicable process;
- 11 because the case had also been referred to another ombudsman at the same time;
- 14 cases were reclassified as alerts because they sought merely to expose a practice without claiming compensation. Once reclassified as alerts, these cases were forwarded to the relevant AMF staff for monitoring;
- 12 cases were reclassified as consultations, as they raised questions for the Ombudsman but no dispute was referred;
- 80 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;
- 5 were rejected for late case referral, because the prior complaint was made more than a year ago, which provides grounds for inadmissibility;
- 46 cases involved firms who rejected the mediation procedure, versus 40 in 2021. As a reminder, the confidentiality governing mediation protects only those parties entering into mediation and not those which refuse to enter into mediation. When the exercise of this occasional right, 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 (Article L. 612-1 of the French Consumer Code).
- Most of these rejections concern various financial investment advisers, 34 cases.
- 19 cases for other reasons.

1,014 OPINION PROPOSALS

These 1,014 opinion proposals, also called "Ombudsman's proposals" to comply with the specific regulations of the French Consumer Code, were favourable to the plaintiff in 549 cases (i.e. 54%) and unfavourable to the plaintiff in 465 cases (i.e. 46%). Note that a high rate of favourable recommendations cannot be an objective in itself, since the nature of the proposals depends on the intrinsic characteristics of the case, i.e. the merits of the request.

The rate of compliance with the Ombudsman's proposals is expressed in two ways: first, 95% of proposals, when they are favourable to investors, were followed by both parties, and second, only 4% of proposals unfavourable to investors were 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. Note that in the event of persisting disagreement, investors can always bring their dispute before the courts, which they are always reminded of, moreover, as required by the regulations (Article R. 612-4 of the French Consumer Code) and, throughout the mediation period, the prescriptive period is suspended.

Mediation topics:

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

- poor execution;
- poor information or advice;
- mismanagement;
- issuer complaint;
- other.

In 2022, the top two categories of complaints represented 86% of mediation cases processed. Mismanagement accounted for only 4%.

Each year, the topics addressed differ widely, as illustrated by the Ombudsman's Online Diary, which is published monthly on the AMF website (see Appendix 4 to the report, page 64).

IN 2022, THE CASES PROCESSED AND CLOSED CONCERNED 254 DIFFERENT FIRMS:

- investment service providers;
- financial investment advisers;
- market operators;
- unregulated service providers;
- listed companies;
- portfolio asset management companies.

The vast majority of cases (82%) were related to investment service providers.

CHART 5

BREAKDOWN AND ACCEPTANCE OF OPINIONS ISSUED IN 2022

1,014
recommendations
in 2022

54%
of recommendations were favourable to applicants (partiallyor totally)

95%
of favourable recommendations were followed by both parties

46%
of recommendations were unfavourable to applicants

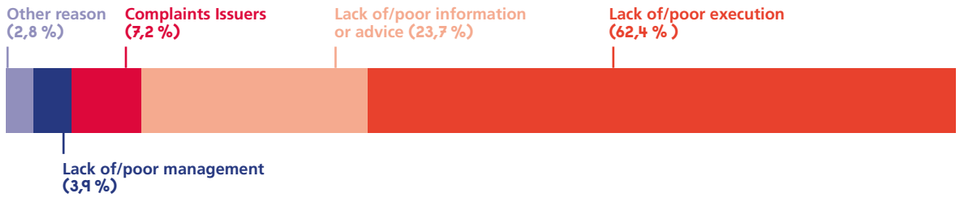
4%
only of applicants, for whom the recommendation was unfavourable, stated that they were not satisfied

MAJOR TRENDS BY SECTOR IN 2022

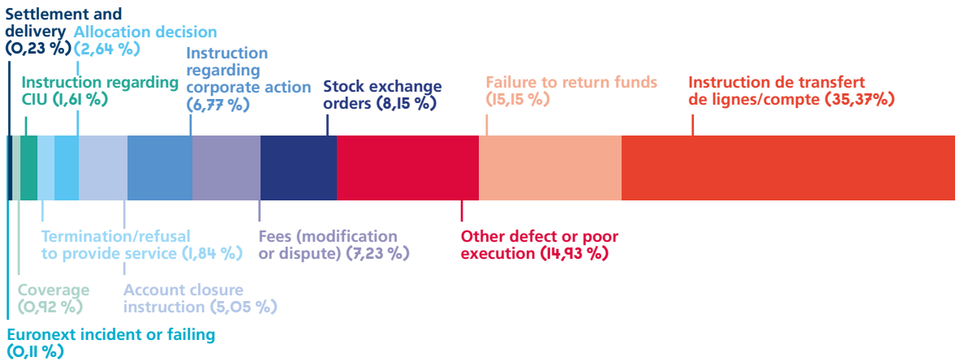
- Cases concerning "PEA" personal equity savings plans, especially the length of time for PEA transfers, were the main reason for disputes, as in 2021.
- Once again, there were many serious misunderstandings concerning corporate actions: procedures and consequences.
- Many cases again concerned problems of order execution in the stock market and net asset values of UCITS.
- The number of case referrals relating to employee savings schemes started to increase again; these have no longer been the main subject of dispute since 2021.
- Cases relating to crypto-assets are increasing but as yet not many of them come within the jurisdiction of the AMF Ombudsman.

CHART 6

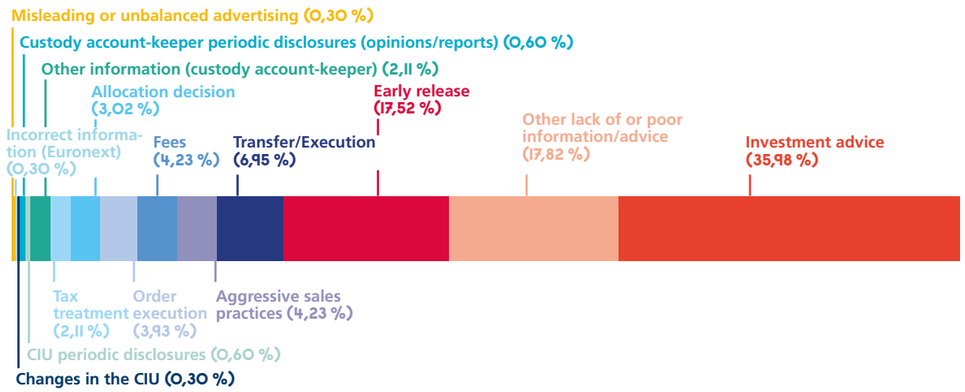
REASON FOR COMPLAINT IS NOT EMPTY



REASON FOR COMPLAINT IS LACK OF/POOR EXECUTION IN 2022



REASON FOR COMPLAINT IS LACK OF INFORMATION OR ADVICE IN 2022



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 not limited by the legislation or 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 2022 the process as a whole – i.e. until the date of issue of the Ombudsman's opinion which marks the end of mediation – lasted six months on average, with a median of three and a half months.

In the event of a favourable opinion, the Ombudsman will wait for the reply from the investor, who has 15 to 30 days for this purpose, depending on the case. 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 2022, average processing times resulting in an opinion from the Ombudsman were as follows:

- **4 months:** between receipt of the plaintiff's case and the time of its completion, with a median of two months. This period includes time waiting for replies to the Ombudsman's requests, which sometimes require follow-ups and several exchanges of correspondence, some financial intermediaries being less proactive than others.
- **6 months:** between receipt of the plaintiff's case and issuance of the Ombudsman's opinion, with a median of three and a half months, versus four and a half months in 2021. The shortening of this median time in 2022 compared with 2021 is a result of the strong mobilisation of the personnel and temporary backup staff which made it possible to save time and reduce the backlog of cases by 35%.
- **64 days:** between completion of the case and issuance of the Ombudsman's opinion, with a median of 16 days, versus 60 and 28 days, respectively. Here again, a major team effort made it possible to reduce the median completion time significantly. 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 2022, notice of inadmissible mediation requests was given to the plaintiffs within 13 days on average, with a median of six days.

RESULTS ACHIEVED BY MEDIATION IN 2022

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

- either to obtain execution of an instruction (61% of favourable opinions accepted);
- or to obtain reparation for the loss through compensation (39% of favourable opinions accepted). The total amount of compensation obtained in 2022 was €864,519, compared with €555,273 in 2021.

Regarding all cases closed in 2022, 549 favourable recommendations were made, including 202 financial recommendations. For those 202 financial recommendations, goodwill gestures ranged from €2 to €100,000, with an average of €4,280 and a median of €406.

Regarding Forex cases closed in 2022, 13 favourable recommendations were made, all financial. The goodwill gestures ranged from €200 to €22,000, with an average of €7,708 and a median of €6,254.

Regarding employee savings scheme cases closed in 2022, 85 favourable recommendations were issued, including 29 financial recommendations.

For those 29 financial recommendations, goodwill gestures ranged from €16 to €1,305, with an average of €1,073 and a median of €100.

François Denis du Péage, Deputy Ombudsman

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PEA PLAN: THE OMBUDSMAN'S RECOMMENDATIONS

With its advantageous tax regime, the personal equity savings plan (PEA plan) is still very popular with retail investors. According to figures from the Banque de France[1], there were 5.1 million PEA plans opened as at 31 December 2021, valued at about €101 billion[2],i.e. 13.10% more than in 2020.

However, the operating rules for this "tax wrapper" are complex and a source of disputes.

Accordingly, for the second year running the PEA plan was once again the leading reason for case referral to the Ombudsman, ahead of employee savings schemes.

As a reminder, in 2021 the PEA plan accounted for 28% of case referrals to the Ombudsman, with 329 cases closed (versus 154 in 2020). In 2022, this figure increased again, with 362 PEA-related cases closed.

Again in line with the findings in 2021, in two-thirds of cases the disputes concerned the sometimes worrying time taken to transfer the PEA plan when investors change institutions and the consequences of this (229 cases closed this year).

All of the dysfunctions noted by the Ombudsman in 2021, and already pointed out in her 2021 report, persisted and in some cases increased. The Ombudsman had already issued a number of general recommendations, which were specific to her. These general recommendations are replicated here and enriched with the observations made throughout 2022 and, at the time of writing these lines, they constitute the Ombudsman's specific recommendations regarding the PEA plan.

The Ombudsman can only rejoice at the establishment by the AMF Board, after the Ombudsman's presentation of her 2021 annual report, of an institutional working group within it which met actively in the last quarter of 2022 chaired by one of its members, Mrs Jacqueline Eli-Namer (see special box on the working group page 23). Its conclusions and proposals, after being validated by the AMF Board during the first half of 2023, have been submitted for a general public consultation until 5 June 2023[3].

As a reminder, the legislative and regulatory texts do not stipulate a deadline for transfer of the PEA plan. The reasons for the delays are numerous: they may be due to the owner of the PEA plan (and in particular the composition of their portfolio), the originating firm or the receiving firm, and sometimes a combination of them.

There are two main types of problems resulting in the increased length of transfer times:

- structural problems due in particular to the complexity of the PEA regulations, which will be discussed below;
- more specific problems related to the business, which may lead to "mass litigation". In 2021, for example, 101 transfer cases were related to the takeover of one financial institution by another. In 2022, it was the discontinuance of business by a financial institution in France which gave rise to about one hundred cases.

TRANSFER TIMES: PERSISTENT MULTIFORM FACTORS OF COMPLEXITY

For the cases processed in 2022, the Ombudsman once again identified a number of factors of complexity which had a direct impact on transfer times.

First factor of complexity: incompleteness of the account holder's request

This could, for example, be due to the absence of a certificate of identification of the new PEA plan when requesting a transfer, or the lack of funds on the PEA cash account to pay the transfer fees and initiate the procedure, or else its incorrectness (e.g., transfer requested by the client when it is up to the receiving firm to initiate the procedure, demand for a handwritten signature to request the transfer, or an IBAN error between the cash account and securities account).

While the firm's refusal to carry out the transfer in these cases may be justified, on the other hand the time taken to notify the PEA account holder of the dysfunction in question may sometimes seem hard to understand. For example, this year the Ombudsman once again noted in several cases a lack of proactiveness of the originating firms faced with an incomplete or incorrect request by the client.

The Ombudsman also reminds PEA account holders that they must without fail set aside provisions for transfer fees (at least 150 euros) and that is not for them to initiate the transfer request, but the receiving institution.

[1] www.banque-france.fr/statistiques/epargne-et-comptes-nationaux-financiers/statistiques-sur-plans-depargne-actions-pea-et-les-pea-pme

[2] Source : Banque de France.

[3] The PEA plan also interests the legislator: see the bill to enhance investor protection filed by senators Jean-François Husson and Albéric de Montgolfier on 25 January 2023: the aim in particular is to establish a right to error in the case of a purchase of ineligible securities. The text is undergoing examination in the French Parliament.

RECOMMENDATION 1

ESTABLISH AN OBLIGATION FOR ACCOUNT-KEEPERS TO REFER BACK TO THE PEA ACCOUNT HOLDER IN THE EVENT OF AN AMBIGUOUS, INCOMPLETE OR INCORRECT TRANSFER REQUEST

The Ombudsman proposes that the professional be required to refer back to the client within a short period of time to alert them regarding the problem identified and prompt them to rectify the situation, so as to enable the transfer procedure to continue.

Based on the same rationale, the Ombudsman proposes that the professional be required to forward the request to the competent department in the case of a request sent to the wrong contact person.

Going beyond good practices, the regulations could provide for such an obligation placed on the account-keepers, as exists in relations between the administrative authorities[4] and the public since Ordinance No. 2015 1341 of 23 October 2015.

Second factor of complexity: the composition of the account holder's portfolio

This concerns the presence of unlisted or delisted securities, foreign securities, membership shares of mutual institutions, securities that have become ineligible and must be removed from the PEA plan, or again corporate actions or orders undergoing processing, etc.).

As a reminder, the transfer cannot be partial. A blockage faced on a single investment prevents the transfer from continuing.

Furthermore, the transfer is blocked when a security is involved in a corporate action, which could entail significant delays, especially for portfolios containing several investments affected by corporate actions.

The Ombudsman prompts PEA account holders to analyse their portfolio before initiating the transfer, in order to identify securities which could pose problems, possibly with the help of the receiving firm. If the portfolio contains this type of securities, then the Ombudsman recommends selling them or placing them on an ordinary securities account.

The Ombudsman also encourages PEA account holders to avoid insofar as possible initiating the transfer when they know of a coming corporate action which will inevitably delay the transfer.

Third factor of complexity: the insufficiently automated and standardised nature of PEA management and problems related to publication of the tax information slip

For the mediation cases processed in 2022, the Ombudsman once again noted divergences in firms' practices regarding their transfer requirements. For example, some firms continue to refuse the client's electronic signature while others accept it, and some use a single IBAN for the PEA plan while others use two different ones for the cash account and the securities account, which can result in problems of identification of the PEA plan or rejections when transferring the cash balance.

The Ombudsman also noted recurring problems related to publication of the tax information slip. Now, so long as this slip, tracing the history of the PEA plan and enabling the receiving firm to verify anteriority for tax purposes and compliance with the PEA operating rules, has not reached the receiving firm in a correct and complete form, the transferred PEA plan cannot be "reactivated", i.e. used.

[4] Code of Relations between the Public and the Administrative Authorities, Article L. 114-2 and Article L. 114-5.

The key question, still not resolved as yet, of ignorance of the extent of opportunities for arbitrage during the transfer and the need for an improvement in the account holder's information on this subject

The corollary of the transfer time is whether or not the PEA account holder can arbitrage during the transfer period, in the absence of clear, standardised information from the account-keepers concerning this point.

Indeed, the actual technical PEA lock-in period seems to vary from one firm to another (a few days or throughout the procedure) and, moreover, is largely unknown to clients.

The existence of a possible loss of opportunity for not having been able to arbitrage, harming the client's interests, could constitute a source of major liability for the management firms if the client can provide proof of this. Unfortunately, in most cases, the plaintiff merely makes the assertion, without being able to demonstrate this harm, or else the plaintiff applies for compensation based on a percentage of their portfolio as a function of the market's performance, sometimes forgetting that their portfolio has remained invested during the transfer.

In her 2021 annual report, the Ombudsman had expressed, by way of a recommendation, that investment firms should at last clarify the key question of the possibility of arbitrage during the transfer, its duration, and the consequences this entails (deferment or suspension of the transfer procedure). This recommendation formed part of a more general recommendation that the originating firm should provide its client with comprehensive information enabling them to measure their risk during this period.

A PEA WORKING GROUP WITHIN THE AMF

On 13 September 2022, the AMF Board decided to set up a working group dedicated to the PEA plan in order to look into the difficulties encountered by some investors in using their equity savings plans (PEAs).

The working group's task is to identify the most problematic dysfunctions within the AMF's remit, which therefore excludes PEAs subscribed to with insurance companies and any interference with tax-related provisions. Its role is also to propose solutions in order to remedy the identified dysfunctions.

This working group, chaired by AMF Board member Jacqueline Eli-Namer, is made up of representatives of the various professionals concerned (security custodians, traditional banks and online banks), retail investors and the French Treasury Department, with the support of AMF staff.

Marielle Cohen-Branche, AMF Ombudsman, whose observations in her 2021 Annual Report led to the setting up this working group, has been a permanent guest member.

The working group held its first meeting in September 2022. After being presented to the AMF Board, its report has been published on AMF website.

RECOMMENDATION 2

PURSUE THE HARMONISATION OF ACCOUNT-KEEPERS' PRACTICES REGARDING THE PEA PLAN

The Ombudsman continues to recommend an improved harmonisation of account-keepers' practices, regarding both the firms' transfer requirements and the procedures for publication of the tax information slips.

The Ombudsman also encourages development of the automation of PEA management, which is still largely manual.

RECOMMENDATION 3

CLARIFY THE POSSIBILITY OF ARBITRAGE DURING THE TRANSFER

Rather than adopt regulations defining a maximum time for transfer of the PEA plan when the reasons that could extend the transfer time are multiform and sometimes justified, and following on from the recommendations expressed in her 2021 Annual Report, the Ombudsman asks that account-keepers confirm the possibility of performing arbitrage transactions during the transfer, and the effective length of lock-in of the PEA plan, which should be as short as possible (a few days).

Thus, the Ombudsman recommends that access to the PEA plan be maintained until termination of the transfer, which occurs at the time of publication of the tax information slip, which would enable the PEA account holder to continue to seize market opportunities during most of the PEA transfer procedure.

This solution could thus drastically limit any loss of enjoyment sustained by plaintiffs who blame the account-keeper for not having been able to perform transactions during the transfer.

RECOMMENDATION 4

IMPROVE THE INFORMATION OF PEA ACCOUNT HOLDERS DURING THE VARIOUS PHASES OF THE TRANSFER

The Ombudsman recommends that the PEA account holder be informed transparently and clearly during the various phases of the transfer.

When the transfer procedure is engaged, the client should, by means of an informative document whose wording could be standardised among the account-keepers, be informed of:

- Their rights regarding arbitrage but also the consequences of this (deferment or suspension of the transfer) so that they may measure their risk if they perform transactions. For example, if the client continues to place orders, they contribute to delaying the transfer, a situation that the Ombudsman encountered in several cases this year;
- The time at which lock-in of the PEA plan will be triggered, to allow publication of the tax information slip;
- Delays that could be caused by certain factors of complexity, related in particular to the composition of the portfolio (holding of certain securities, orders outstanding, corporate actions, etc.).

When access to the PEA plan is blocked, the client should be informed that they no longer have access to it and that they can no longer place orders.

If a problem occurs during publication of the tax information slip, or if the receiving firm to which the slip was sent notes an error preventing it from "activating" the transferred PEA plan (a situation frequently found in cases processed in 2022), the Ombudsman recommends that the client be informed as soon as possible in order to seek solutions on a case-by-case basis.

When the transfer procedure is finalised, the client should be informed of the restoration of access to the PEA plan and hence of the possibility of arbitrage in the receiving firm.

In what circumstances is it possible for a firm to refuse securities eligible for a PEA/PEA-PME plan?

The PEA account holder is responsible for the eligibility of the securities included in the plan and must check on the security's eligibility with the issuer if in doubt. But what about the possibility for firms to exclude certain securities (or certain categories of securities) from their commercial offer, even though they are eligible for the PEA or PEA PME plan?

This year the Ombudsman noted that, based on product governance and "target market" principles (see page 28, reference to the section on the target market), some firms purely and simply excluded certain categories of eligible securities from their offer. For some, these are unlisted securities whose management is considered too complicated and not very profitable, especially since the capping of fees as a result of the PACTE Law, while for others this means FCPR retail private equity investment funds, AIFs, etc.

Admittedly, the list of securities eligible for the PEA plan[5] is not a matter of public policy.

However, although the principle of contractual freedom makes it possible to envisage such exclusions, in the Ombudsman's view this is possible only provided that investor information on this point is clear, accurate and above all readily available.

This is not the case of excessively vague stipulations, buried in general conditions which constitute a contract of acceptance signed with a consumer. Such stipulations could be significantly unequal for retail investors, because they substantially restrict their rights. In these circumstances, the Ombudsman even wonders about the potential unfairness of stipulations present in the general conditions of certain firms.

For example, in several cases processed by the Ombudsman in 2022, the general conditions were imprecise regarding the firm's product governance policy and the exclusions resulting therefrom. The category of securities refused in the PEA-PME plan (namely, FCPR retail private equity investment funds) was not even named specifically in the general conditions, so that clients could not be informed of this exclusion. Now, the clients in question had opened a PEA-PME plan for the sole purpose of receiving units of the contentious FCPR fund.

RECOMMENDATION 5

PROVIDE RETAIL INVESTORS WITH COMPREHENSIVE, CLEAR AND READILY AVAILABLE INFORMATION IN THE EVENT OF A REFUSAL OF SECURITIES ELIGIBLE FOR THE PEA PLAN

The Ombudsman recommends that current or potential clients be given a clear and readily available warning that the firm has excluded certain securities or categories of securities eligible for the PEA plan from its commercial offer.

This warning could appear on the firm's website, where the categories of securities refused could be listed, or else in a box and written in bold letters in the general conditions and in a specific information document submitted to the client when opening the PEA plan.

The Ombudsman also recommends that another warning be sent to PEA account holders in the event of a change in the commercial policy resulting in the exclusion of eligible securities.

The Ombudsman also prompts clients, notably in the case of a PEA transfer, to check whether the receiving firm does not exclude certain securities that they already hold from its commercial offer.

Mathilde Casa, Legal Advisor

[5] Article L. 221-31 of the Monetary and Financial Code. Moreover, Article 322-5 of the AMF General Regulation stipulates that "Prior to the supply of the custody account-keeping service, the custody account-keeper shall conclude an agreement with each holder of a securities account" [including information on] 2° The type of services supplied as well as the categories of financial securities to which the services relate".

RECOMMENDATION 6

EXEMPT WORTHLESS SECURITIES FROM CUSTODY FEES

The Ombudsman recommends a complete exemption from custody fees for the custody of worthless securities whose issuer is in court-ordered liquidation, appearing on an ordinary securities account.

Regarding this, the Ombudsman notes that several firms have already adopted this good practice.

Although these fees are provided for contractually, the Ombudsman considers that there may arise the question of an illusory or ridiculous service in return within the meaning of Article 1169 of the French Civil Code, which could result in nullity of the stipulation.

The residual problem of securities that are worthless as a result of court-ordered liquidation of the issuer

Following a suggestion recommended by the Ombudsman, the security of an issuer in court-ordered liquidation, having become ineligible for the PEA plan and worthless, may be removed from the PEA plan without prejudice to the account holder upon the legal decision to open insolvency proceedings[6]. This removal entails neither closing of the plan, nor termination of the possibility of making further investments, irrespective of the age of the PEA plan.

The security is then registered in an ordinary securities account until the legal decision to close the court-ordered liquidation because of insufficient assets, which could take place years later. This situation raises another problem related to the custody fees invoiced for several years, sometimes more than ten years or so, by the account-keepers, to which may be added account management fees even though the securities account contains only this single investment in securities of no value, and is therefore inactive.

This was the situation faced by a retail investor in a case processed recently, whose securities account contained a single investment in securities of a company in court-ordered liquidation, which had become worthless, and who disputed the custody fees and account management fees that had been invoiced to him for more than ten years, and this led the firm to consent to a commercial gesture in his favour.

RECOMMENDATION 7

CONSECRATE A RIGHT TO ERROR REGARDING THE PEA PLAN

In the current state of positive law, whenever, due to an error by the professional, the funds to purchase securities do not come from the bespoke cash account, a correction of the error and reinstatement of the securities in the PEA plan, even within a very short time frame, is impossible. Calculation of the compensable damage is in that case extremely complex.

The account holder may also in good faith commit errors which will lead to closure of their PEA plan due to tax irregularity, since the regulations are extremely fastidious (e.g. failure to deposit on the cash account the proceeds from the sale of unlisted securities beyond the two-month deadline).

It would be highly desirable that in future the regulations provide for a right to error allowing correction of the transaction in the event of an error committed in good faith by the professional or the account holder, thereby avoiding closure of the PEA plan - a product that the authorities nevertheless want to promote - like what has been put in place for relations between the public and the administrative authorities[7], or else what is stipulated with regard to employee savings schemes since the PACTE Law[8].

This possibility of correction would be restricted to a short period of time for reasons of legal security and to avoid any form of abuse.

[6] Article L. 221-32 IV of the Monetary and Financial Code.

[7] The "Law for a state serving a society of trust" (ESSOC Law) of 11 August 2018 established a right to correction in case of error committed by a person having infringed for the first time a rule applicable to their situation or having committed a material error when entering information on their situation (Article L. 123-1 of the Code of Relations between the Public and the Administrative Authorities).

[8] Ordinance of 24 July 2019 supplementing the PACTE Law enabling an employee to express their real choice in the month of notification or of their knowledge of the investment by default performed on its PERCO collective retirement savings plan.

Option*	Advantages	Disadvantages
Keeping of the securities in the portfolio	For an ordinary securities account: possibility of deducting the capital loss in advance pursuant to Article 150-O D, 12 para. 2 of the General Tax Code and subject to compliance with the procedure set out in Article 74-0 G of the same code. Special case of the PEA: no advance deduction. The capital gain or loss is assessed globally when the plan is closed and corresponds to the difference between: ▪ the net asset value of the plan on the date of closure of the plan; ▪ the amount of payments made into the plan since it was opened, excluding those relating to previous withdrawals or redemptions that did not result in the closure of the plan.	The line may be subject to custody fees until the closure of the court-ordered liquidation proceedings - unless the account keeper exempts clients from this, which is a good practice that is becoming increasingly common. In some cases, the line is not valued at zero but retains, many years later, its last valuation before delisting. If the account keeper nevertheless deducts fees, the AMF Ombudsman considers that the account keeper runs the risk of having such a fee challenged on the grounds that although the consideration may exist, it is illusory or derisory, since the securities are worthless (Article 1169 of the Code). Special case of the PEA: ▪ The presence of securities, even valued at zero, prevents the closure of the PEA, as long as they have not been withdrawn from the PEA.
Withdrawal (or voluntary abandonment of securities by the client)	Allows the line to be removed from the portfolio and is therefore of interest in particular when the account cannot be closed precisely because the portfolio includes securities of an issuer under court-ordered liquidation.	Withdrawal constitutes a definitive waiver of all rights to any present or future claim relating to the abandoned securities, including the allocation of a liquidation bonus and the possibility of a capital loss deduction. We strongly advise against such a withdrawal if the capital loss has already been deducted in advance.
Cession pour I euro symbolique au teneur de comptes	Solution negotiated by the Ombudsman for a case. Allows the line to be removed from the portfolio and is therefore of interest in particular when the account cannot be closed precisely because the portfolio includes securities of an issuer under court-ordered liquidation. Avoids having to create a securities account for this sole purpose and, having to pay custody fees, where applicable. Does not prevent the client from deducting capital losses if they have not already been deducted in advance.	There are no disadvantages, however, the solution is not accepted by all institutions and is examined on a case-by-case basis.
Conversion des titres au nominatif pur	The option of converting to pure registered shares automatically removes the securities of companies in liquidation from the client's portfolio, thus sparing clients from paying custody fees while safeguarding their interests in the event of compensation. Special case of the PEA: ▪ Pursuant to the Pacte Law (see Article L. 221-32 IV of the Monetary and Financial Code), securities of companies in liquidation can be withdrawn from PEAs free of charge, without affecting the possibility of making new payments or closing the plan. This provision allows the account keeper to subsequently convert the securities to pure registered shares, if the financial instrument account agreements so permit.	This procedure is conditional on the account keeper receiving a "Securities info" from Euroclear France to inform them of this specific operation.

*Some of the options may be more complex to implement where foreign securities are concerned

STOCK EXCHANGE ORDERS AND FOREIGN CORPORATE ACTIONS

3

DISPUTES CONCERNING STOCK EXCHANGE ORDERS

Regarding stock exchange orders, quite paradoxically, the Ombudsman observes that while the most fundamental principles are still the subject of numerous disputes, new problems are now appearing that are far more sophisticated and often related to investments in foreign securities.

Stock exchange orders: fundamentals still not known by investors

Investors should pay particular attention to the type of order they are choosing (market order, limit order or stop loss order). It is essential that investors regularly ensure that they fully understand the specific characteristics of the orders they choose, particularly in the case of priority orders and orders without price limits. (See Ombudsman's Online Diary - April 2022).

In many cases the Ombudsman notes that investors do not have a clear understanding of the specific features of the various types of stock exchange orders, especially those without a price limit, which can therefore reserve unpleasant surprises for those using them.

In another case, the Ombudsman had occasion to draw attention to the fact that the buyer and seller of financial instruments are, as of execution of the order, definitively committed, the former to pay and the second to deliver. Therefore, whenever an order is executed, it is incumbent on each counterparty to fulfil their obligations. In the case mentioned previously (see insert beside), the investor could therefore in no way escape payment of the securities purchased, despite the debit balance generated by this transaction on their account.

Moreover, in this example, the order was received by the account-keeper, providing a service of reception and transmission of orders, which carried out a systematic provision check, via its covering unit, based on the last known closing price. It is therefore clearly at the stage when the order is given - and not when it is executed - that the provision is checked based on the last known closing price, as the Ombudsman reminded the plaintiff.

VARIOUS TYPES OF ORDERS AND THEIR CHARACTERISTICS

With regard to limit orders, they make it possible to buy at a maximum price or sell at a minimum price, provided, of course, that the price limit has been reached.

A stop loss order, meanwhile, is first and foremost a way of protecting oneself against a possible market reversal, by limiting losses or ensuring a minimum return, but it does not allow the investor to set price limits.

POTENTIAL RISKS OF "MARKET ORDERS" TRIGGERED AT MARKET OPENING

The Ombudsman has had occasion to examine a rather special case in which an investor had wanted to take part in the initial public offering of a company by buying shares via "market orders", at 8.33 am – i.e. before the market opening – on the very day of the company's IPO. However, this IPO of the company on Euronext made the stock extremely volatile on its first trading day. Thus, at the time when the contentious order was executed, at market opening at 9.00 am, the share's unit price was more than two times higher than the valuation estimated by the client, which in such a situation could only be based on the price of the firm price offering, as the Ombudsman reminded the client, and not on the last known closing price, which was non-existent in this specific case. In this context the order was executed for a gross amount far larger than that expected by the client, creating a debit on their cash account.

Stock exchange orders and product governance: the emergence of radical new practices

Under "product governance" (i.e. determining a client target market to ensure improved client protection in accordance with MiFID II), an analysis of the cases that were encountered by the AMF Ombudsman's Office in 2022 highlights the fact that certain financial institutions, rather than provide their clients with a justified alert, will quite simply prevent the acquisition of securities by their clients in some situations.

Admittedly, such extreme practices may be possible in some cases, but without an appropriate explanation or guidance these decisions will ultimately engender misunderstandings and disputes.

This tendency was noted in particular in application of Directive 2014/65/EU (MiFID II), which requires that firms manufacturing and distributing financial instruments determine a "target market" for end clients, so as to ensure that the financial instruments are proposed or recommended only when it is in the interest of the client (Directive 2014/65/EU, Articles 16(3) and 24(2)). These requirements were specified in the AMF General Regulation.

Article 313-22 of the AMF General Regulation stipulates, in particular, that "The distributor shall review the financial instruments it distributes and the services it provides on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market".

Under these conditions, where an event affecting the life of a security might impact the target market, some investment firms will prefer to adopt a radical approach by purely and simply blocking purchases of the security, rather than issue a warning or an alert, even if the sale takes place without advisory services.

The Ombudsman gives a reminder that these choices related to the product governance arrangements are incumbent on the account-keeper, in accordance with Article 313-19 of the AMF General Regulation, which stipulates that: "The distributor shall have in place adequate financial instrument governance arrangements to ensure that financial instruments and services it intends to offer or recommend are compatible with the needs, characteristics, and objectives, including any sustainability objectives, of an identified target market and that the intended distribution strategy is consistent with the identified target market."

It is therefore incumbent on investment service providers to define and implement product governance arrangements and, accordingly, decide in what cases a warning or blocking is appropriate with regard to sales outside the target market.

In any case, in the event of blocking by the account-keeper, this measure should be accompanied by adequate justifications and explanations for the investors concerned.

Virginie Lavolé, Legal Advisor

HOW FAR CAN INVESTOR PROTECTION GO WHEN, FOR EXAMPLE, EURONEXT PLACES A LISTED SECURITY IN THE PENALTY BOX (F6)

The facts: In one case submitted to the Ombudsman, a retail investor found, on 12 July 2022, that it was suddenly impossible for him to place buy orders on a given security. At each attempt to place his buy order (for 70,000 shares at a price of €0.012 per share, or for €840 in all) on the security in question, the client found himself blocked by the account-keeper's systems.

Customer Service, questioned by the investor himself, told him that the issuer of this stock, which no longer complied with its information and reporting requirements, had been placed by Euronext in the Penalty Box (F6). It was therefore specified to the client that, as a result of this decision, the financial intermediary, as account-keeper, had taken the initiative of preventing any further purchase of the contentious security (while still allowing sales of the security).

The investment firm's analysis: For its part, the investment firm explained to the Ombudsman its blocking decision by the fact that the retail client was no longer in the target market for the contentious share. More specifically, after the security was placed in the Euronext penalty box, the target market was restricted by the account-keeper. The Ombudsman's analysis: In this case, the Ombudsman had occasion to recall the rule according to which the market operator Euronext may, depending on the nature and seriousness of the regulatory infringement, allocate the issuer's securities to a particular segment of the Euronext Growth market concerned (e.g. in this case the penalty box), in accordance with Appendix V of the Euronext Growth rules.

Euronext may therefore decide to include a security in the penalty box whenever the issuer infringes the market rules to which it is subject.

In practice, no other penalty is imposed by Euronext other than that consisting of placing the security in this "box". This allocation is sometimes only temporary and may be removed when, precisely, the issuer comes into compliance with the market rules, e.g. by publishing its financial statements.

In the case in question, at the time when the case was referred to the Ombudsman by the client, the issuer was still in infringement status.

In these circumstances, the Ombudsman finally concluded that the restriction of the product's positive target market, when the instrument was allocated to the Euronext "penalty box" by the account-keeper, appeared to be in line with the obligations incumbent on investment service providers as part of product governance and in accordance with the rules applicable in this respect.

However, the Ombudsman greatly regretted that such a measure was not accompanied by an alert or a fuller explanation to the client. The Ombudsman therefore specified in this case that it would have been preferable for the client to be informed personally of the restriction adopted, and also be informed of the subsequent removal of the restriction, which proved temporary.

Stock exchange orders and foreign corporate actions: complex new issues

"Microcaps"

On the subject of stock exchange orders, the Ombudsman is encountering increasingly complex and sophisticated issues. This tendency underlines new problems related to orders which must be settled on foreign markets – especially US markets.

In this context, the Ombudsman notes the emergence of disputes relating to "microcaps". This term designates companies having small or "micro" capitalisations, i.e. whose market capitalisation is less than $250 or 300 million. Microcap equities tend to be low-priced and are traded in small volumes on the over-the-counter market (OTC), rather than on a national stock exchange for transferable securities such as the New York Stock Exchange or the NASDAQ.

For these companies, whose shares are traded on the over-the-counter market, checking the relevance and accuracy of the information available to the public is a complicated matter and there are high risks of fraud and market abuse concerning these stocks.

On the US market, microcaps do not file financial reports with the Securities and Exchange Commission (SEC), so it is hard for investors to obtain information concerning the company's management, products, services and finances. When information available to the public is scarce, fraudsters can easily disseminate false information concerning the companies, generating profits for themselves and losses for other investors.

Therefore, given the risks associated with these microcap stocks, the US regulator strongly urges US financial institutions to suspend trading and custody regarding these equities. In this context, transactions on microcaps are the subject of heightened supervision by the US authorities and, very often, the US sub-depositaries refuse to trade these securities in order to comply with local requirements. As a consequence, more and more often, US sub-custodians (on whom French financial institutions depend for transactions settled on US markets), no longer accept any new inclusion of these securities in portfolios. Financial institutions then have no means of allowing trading (buying or selling) in these stocks. Thus, very often, when a transaction has been identified on a microcap stock and settlement and delivery takes place with settlement on the US market, the transaction is rejected.

Eva Lasla-Bortolussi, Legal Advisor

COMPLEX SOLUTIONS ON A CASE-BY-CASE BASIS

In light of the cases relating to microcaps that were processed by the Ombudsman's Office, when an investor holds such stocks in their portfolio and when the local sub-depositary refuses to handle the order, it seems possible to transfer the contentious securities to another firm whose local depositary has not suspended trading in that stock. In that case, however, there is a risk that the original sub-custodian may refuse the transfer to the other firm.

One solution, which was able to be identified in one case, is to try to settle the order on another (non-US) market, and in a currency other than the US dollar.

In another dispute relating to a sell order on microcaps whose sub-depositary refused to handle them, a solution was able to be found (and the securities sold) after the issuer was no longer considered as a microcap stock, since the company's market capitalisation increased significantly.

Order execution and account-keepers: what information is provided in the event of a reservation or suspension of trading and what information is provided in the event of a recall of certificates

Notification of a suspension of trading underway

The Ombudsman has had occasion to give an opinion in a rather uncommon situation. An investor holding shares in Solutions 30, a security suspended for a long time, had clearly identified the restrictions affecting the security: a notification bar was placed on the product data sheet and it was impossible for investors to enter orders on the Solutions 30 stock.

Following the official announcement of the resumption of listing, the opening fixing of the first trading session was marked by very high volatility: the stock fell 70%. A so-called simple "reservation" period was therefore triggered immediately by Euronext Paris, which lasted about one hour. But no information relating to this reservation had been sent to warn the investor, with the result that his order was sent to the market after the suspension but during the reservation period, and order execution took place when listing resumed. Because the order entered was a "market order", i.e. without price limits, it had been executed at a price more than two times lower than the last known closing price. The investor reproached his intermediary with not having provided him with information regarding the reservation of the security.

However, in the current state of the law, such information does not constitute an obligation incumbent on the professional; this can probably be explained by the brevity of a reservation period, sometimes a few minutes, and because purging of the order book is not systematic. In the case in question, therefore, the Ombudsman had no grounds for accusing the professional.

In similar situations, it is therefore up to the clients originating orders to be very vigilant and seek out this information. Euronext announces reservation periods underway by the indication "Halted" on the fact sheet for the securities and displays reservation thresholds, which makes it possible to observe the imminence of the potential triggering of this circuit breaker in real time.

FOCUS ON THE RESERVATION AND SUSPENSION OF TRADING

A trading reservation is due to the momentary impossibility of adjusting supply and demand within authorised price ranges. Trading of the securities is then placed on hold.

The Ombudsman is regularly referred to for disputes relating to orders placed during a trading reservation period. Although the plaintiffs' complaints are not the same, it is almost unanimously clear that the investors were not informed of the fact that a reservation of trading was underway and de facto affected operations during the trading session.

The importance of understanding the reservation of trading

The disputes which originate in a reservation period all have as their common denominator the investor's ignorance of the situation.

Circuit breaker intended to limit volatility

Investors are faced with trading reservations in periods of significant volatility, which may have serious consequences if their orders were placed without limits on the execution price. The market operator (Euronext Paris) temporarily reserves the listing of a security whenever a buy or sell order would, if it were executed, result in trading at one (or more) prices located outside these limits termed the "reservation threshold". Reservation thresholds are established by applying a percentage of maximum fluctuation to a price called the "reference price".

Orders validly registered

In a reservation period, the orders entered by investors continue to be validly registered, modified or cancelled. They will then be executed if the resumption of listing takes place the same day, depending on the order book. A fixing is organised systematically before resuming continuous trading. However, no specific information is planned to alert the investor of this situation.

→ To know more on the reservation of trading
See the case of the month
April 2022

And July 2021

DO NOT CONFUSE "RESERVATION" AND "SUSPENSION"

A suspension of listing may be due to a decision by either Euronext, the listed company or the AMF, and is the subject of a Euronext opinion indicating the reasons (filing of a draft offer, waiting for a press release, etc.) and the date and conditions of the resumption of listing; by default, the opinion specifies that the stock will remain suspended until further notice.

Unfortunately, there is often confusion between a "reservation" period and a period of "suspension" of listing in the terminology used to describe a situation of a pause in trading. The reservation is a theoretically far shorter period in which a circuit breaker is initiated only by Euronext, whenever the market operator is momentarily unable to adjust the supply to the demand. And on Euronext, if the order cannot be executed, it can nevertheless be sent to the market.

Importance of a clear indication of the reservation announcement

The Ombudsman recommends improving the information effectively available to investors when placing their orders, notably by generalising the good practice observed among certain professionals, consisting of indicating the reservation on the security fact sheet for the product referenced by the intermediary in order, insofar as possible, to inform the investor at the very moment when they enter their order. The term adopted would therefore be crucial to avoid leading the market into error and to clearly distinguish between reservation and suspension.

Early recall of a certificate: for an improvement in the information chain

For many years now, the Ombudsman has been referred to by investors surprised and disillusioned at not having been informed of the early recall of the certificates they hold. This recall generally takes place thirty days before the expected date of maturity of the product, which also corresponds to its last trading session, which will be followed by early cancellation and redemption or early payment to investors by the issuer amounting to the residual value of the security.

Overview

- An outdated information channel

When an issuer decides to recall a certificate, in accordance with the provisions in the product's documentation, investors are only informed of this by the publication, generally 30 days before maturity, of a notice in the Official Journal. The only virtue of this initiative is that it has the merit of existing – it exempts the issuer from any regulatory breach of information – and the conviction that one derives from it: the information channel used is both obsolete and inefficient.

- Absence of account-keeper information

As the Ombudsman already stressed in her 2019 Annual Report, each series of early recalls of certificates leads to a significant number of disputes in which investors complain that they were not informed of the early recall, either by the issuer or by their custody account-keeper.

In the current state of the legislation, issuers are therefore not formally required to inform the central securities depositary at the early recall stage because this is not a corporate action. However, if the latter were to receive the information beforehand, it could then circulate it to all the custody account-keeper firms, it being incumbent on them to communicate it to investors.

At present, the custody account-keepers do not communicate the information to investors within the 30 days preceding the recall, because they have not themselves received it.

In application of Article 322-12 II. 2. of the AMF General Regulation, the custody account-keeper is required to send to its clients "Information relating to the other operations in financial securities which give rise to a modification to the assets recorded on the client's account, which it receives individually from the issuers of financial securities".

Harmful consequences for investors

- The tax repercussions of early recall

The mediation cases submitted show the harmful consequences of the current information arrangements: The early cancellation of certificates may have harmful tax implications if investors do not sell their securities before the date of maturity, because the loss registered subsequent to cancellation can no longer be offset against any capital gains of the same type. Specifically, in the event of a disposal before early cancellation, the tax treatment for capital gains or losses on the disposal of transferable securities applies (in particular the offsetting of losses against capital gains of the same type). On the other hand, in the event of redemption, the loss booked is not deductible because it is not considered as a disposal loss but as a loss of capital.

In practice, very often, the issuer of the certificate that will be recalled during a period of one month's prior notice is no longer positioned as a buyer, hence the expression "bid only". It is therefore no longer possible to subscribe to the product directly from the issuer but only to sell the securities to the issuer at a price which could be around a few euro cents but which allows offsetting against capital gains. However, in the case of a listed financial instrument, the issuer does not know the holders of these products, and in the current state of the legislation, only investors who go to the product data sheet on the issuer's website can learn of this. The Ombudsman had to explain, in cases in which investors had referred the matter to her and blamed their account-keeper for a lack of information and warnings, that these same account-keepers are only required to provide information that they could have received individually, and since they had not themselves been notified, nothing could be alleged against them.

For an improvement in information prior to a recall

- Ombudsman's recommendation for the addition of a link to the information chain

Already in 2019, the Ombudsman pointed in her annual report to this information asymmetry entailing serious consequences and the actions taken to alert the Paris marketplace and the regulator. However, although marginal initiatives may be taken, no effective measure seems to have been adopted.

In any case, given the inefficiency of the current system, which is potentially harmful, the Ombudsman will suggest to the AMF, with a view to possible changes, that it examine the possibility of sending preliminary information to the central securities depositary at D-30 days instead of publication of this information in the Official Journal.

RECURRING DISPUTES RELATING TO CORPORATE ACTIONS

Preferential Subscription Rights (PSRs)

Risks of investor errors in the context of the arrangements for shortening of the PSR subscription period practised by account-keepers:

In the past few years, the AMF Ombudsman has received numerous case referrals by investors concerning the shortening (often misunderstood) of the subscription period in capital increases with maintenance of the preferential subscription right (PSR) practised by account-keepers.

Two Cases of the Month on this subject have already been published in the Ombudsman's Online Diary, on 3 March 2017 and then on 1 March 2021.

However, it must be admitted that the Ombudsman is still faced with discontent and disputes relating to this issue, especially since 2022 was a favourable year for capital increases with PSRs.

Besides, since the European harmonisation of corporate actions, the account-keeper is entitled to contractually shorten the official period for subscription to new shares within the framework of capital increases with PSRs, and thereby bring forward the closing date of these actions, as set out in the prospectus, so as to ensure smooth processing of equity interests.

For the most part, the obvious misunderstanding of investors who refer cases to the Ombudsman is based on the information appearing in the prospectus, distributed by the issuer and approved by the AMF, which they cite as grounds for disputing the shorter time practised by account-keepers.

As a reminder, the prospectus, which must be approved by the AMF, consists either of a single document, or several different documents which subdivide the required information into:

- a universal registration document;
- a securities note; and
- a summary of the prospectus (included in the securities note).

In this context, the Ombudsman notes numerous errors on the part of retail investors, since they consider themselves entitled to exercise their PSRs until the date set by the issuer, as it appears in the prospectus. It should be stressed that if the deadline set by the account-keeper is exceeded, the PSRs lose their entire value.

Moreover, it should be pointed out that some investors become owners of PSRs during the period of listing of these securities – then tradable on the stock exchange, although without having previously been holders of the shares associated with these PSRs prior to the start of the operation. This possible case implies that these investors, owners of PSRs but not of existing shares, did not receive a securities note beforehand and have therefore not obtained knowledge of the subscription deadline determined by their account-keeper.

PSR SUBSCRIPTION DEADLINE: OMBUDSMAN'S PROPOSAL ADOPTED BY THE AMF

It should be emphasised that with regard to PSRs, in order to ensure compliance with European standards, the Ordinance of 31 July 2014 (No. 2014-863), applicable since 1 October 2016, has amended Article L. 225-132 of the Commercial Code. From now on, the PSR trading period opens two days before the subscription period and ends, at the latest, two days before the close of the subscription period.

In light of the complexity involved in the use of PSRs and the number of disputes arising therefrom, the Ombudsman has often been forced to give a reminder of the rules that apply (Ombudsman's Annual Report, 2016 and 2017, Ombudsman's Online Diary in March 2017 and then March 2021).

As mentioned earlier, one of the major problems faced by shareholders in exercising their PSRs is the fact that the account-keepers are entitled to shorten the subscription period indicated in the prospectus. This practice of account-keepers found a regulatory expression in implementing regulation (EU) 2018/1212 of the Commission of 3 September 2018. Article 9 paragraph 4 subparagraph 3 of said implementing regulation stipulates, in particular, that "The last intermediary shall not set a deadline requiring any shareholder action earlier than three business days prior to the issuer deadline […]".

Faced with misunderstandings resulting from the divergence between the date set by the issuer and that set by the account-keeper, and on the Ombudsman's proposal, in February 2023 the AMF took the decision to oblige issuers to insert a warning in future prospectus summaries (and more precisely in the timeline of the offering) informing investors that the deadlines for exercise of their PSRs may be shortened by their account-keepers.

This information will also be included in the "Guide to preparing prospectuses and information to be provided in the event of a public offering or admission to trading of financial securities" (Position-Recommendation DOC-2020-06).

Corporate actions on foreign securities

In the case of corporate actions on foreign securities, the deadlines are often extended due to the large number of intermediaries involved in the chain of information transmission.

Longer times for transmission of information

The information relating to a corporate action must be transmitted within the deadlines defined by Regulation (EU) 2018/1212, through to the last intermediary in charge of informing the investor and collecting his choice in order to transmit it along the intermediation chain to the issuer.

In accordance with the aforementioned regulation, the first intermediary and any other intermediary receiving information relating to a corporate action requiring a response from the investor shall transmit this information straightaway to the following intermediary in the chain, and no later than the close of the business day on which it received the information. When the intermediary receives the information after 4.00 pm on a given business day, it shall transmit the information straightaway, and no later than 10.00 am on the following business day.

These constraints in the information transmission process are designed to allow investors to have sufficient time to transmit their choice and for it to be effectively acted on.

The problem lies in the fact that, when a corporate action involves securities listed on foreign markets, the transmission times are extended, because more intermediaries are involved in the operation. Moreover, the system is especially complex in the case of foreign corporate actions, because the procedures for handling corporate actions may vary depending on local regulations.

Lysiane Flobert, Assistant Ombudsman

Longer times for settling transactions

In one case that was submitted to the Ombudsman, an investor took part in a corporate action on a US security, listed on the NASDAQ, on completion of which he was to receive securities in kind as well as a balancing cash payment. However, having considered that the securities and cash had been belatedly credited to his account, the investor asserted that because of the time (abnormally long, in his opinion) for settlement and delivery by his account-keeper, he was not able to reinvest the securities in kind in the conditions he wanted.

In this case, the Ombudsman reminded the investor that, since this was a foreign security and listed on a foreign market, several adjustment and exchange transactions had taken place between the French depositary and the local sub-depositary. To the extent that this was a foreign security involving a custody circuit in which numerous entities take part, it was not abnormal that the customary times for processing a corporate action were inevitably longer, and the time noted in this specific case was not excessive, moreover.

CONSEQUENCES OF THE CHOICE OF MEDIUM FOR RECEIVING COMMUNICATIONS

In one mediation case, an investor having chosen to receive communications from his account-keeper in paper format – and not by an electronic medium, received a notice of corporate action on a foreign security too late, and this prevented him from taking part in the operation, even though the account-keeper had complied with its obligations concerning the transmission of information relating to the corporate action.

In this case, the investor disputed both the postal delivery time and the times concerning transmission of the information by his account-keeper. Since the account-keeper was diligent, the Ombudsman decided there was no regulatory infringement.

→ See the case of the month, October 2022: *Transfer of a retirement savings plan (PER): when incomplete information results in a blockage situation*

Mini-tenders

Meanwhile, the Ombudsman had to cope with disputes relating to highly controversial transactions targeting US securities, called "mini-tenders".

Mini-tenders aim to acquire less than 5% of another company's shares outstanding, thereby avoiding the numerous disclosure and control procedure requirements which apply to offers concerning more than 5% of the shares outstanding, which must be registered with the supervisory department of the US stock exchange regulator, the SEC.

As a consequence, mini-tenders do not provide investors with the same level of protection as that provided in the case of other public tender offers in the United States, which are under the control of the SEC, still less in the case of public offers in France.

In other words, these are extremely risky operations, because they are subject to foreign law but not supervised by the SEC. Furthermore, these operations provide no guarantee of completion.

Also, the duration of the tender may be extended discretionarily and the tender price is generally less than the market price. Specifically, while at the time of the tender, it may seem attractive because it is higher than the share price, it is standard practice for the initiator to tacitly and discretionarily extend the offer period until the share price exceeds the purchase price originally proposed, while the shareholders cannot renege, contrary to what was announced. The initiator thus acquires shares at a far lower price than their market price and can pocket the difference at the shareholder's expense.

The irrevocable nature of the offer and its discretionary extension are the two main characteristics which allow the "mini-tenders" trap to close on the shareholders who have accepted the tender.

The Ombudsman considers that account-keepers should not communicate this type of offer since they inevitably turn out to be unfavourable for the client, because they are contingent on a purchase price lower than the market price (Ombudsman's Online Diary, February 2023).

At the very least, the Ombudsman gives a reminder that the warning appearing on the notice of corporate action sent to clients should include clear and comprehensive information on all the risks inherent in mini-tenders, so that shareholders are thoroughly warned and capable of making an informed decision.

TRADITIONAL ISSUES

4

EMPLOYEE SAVINGS SCHEMES

The AMF Ombudsman is referred to for numerous disputes concerning employee savings schemes, which have been a tool for sharing value for more than 50 years. This topic, which, moreover, was the Ombudsman's main field of operation for several years, declined for the second year in a row (171 requests in 2021 and 260 in 2020 versus 287 in 2019) due, in particular, to a significant reduction in complaints relating to account management fees.

In 2022, the number of mediation requests received increased to 190, as fund inflows reached a record amount between June 2021 and June 2022[9]. It is therefore still necessary to review the persisting trends and issues in this area.

Primacy of requests for early release of funds

It was confirmed in 2022 that the remaining concerns with regard to employee savings schemes (which have not been resolved without resorting to mediation) now mainly relate to the early release of funds requested either for:

- home ownership or improvements to the main residence;
- changes of career path.

Although the regulations and the policy are already substantial on this subject, it must be recognised that sometimes these documents do not make it possible to assess whether a specific version of one of the cases of release of funds referred to by the French Labour Code should effectively give entitlement to early redemption of the assets in an employee savings scheme. In the absence of legal provisions, the account-keepers for employee savings schemes generally choose a strict interpretation of the regulations or a certain mutism to reject the employee's request.

Fairness therefore often proves to be an essential criterion for settling disputes when common sense demands an outcome favourable to the investor. However, requests for a re-examination based on equitable principles require - even more than recommendations at law - obtaining the approval of the investment firm on a case-by-case basis, and this remains unpredictable.

Moreover, the problem raised is often of a recurring or worrying nature which would justify providing a more general correction. It is in this context that once again in 2022 the AMF Ombudsman was led to express, based on actual cases submitted to her, recommendations of a general nature for firms in the sector, but also for professional associations and even government departments. Implicit in these recommendations is the Ombudsman's conviction that increased flexibility for early release of funds would, at the same time, favour the government's desire to channel investment towards the investment vehicles in question (PEE, PERCO, PER plans, etc.). In other words, the more employees have the impression that the rules of the game are clear and appropriate with regard to the exit possibilities, the more they will be inclined to invest their bonuses or make voluntary contributions.

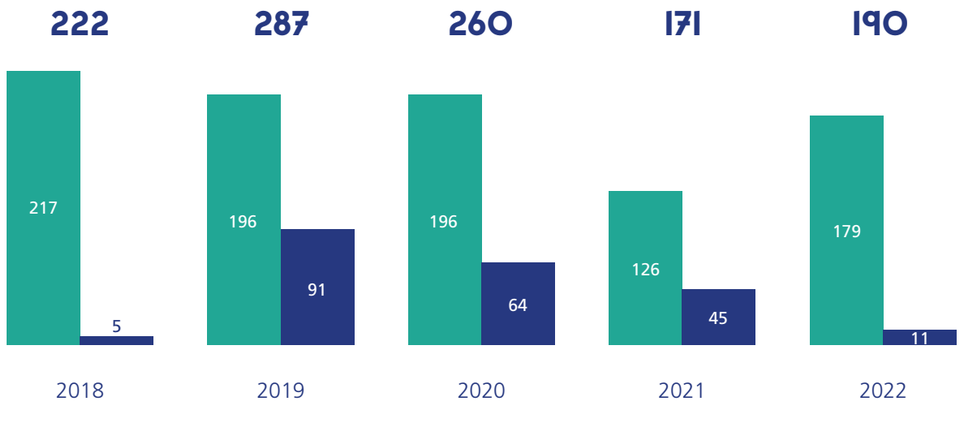
In parallel to these issues relating to reasons for the release of funds, in 2022 the Ombudsman saw a new type of dispute emerge relating to the transfer between retirement savings schemes, following the entry into force of the 2019 PACTE Law.

Mathilda Bloquet, Legal Advisor

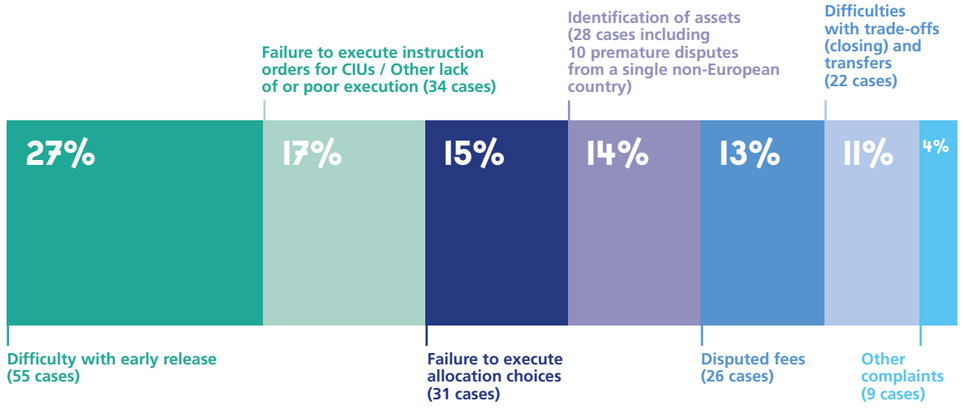
[9] AFG press release – 10 November 2022: Employee savings schemes remain vigorous, thanks to record fund inflows, and despite a negative market environment

CHART 7 AND 8

CHANGE IN NUMBER OF EMPLOYEE SAVINGS SCHEME CASES RECEIVED IN 2022



PROBLEMS ENCOUNTERED IN EMPLOYEE SAVINGS SCHEME CASES CLOSED IN 2022
(190 CASES)



Issues faced regarding home ownership and improvements to the main residence

Requests for mediation with regard to employee savings schemes mainly concern the early release of funds for a purchase or enlargement of the main residence.

According to the AMF Ombudsman, this trend is in line with a context of changing family life styles, together with rising housing prices, which it seems essential to take into consideration both in analysing the individual situations which the Ombudsman has to face personally and from a perspective of potential legislative or regulatory changes in the future.

Three specific situations faced by the Ombudsman's Office illustrate the changes that can be expected in this area.

- **The case of home ownership by entering into a "bail réel solidaire" leasing arrangement**

In 2022, the Ombudsman was referred to for a dispute in which the employee savings scheme account-keeper refused early release of the plaintiff's funds invested in a PEE employee savings plan on the grounds of their entering into a "bail réel solidaire" leasing arrangement (BRS) not corresponding to the "purchase of the main residence" within the meaning of Article R. 3324-22 of the French Labour Code. As a reminder, the BRS separates the building and the land ownership, in order to very significantly reduce the cost of home ownership. Subject to certain revenue conditions, households buy the walls of their apartment in districts where housing prices are high, but not the land, which remains the property of a solidarity property organisation (OFS), set up by the local authorities and accredited by the State. The buyer then pays a monthly property rent of €1 per square metre. The reduction in the price of such a housing unit is on average 30% by comparison with market prices. The term of the lease is limited to between 30 and 99 years and it is also possible to renew the contract.

The Ombudsman considered that it was fully within the spirit of the regulations[10] on release of employee savings funds to allow redemption before expiry of the lock-in period for all situations aiming at the purchase of a main residence, with a view to encouraging home ownership of households' primary residence. Other evidence, according to the Ombudsman, is the fact that the Bulletin officiel des finances publiques[11] stipulates that lessees within the framework of a BRS arrangement are indeed liable (although having a special rebate) for property tax, i.e. the local tax applicable precisely to the owners of real estate property.

Therefore, the Ombudsman considers that the signature of a BRS arrangement and the property right that it confers can be assimilated to a "conventional" acquisition thus giving entitlement to early release of the funds invested in employee savings scheme investment vehicles.

However, since this is a regulatory interpretation, the Ombudsman requested the opinion of the National Directorate of Labour regarding this proposal in this case.

- **The case of self-building of the main residence**

During the past year, the Ombudsman was referred to for a dispute in which the account-keeper of an employee savings scheme refused to allow an employee a repeated release of funds from its investments on a PEE plan on the grounds that Article R. 3334-5 of the French Labour Code established the principle of a single release of funds in the following terms: "The early removal of lock-in takes the form of a single payment covering, at the employee's choice, all or part of the rights that may be released".

Now, the Ombudsman has observed that the strict application of this principle constitutes a barrier to the release of funds in cases where the employee performs enlargement works himself by building. Specifically, the investor needed the funds as the occasion arose and could not wait until completion of the works to settle the various related invoices.

In this case, the National Directorate of Labour was also questioned and has already indicated that it shares the Ombudsman's opinion allowing - for this specific case exclusively - repeated early release of funds in line with work progress for the beneficiary of the employee savings plan, with the proviso that the latter provide the account-keeper with:

- the declaration of work making it possible to have an overall view of the project;
- an affidavit by which the account holder undertakes to perform the works himself;
- the invoices for the equipment and materials used.

In such a case, the Ombudsman considers that a staggered release of funds could be envisaged in line with the presentation of invoices by the investor, within the limits of their personal investment (which very often consists exclusively of their employee savings scheme) to avoid any risk of over-funding.

Since, according to the investment firm in question, the conditions of application of this exceptional authorisation constitute a major paradigm change, it requested that strict stipulations concerning the conditions of application also be defined by the authorities.

[10] See, in particular, the report to the president attached to Ordinance No. 2016-985 of 20 July 2016 regarding the "bail réel solidaire" leasing arrangement.

[11] See BOI-IF-TFB-20-30-60.

The case of enlargement of the main residence by building

Another dispute investigated in 2022 concerned this time the issue of home enlargement by building. In this specific case, which, moreover, was the subject of a publication in the Ombudsman's Online Diary. The investor wanted to obtain early release of the money invested on his PEE plan for the construction of a building not attached to his main residence. Although the Ombudsman considered that this possibility should be available to him, the French Treasury Department was not prepared to adopt this position for the time being. However, it is recommended that further thinking be given to the subject in light of changes in the life style the organisation of the family, the length of children's education and population ageing which are leading an increasing number of investors to adopt, for example, solutions such as the prefabricated "garden studio" set up on their land.

→ See the case of the month, December 2022:
Transfer of a retirement savings plan (PER): when incomplete information results in a blockage situation

Issues faced in the event of changes affecting the career path

The Ombudsman is also regularly referred to by investors wanting to benefit from early release of funds from their employee savings schemes due to circumstances affecting their career or else with a view to occupational conversion.

These new disputes form part of what could be perceived as a paradigm change in career paths. A single job with a single employer is no longer considered the norm, and here again it seems necessary to consider the potential for early release of funds in order to facilitate the financing of occupational conversion projects following a job loss.

In recent years, the examination of several cases has made it possible to identify the limitations of cases restricting the early release of funds from the collective retirement savings plan (PERCO) on grounds of the expiry of entitlement to unemployment insurance (see Ombudsman 2020 Annual Report, page 29 and 2021, page 39).

In 2022, other specific situations faced by the Ombudsman's Office illustrate further changes that can be expected in this area. For example, in one case concerning a plan for occupational conversion, the investor had been refused early release of his funds invested in a collective retirement savings plan (PERCO) with a view to training already partly financed by all the money invested on his PEE plan, released on the occasion of the termination of his employment contract.

At a time when a linear career is no longer necessarily the norm, and in light of the transformation of certain jobs, maintaining one's employability may become a necessity. And yet, some occupational conversion plans may be jeopardised for want of resources. Although there are a number of arrangements to provide support and financing for job transitions, such as the personal job training account ("CPF"), some occupational conversion plans may be jeopardised for want of resources, since the amount of the "CPF" may prove insufficient.

Based on these sociological considerations, the Ombudsman was able to obtain an exceptional release of funds on equitable principles. However, it seems necessary to envisage the creation of a new case of early release of funds from the PERCO plan (or PER plan) to cover the training expenses entailed by retraining, in addition to the existing financing arrangements.

Nevertheless, in 2022 the exceptional measure for release of funds[12] (up to a limit of €10,000) resulting from mandatory and/or optional profit-sharing scheme grants invested in a PEE plan before 1 January 2022 was able to come to the rescue in specific lock-in situations.

The transferability of retirement savings schemes

Before the entry into force of the PACTE Law, the possibilities for transfer between existing retirement savings schemes (PERCO, "Article 83" scheme, PERP, etc.) were fairly limited, being confined to transfers between schemes of the same type. Moreover, the transfer of a PERCO plan from a former employer to the PERCO plan of a new employer was often the solution to enable the employee to avoid debiting of the account management fees which are incumbent on all exiting employees who, need one reiterate, cannot release their PERCO plan on the grounds of termination of the employment contract.

By creating the retirement savings plan (PER) and its three variants (personal, collective and corporate), the PACTE Law of 2019 aimed to facilitate the transferability of retirement savings schemes and, in particular, enabled transfers between various existing retirement savings products, e.g. from an old scheme to the new PER plan, including the collective corporate PER (called PERECO or PERCOL), replacing the former PERCO.

In 2022, the Ombudsman was accordingly referred to on several disputes concerning the implementation of these transfer possibilities. She noted, on the one hand, that these new measures may have had unexpected effects, and on the other hand that, like transfers of PEA plans, the transfer time could, in some cases, prove unusually long.

In the first case, an investor who wanted to transfer his existing PERCO plan to the PERCO plan of his new employer, opened with another account-keeper, which, as mentioned earlier, was previously quite possible, faced a refusal from the account-keeper of his first PERCO plan. The interpretation of the PACTE Law adopted by the latter had indeed led it to consider that while outward transfers of the PERCO to a PER plan (resulting from the PACTE Law) are authorised, this is not the case, in its opinion, for transfers from a PERCO scheme to another PERCO scheme.

More specifically, to refuse such a transfer, several account-keepers cite Article 8 IV of Ordinance No. 2019-766 of 24 July 2019 which stipulates that the personal rights established on specific pre-existing retirement savings contracts, including the PERCO plan, can only be transferred to a PER plan. In other words, these account-keepers deduce from this that PERCO-to-PERCO transfers are now prohibited. However, the Ombudsman observed that the article coded in the Monetary and Financial Code[13] did not adopt this restriction and that the French Labour Code, which already provided for this possibility, had not been altered[14].

The coexistence of these provisions unnecessarily heightens the risks of disputes or sometimes legitimate misunderstandings of both investment firms and retail investors. That is why the Ombudsman decided to ask the authorities for clarifications, considering, for her part, that in light of the hierarchy of standards only the coded texts should prevail.

Moreover, the Ombudsman observes that the persisting refusal of a transfer to the PERCO plan of the new employer very seriously harms the investor because, his previous employment contract having been terminated, the account management fees of the PERCO plan that he cannot transfer to his new employer are therefore payable by him until his retirement, or at least for very many years.

Such a refusal is especially problematic for the employee since the creation of a PER plan in a company does not depend on him. In this case, after several discussions with the various parties, it turned out that, in the meantime, both the former employer and the new one had converted their PERCO plans into PER plans, thereby settling the dispute.

Likewise, in another case, an employee had, by mistake, made a voluntary contribution to her PEE plan of money that she wished, in fact, to place on her PERECO plan. The account-keeper having refused to rectify the transaction, she was deprived of the corresponding employer's contribution. In reply to the Ombudsman's questions, the account-keeper told her that before the entry into force of the PACTE Law, it was possible to make a transfer from a PEE plan to a PERCO plan, but that it is now no longer permissible to transfer assets held in a PEE plan to a PER plan. The Ombudsman therefore noted that Article L. 224-40 of the Monetary and Financial Code, which lists the individual rights that can be transferred to a retirement savings plan (PER) created by the PACTE Law, does not mention the PEE plan. However, the Ombudsman would like more general thinking to be given to the establishment, in such a case, of a right to error, on certain conditions, to prevent this type of setback.

The portability of pension schemes was a key aspect of the PACTE Law, and disputes regarding transfer times started to appear in 2022 and, of course, to be submitted to the Ombudsman.

In several cases, the Ombudsman noted that the transfer could spread over several months and, in some cases, she was able to obtain compensation for an abnormally long completion time.

One case in particular highlighted the fact that precise information regarding the history and category of the amounts saved, to enable calculation of their tax treatment, is demanded for the transfer, which may result in longer active completion times that are sometimes detrimental to the investor. In this case, the Ombudsman felt that in the absence of information regarding the original compartment(s) on which depends the applicable tax treatment, the account-keeper implicated was unable to finalise the transfer. However, although the latter had subsequently proved to be extremely active by sending regular reminders to the original firm, it was found that no action had been taken by it during the first six months. The Ombudsman therefore concluded that the responsibilities were shared, and recommended a commercial gesture in the form of a payment of €1,500.

→ See the case of the month, October 2022:
Transfer of a retirement savings plan (PER): when incomplete information results in a blockage situation

[12] See (available only in French): https://www.amf-france.org/fr/espace-epargnants/actualites-mises-en-garde/mesure-exceptionnelle-de-deblocage-du-plan-depargne-entreprise-pee-comment-ca-marche

[13] Article L. or R. 224-40 of the Monetary and Financial Code.

[14] Article L. 3335-2 of the French Labour Code.

FOCUS

CAPPING OF ACCOUNT MANAGEMENT FEES

While the management fees for the PERCO plan, marketing of which is no longer authorised since the PACTE Law came into force, are capped[15], it should be reiterated that there is no similar price cap as regards the PEE plan.

Regarding this, a mediation case shed light on a practice employed by several account-keepers which, where there is a PERCO plan and one or more other employee savings schemes (PEE and/or PER), apply a fixed-price fee which may then, de facto, exceed the aforementioned price cap. It would therefore be a good practice for account-keepers to give details of the fee schedule by distinguishing between the management fees applicable where there is only a PERCO plan, but also clarify the fees applicable where there are several schemes.

This longer transfer time can sometimes be explained by the nature of the parties present, the employee savings scheme account-keeper on the one hand and the insurance company or mutual company on the other hand, which do not have the same processes or the same terminology, which can be a source of misunderstanding.

These cases are accordingly also an occasion for the Ombudsman to reiterate the limits of her jurisdiction, because, while she can take action with an employee savings scheme account-keeper, on the other hand she is not empowered to bring the case before an insurance company or mutual company, which are not entities regulated by the AMF. This confusion, which is completely legitimate, is found not only in cases of transfer between retirement savings schemes, as the Ombudsman has been able to observe. For example, in a case received in 2022, a retail investor requested the Ombudsman's intervention on the grounds that she had been unable to perform the desired arbitrage in her compulsory PER plan, called the PERO (which was the successor to the "Article 83" scheme). But the Ombudsman was led to inform her that this type of PER plan, opened with an insurance company or a mutual company, is based on an insurance policy and, moreover, she noted that the information prospectus of the compulsory corporate retirement savings insurance policy stipulated that: "The contract subscribed to by your employer and covered by the present prospectus is a compulsory group life insurance policy governed by Articles L. 141-1 et seq. of the French Insurance Code." The Ombudsman therefore urged her to refer the case to the insurance company's ombudsman, as indicated, moreover, in the "competent ombudsman" section of the information prospectus.

FOCUS

IMPLEMENTATION OF AML/CFT WITH REGARD TO EMPLOYEE SAVINGS SCHEMES

Many retail investors are unaware that in the case of employee savings schemes, measures for anti-money laundering and combating the financing of terrorism (AML/CFT) apply. Now, financial institutions are bound by strict obligations in this respect.

The regulations oblige employee savings scheme account-keepers to have an up-to-date knowledge of their clients and to monitor their transactions.

As a consequence, voluntary contributions to a PEE plan or a PERCO/PERECO plan should be checked, especially when the cumulative amounts of these contributions exceed €8,000. In that case evidence of identity and the source of the funds is required of the beneficiaries.

Unless this evidence is provided, the investor can no longer perform transactions on his or her employee savings or retirement savings scheme account.

[15] Article D3334-3-3 of the French Labour Code

RETAIL PRIVATE EQUITY INVESTMENT FUNDS

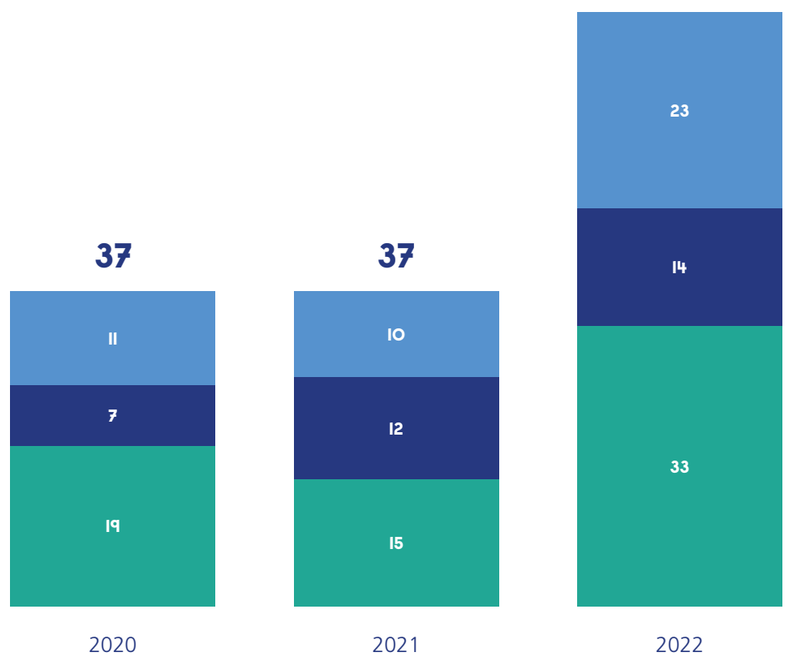
In the past few years, the Ombudsman has received a growing number of disputes relating to investments in retail venture capital investment funds (FCPIs) and retail local investment funds (FIPs): either because their performances may prove disappointing for investors, or, and primarily, because it is noted that the regulatory lifetime of the FIP or FCPI fund is exceeded.

Establishment of an AMF working group following alerts by the Ombudsman

Now, the risk of exceeding the regulatory lifetime of the FIP/FCPI fund may sometimes extend several years beyond the date of termination of the fund and be brought to the knowledge of the investors only when they are faced with it. That is precisely why the Ombudsman expressed the hope, in her 2020 Annual Report, that research be performed on a comparison between the benefits and drawbacks of improved information, as of the subscription stage, e.g. in the Key Information Document (for the investor) or the subscription form, regarding the risk of exceptional circumstances of very lengthy winding up for their investment, so that this risk could be better taken into consideration by investors.

CHART 9

BREAKDOWN OF FCPR CASES



Following the alert issued by the Ombudsman, in 2021 the AMF carried out a wide-ranging study on FCPI retail venture capital investment funds which exceeded the maximum time limits for the reimbursement of venture capital investments in innovative sectors. This study revealed that around half of the funds did not comply with these time limits, exceeding them by variable lengths of time. 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 to make proposals to improve the regulatory framework relating to the end of life of private equity funds for the future. As a result, 19 proposals were published on the AMF website in July 2022.

Among the proposals made by this working group, one concerns improved pre-contractual information regarding the risks represented by these products.

Mathilde Le Mélédo, legal advisers

PROPOSAL 6

The working group proposes supplementing Position-Recommendation DOC-2012-11 regarding the conditions to be met for information to be considered clear, accurate and not misleading, by indicating:

- the risk of exceeding the fund's lifetime. To illustrate, disclaimers were proposed to the AMF staff mentioning this risk as follows: "In light of the unlisted and illiquid nature of the fund's assets, the asset management company could have to decide that it is in the interest of the fundholders to extend the life of the fund beyond the scheduled date and under the conditions provided for in the rules.";
- for those companies that have not complied with the lifetime of at least 50% of the funds that they manage or have managed during the last ten years, a warning notice added in the marketing documentation indicating clearly the fact that in the past the asset management company has not complied with the scheduled lifetime of the funds: "The AMF draws subscribers' attention to the fact that the asset management company has not managed to complete within the initially announced time limits the liquidation of at least 50% of the funds that it manages or has managed in the last ten years."

Regarding the scope of application, this proposal would be applicable to FCPR funds (including FIP and FCPI funds) in the course of creation or marketing. Since the KIID is highly standardised, the potential changes suggested by the working group could only be made to the rules of the funds, which are available on request.

All the proposals made by this working group were submitted for public consultation at the end of 2022. The resulting feedback, in particular regarding this proposal No. 6, is due to be submitted to the AMF Board in June 2023.

On the subject of exceeding the regulatory lifetime of FCPI/FIP funds, see the 2020 Ombudsman's Annual Report, page 34, and the 2021 Ombudsman's Annual Report, page 49.

Also see the Ombudsman's investigation of the complaint relating to exceeding the fund's lifetime, in the Ombudsman's Online Diary of May 2018, available on the AMF website, in the "Ombudsman" section.

→ See the case of the month, May 2018:
Attention: the possible lockup period for your assets placed in an FCPI

SCPIs

In 2022, 36 disputes relating to units of real estate investment companies (SCPIs: sociétés civiles de placement immobilier) were submitted to the Ombudsman, versus 27 in 2021 and 24 in 2020. The Ombudsman issued 57% of favourable opinions to consumers. Although the issues raised in these disputes are diverse (marketing, fees, management decisions, etc.), it is interesting to note that the recommendations issued regarding completion times for redemption requests were mostly unfavourable to the investors. This reveals a certain lack of awareness on their part of the redemption conditions, even though they are indicated in the documents submitted, and insufficient attention paid to information on the liquidity risk related to this investment.

In one case examined by the Ombudsman, an investor had subscribed to SCPI units (some with full ownership and others with title ownership) after informing his financial investment adviser of a need to optimise his tax treatment and obtain income on a long-term basis. A few months later, this investor wanted to redeem his units in order to be able to provide funding for the cash purchase of his main residence. His need for financing was short-term and he had taken into consideration neither the recommended holding period nor the liquidity risk which could result in an indefinite time for execution of his redemption requests, especially in the case of units encumbered by beneficial ownership for which there is no market. These problems led him to invoke the civil liability of his financial investment adviser for failing in his duty to advise and provide information. Even though the Ombudsman noted no failing, the financial adviser, for the sake of appeasement, nevertheless agreed to have his firm buy back title ownership of the units, which it would have been very difficult for the investor to dispose of.

WORTH KNOWING

As a reminder, the real estate investment company (SCPI) is a company which brings together investors with a view to buying buildings intended for leasing. The SCPI fund, also known as an investment in "real estate paper", is classified among alternative investment funds (AIFs), and more specifically among funds open to retail investors, which include general retail investment funds, private equity funds, OPCIs, SCPIs, forestry savings companies and forestry investment groupings, SICAVs and funds of alternative funds.

SCPI fund units cannot be listed: trading therefore takes place in the secondary market with the asset management company acting as market-maker, or in the OTC market. Since SCPI fund units are not listed, they entail a significant liquidity risk.

Pursuant to Article L. 214-144 of the Monetary and Financial Code, the purpose of an SCPI is the acquisition and management of real estate for letting, and the management of buildings that it has had built exclusively for the purpose of letting.

Two main types of SCPI can be distinguished: the corporate real estate SCPI and the residential SCPI. The corporate real estate SCPI owns assets consisting of commercial buildings (offices, warehouses, residential hotels and elderly homes, etc.) and its main purpose is the distribution of regular income. The residential SCPI is a CIU for the purpose of acquisition and management of residential real estate assets, new or for renovation. These are generally SCPIs for tax purposes, which make it possible to benefit from tax cuts corresponding to a relevant tax law (SCPI Pinel, SCPI Malraux, SCPI Scellier, etc.).

SCPIs can also have fixed capital or variable capital. To invest in a fixed-capital SCPI, investors must wait for a capital increase (purchase in the primary market), or acquire, in the secondary market with the involvement of the asset management company, the units of shareholders having sell positions. The redemption of a shareholder's stake therefore depends on the existence of a buy order entered on the company's register. Where applicable, buy and sell orders are executed at the execution price, which corresponds, for each order matching period, to the price at which the greatest number of units can be traded, taking into account the priority of orders: buy orders at the highest price, sell orders at the lowest price. A selling price that is too high or a buying price that is too low could therefore give rise to no execution of the order.

The variability of the capital allows subscription to new units at any time so long as the upper limit of the registered capital has not been reached. However, the redemption of a shareholder depends on the existence of subscription requests for an amount at least equal to that of the redemption.

Thus, in both cases, the redemption of a shareholder depends on the existence of a corresponding application for subscription. If the liquidity of the fund units is low, it may occur that the number of subscription requests is not sufficient to cover the number of requests for redemption. Shareholders wanting to withdraw may therefore be subjected to exit times of indefinite duration if there is no buyer, or too few. This liquidity risk should be mentioned in the Key Information Document and brought to the knowledge of the investor before making any subscription to SCPI units.

To counter this liquidity risk and meet requests for redemption, it may be necessary to sell part of the SCPI's assets. However, these sales should not be of a repetitive nature, at the risk of jeopardising the non-trading nature of the company and the related tax treatment. Some SCPIs provide in their articles of association for the possibility of establishing a repayment fund making it possible to deal with the oldest redemption requests, generally one year old or more, at a discounted price: the shareholder can then choose to accept or to extend their redemption request. The establishment of such a fund is not mandatory and comes under the statutory freedom of the SCPI.

The SCPI is a non-trading company, which implies a certain statutory freedom. Thus, only meticulous and thorough reading of the SCPI's articles of association and prospectus by the investor could inform him in particular of the conditions of subscription and exit, the fixed or variable nature of the capital, or else the possibility of establishing a repayment fund.

The Ombudsman was also referred to by legal beneficiaries having inherited SCPI units who did not understand why, despite reminders sent to the notary, they were unable to obtain the redemption of these units. The Ombudsman therefore explained to them the reasons for the time taken to execute their instructions, since the beneficiaries had received no pre-contractual information, unlike subscribers to the units, who must receive the KID, the articles of association, the annual report and the latest quarterly news bulletins before any subscription.

It should be noted that to the customary liquidity risk in the case of SCPI units can be added the special nature of SCPIs for tax purposes, i.e. the fact that the subscriber benefited from an attractive tax treatment. In the case of selling in the secondary market, the tax benefit provided by this investment is not passed on to the buyer, which limits the interest of taking a long position in these financial instruments. Accordingly, the secondary market for units of SCPIs for tax purposes may prove practically non-existent.

Focus on mediation cases processed in 2022 involving financial investment advisers (FIAs)

Financial investment advisers (FIAs) are professionals who customarily perform an investment advisory activity[16] concerning financial instruments (equities, bonds, units or shares of investment funds, etc.), the provision of investment services, or the performance of transactions on diverse assets[17] and are subject to obligations, compliance with which is monitored by the AMF.

To avoid a situation of a legal vacuum in the case of products which are not strictly speaking financial instruments and which are governed by no other regulations, FIAs may also perform "other asset management advisory activities"[18], and must therefore also apply the rules of good conduct defined in Article L. 541-8-1 of the Monetary and Financial Code.

Regarding this, most of the cases processed by the Ombudsman in 2022 concern products marketed by FIAs and issued by companies not regulated by the AMF (Marne & Finance, Maranatha, Altipierre and Fairvesta groups).

A more detailed presentation of the conduct of business conditions and obligations of the FIA is available in a study published in the Ombudsman's 2018 Annual Report, page 30.

Concretely, for the investigation of a case implicating an FIA, the Ombudsman analyses the latter's compliance with their obligations resulting from the Monetary and Financial Code.

In particular, the FIA must recommend to their client investments appropriate for their profile and objectives.

Accordingly, the Ombudsman therefore checks whether the FIA, before making the recommendation, has become well informed of the client's knowledge and experience regarding investment, their financial situation and their investment objectives (notably by means of a questionnaire)[19].

The Ombudsman will also check whether the FIA has properly prepared a statement of suitability describing in detail the recommended investments, their benefits and the risks they entail, and will study the content of this key document[20].

Obvious incompatibility between the client's profile and the recommended investments

The Ombudsman frequently notes, in the cases processed, an obvious incompatibility between the client's profile, their objectives and the investments that have been proposed to them by their FIA.

In particular, this year the Ombudsman investigated some ten cases in which FIAs had recommended to their clients investments by the Altipierre group. The Altipierre offer, consisting of the subscription to shares of limited partnerships investing in real estate, had received no approval from the AMF, because it was subscribed to through club deals.

This investment was based on complex financial techniques, and involved major risks of capital loss and risks related to the liquidity of the securities. This was therefore a long-term investment, risky and relatively illiquid, and the fact sheet on Altipierre products specified, moreover, that the units were reserved for "well informed" investors. Now, in most of the cases analysed by the Ombudsman, the investment had been recommended to retail investors having practically no knowledge or experience of financial products. Furthermore, the investment was frequently unsuitable given the investors' income and wealth, or else their risk tolerance or their investment horizon.

The Ombudsman was therefore led to note an obvious incompatibility in this series of cases.

In another case processed in 2022, retail investors had invested in "Malraux" SCPI units financed by the granting of a bullet loan. The Ombudsman observed that this investment giving entitlement to a tax benefit was unsuitable for their cautious investor profile and their objective, which was to prepare for their retirement. Moreover, the information communicated by the FIA was misleading, since the latter had given its clients the impression that this was a risk-free product whereas the per-unit value had been discounted by more than 80%. The Ombudsman obtained compensation for the loss-of-opportunity damage sustained by these investors.

Failure to fulfil the obligation of informing clients regarding the risks incurred

The information provided by FIAs, including marketing communications, must present content that is accurate, clear and not misleading[21].

In most of the cases processed in 2022, the Ombudsman observed that, with regard to the form, the FIA had complied with the obligations incumbent upon it to make a formal statement of the advice, in particular by establishing a statement of suitability outlining the risks involved in the proposed investments (risk of loss of capital, liquidity risk, etc.).

However, too often the statement of suitability gave a very laudatory presentation of the rewards of the recommended investments, such as a profitability presented as "immediate", or else a performance presented as "guaranteed", without expressing the slightest reservation.

In contrast, the risks were evoked far more succinctly in a few lines, leading the Ombudsman to note that the presentation of the risks and rewards was unbalanced. This meant clients could not take investment management decisions in line with their interests on a fully informed basis.

Florence Miller, Legal Advisor

[16] In accordance with Article D. 321-1, 5, of the Monetary and Financial Code "The service of investment advice is defined 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"

[17] In accordance with Article L. 541-1 of the Monetary and Financial Cod.

[18] In accordance with Article L. 541-1 of the Monetary and Financial Code

[19] In accordance with Article L. 541-8-1 4° of the Monetary and Financial Code.

[20] In accordance with Article L. 541-8-1 9° of the Monetary and Financial Code clarified by Article 325-17 of the AMF General Regulation.

[21] In accordance with Article L. 541-8-1 8° of the Monetary and Financial Code.

Difficulties, in some cases, in defining the damage sustained by investors

While failures by FIAs to fulfil their obligations are frequently noted in the cases processed by the Ombudsman after a complete analysis of the case, defining the damage sustained as a result of these failings may sometimes constitute a difficulty.

In particular, to be liable to compensation, the damage must be direct and certain, which excludes compensation for potential or hypothetical damage, and compensation for future damage except when its occurrence is certain.

Now, when the entity with which the investment has been made is in insolvency proceedings, and in particular in a court-ordered liquidation in which case the liquidator works to reconstitute the assets available, the damage is still hypothetical.

Indeed, once the preferential creditors have been compensated, investors, who are merely unsecured creditors, may receive payments as part of the insolvency proceedings, provided that they have regularly declared their claim.

It is therefore impossible to know beforehand the outcome of the insolvency proceedings, which may last many years, and the amount that could be allocated to investors.

In that case, the Ombudsman is forced to observe that the damage resulting from the failings of the FIA is still hypothetical, and therefore not liable to compensation at the present time. So it is important for the investor to take advice from a lawyer regarding the usefulness of bringing the dispute before the courts by requesting, if possible, deferment of the verdict in light of the insolvency proceedings to avoid statute-of-limitation risk.

It may also occur that, in parallel, criminal proceedings be pending against the entity with which the investment was made or its managers, notably for swindling or breach of trust. Criminal proceedings can also make it possible to seize misappropriated funds in order to compensate the victims who will be plaintiffs if the case is referred to the criminal court.

REFUSAL TO ENTER MEDIATION BY FIAS, A MISSED OPPORTUNITY TO SETTLE CERTAIN DISPUTES AMICABLY

Contrary to investment service providers, it regularly happens that FIAs are not inclined to enter into a mediation process. There are several possible cases:

- The FIA does not reply to the request for observations that has been sent to them, despite several reminders. In that case, the Ombudsman is bound to observe that the professional's persistent failure to reply constitutes a refusal to enter into mediation.
- The FIA clearly informs the Ombudsman that they do not wish to take part in the mediation procedure, often after having consulted their professional liability insurance policy.

Although this is their right, the Ombudsman reminds the FIA that the refusal to enter into mediation is not covered by confidentiality, because the mediation procedure has not been initiated. The Ombudsman can therefore forward the case to the competent departments of the AMF, especially in the event of a repeated refusal.

- The FIA has ceased their activity and/or been deregistered from the French Insurance Intermediaries Registration Body (ORIAS), and can no longer be reached.

This trend has existed for some years now, but was more acute in 2022 with 34 refusals of mediation by FIAs (out of a total of 45 refusals to enter into mediation). The vast majority of these refusals concern serial disputes relating to the following offers: Maranatha (14 cases), Altipierre (10 cases) and Marne & Finance (7 cases).

These refusals are all the more regrettable in that the mediation procedure is entirely free of charge, even for the professional, and the Ombudsman's opinions are strictly confidential (whereas legal proceedings may harm the image of professionals) and also non-binding, even though they are usually complied with by the parties.

This is therefore a real missed opportunity for these professionals to try to settle certain sometimes complex disputes amicably, and thus avoid lengthy, costly and unpredictable legal proceedings.

Based on verbal accounts, the Ombudsman wonders whether it might not have been suggested not to enter into mediation based on FIAs' professional liability insurance policies, preferring to wait for legal proceedings to be initiated by the retail investor, notably in the case of serial disputes (or if this may even be demanded by the wording of the insurance policy for the dispute to be covered).

ACTIVITY OF FIAS: APPLICATION OF THE REVERSE SOLICITATION RULE

The marketing in France of units of foreign alternative investment funds (AIFs) (or French AIFs managed by a foreign manager) to retail clients is possible only after the prior authorisation of the AMF[22].

However, it is accepted that the purchase of or subscription to these units corresponding to an investor's unsolicited request to purchase a specifically designated AIF does not constitute an act of marketing in France[23]. In other words, the act of marketing is ruled out in cases of reverse solicitation by the client.

However, there must be genuine reverse solicitation. For example, on 30 April 2021 the AMF Enforcement Committee took a firm stance against a financial investment adviser's practices that it considered to be fraudulent "reverse solicitation". The FIA in question had believed it could use standard clauses to allow its retail clients to acquire products (shares of a German limited partnership) that were prohibited from being marketed in France, by having them sign pre-supplied requests for information.

It was judged that these requests for information constituted purely form letters designed to "artificially maintain the belief that these requests came from clients when in fact they were the result of the FIA's advice"[24] and that the characteristic of reverse solicitation, which is by nature unforeseeable and on the sole initiative of the client, was not compatible with the use of such a document.

The Ombudsman noted, in several cases processed in 2022, the presence of these form letters supplied to clients beforehand for the subscription to units of a foreign AIF, which led her to identify a failing of the FIA in these cases.

SUCCESSIONS

In 2022, the number of disputes submitted for investigation to the Ombudsman, involving financial instruments and occurring within the context of a succession, almost doubled (63 mediation cases versus 36 in 2021). The Ombudsman issued about three times more favourable opinions than unfavourable opinions to retail investors.

Apart from the increase in the number of these disputes processed in the Ombudsman's Office, it should be stressed that the issues raised often prove complex. The causes of dysfunctions concerning the settlement of succession cases are numerous and may be due, for example, to a work overload often observed in the succession departments of financial institutions, to the price volatility of inherited securities, or else to a lack of clarity of the instructions issued by the heirs or the notary. In some cases, the Ombudsman considered that the failings committed were the responsibility of the notary. Regarding this, the Ombudsman gives a reminder that she cannot solicit the notaries, because she does not have jurisdiction to do so, the notarial profession not being regulated by the AMF.

Here are a few examples of actual cases of disputes processed and settled by the Ombudsman in 2022, which it seemed worthwhile mentioning.

[22] Under the conditions of Article 421-13 of the AMF General Regulation.

[23] AMF Position-Recommendation DOC-2014-04.

[24] Bulletin Joly Bourse July 2021, No. BJB200c8, note by M. Storck.

The surviving spouse is a genuine heir

The heirs of the deceased inherited units of an SCPI whose articles of association provided that the asset management company would receive a transfer commission of €240 VAT inclusive for each heir. While the children accepted the principle of this and the amount concerning them, they disputed its application to their mother, considering that she could not be legally considered as an heir for several reasons: she had only become beneficial owner of the units; Article 732 of the French Civil Code defines the surviving spouse as a presumptive heir and not as a heir; the tax treatment for successions is applied only to heirs. The fact that the surviving spouse is exempted from this would therefore prove that they do not have the capacity of heir.

However, Article 756 of the French Civil Code stipulates that the 'presumptive heir' spouse is indeed entitled to the succession. Article 757 describes in detail the options available to the surviving spouse where there are children, common to both spouses or from a first marriage. These two articles are contained in Book III, Title 1 of the French Civil Code devoted to successions, in Chapter III entitled "Heirs". Thus, the 'presumptive heir' spouse, in particular since the Act of 3 December 2001, is a genuine heir, irrespective of the specific nature of their advantageous tax regime. The commissions applied for the surviving spouse were therefore justified.

A firm which provides merely a service of reception and transmission of orders is not bound by a duty to advise

Heirs who sign redemption instructions, received a few days later and executed on the basis of the following net asset value, cannot assert that the professional ought to have refrained from processing that order given the fall in value of the contentious mutual funds (FCPs) due to the sudden emergence of the Covid-19 pandemic.

Admittedly, the FCP units of the deceased were sold at a time when prices had fallen very steeply as a result of the health crisis. However, in this case, the financial intermediary only provided a service of reception and transmission of orders. It was therefore required to process this redemption request swiftly once instructions had been received from the notary representing the undivided estate, which it did. Otherwise, it could have been accused of a lack of diligence in acting on the instructions. Unless otherwise stipulated, the firm was not bound by a duty to advise regarding, in particular, the appropriate time to sell the securities.

A firm cannot execute the instructions of a single one of the co-owners

In a mediation case, the surviving spouse had in 2019 asked the account-keeper of her deceased husband to transfer all the securities that he held there to her personal securities account. She subsequently accused the firm of failing to carry out her instructions. However, the notarial instructions dated mid-November 2022 were received by the firm at the end of November 2022. These instructions mentioned a sale of the securities and the sharing among the heirs of the money resulting from the sale, and not a mere transfer for the benefit of the surviving spouse. The surviving spouse had no mandate to represent the undivided estate. In the absence of such a power of attorney, the financial intermediary could in no case restore the funds of the deceased to her, and that is why it merely executed the notarial instructions.

A plaintiff who cites financial damage must be able to provide proof of its existence

In another mediation case, the heirs provided the deceased's account-keeper with their instructions for the sale of the securities that he possessed, in March 2021. These instructions were carried out only in October 2021, i.e. seven months later, due to the inertia of the firm in question. The heirs pleaded damage corresponding to the loss of opportunity of being able to limit their losses, since it was impossible for them to manage the portfolio and the firm did not execute the sell order. The value of the securities in the portfolio therefore continued to vary with the fluctuations of financial markets over the period covered by the dispute. Although the Ombudsman had observed an unexplained delay in processing this succession case, she could only conclude that there was no financial loss: first, the portfolio's valuation had increased by more than €48,000 between the date of receiving the instructions from the heirs and the date of their effective execution, and second, it was neither pleaded nor verified that the heirs had an immediate need of the proceeds of the sale.

Two deaths entail two successions, even if they occur less than 24 hours apart

In this case, the account-keeper refused to take into consideration a promise for another (a promise by which a person – in this case a notary - undertakes personally to have ratified the deeds of the trustees' agreement) by the notary in charge of the succession and refused to carry out the instructions for sale of the securities, on the grounds that the amount of the inheritance exceeded the ceiling defined by its in-house policy, above which promises for another were no longer accepted.

However, there were in fact two successions, because the two spouses died about one day apart. Each succession therefore had to be considered separately and not as an overall amount. That made it possible, for each of them, to comply with the ceiling below which the account-keeper, based on its own policy, accepted a promise for another. The firm had to agree to take into consideration this commitment by the notary and ought to have carried out the instructions given by the notary at the first request by the latter. The account-keeper therefore agreed to compensate the undivided estate for the difference in value resulting from the delay in execution of the sell order, the value of the securities in question having fallen significantly in the meantime.

CRYPTO-ASSETS: A TRIPLING OF DISPUTES IN 2022

In 2022, the number of disputes relating to crypto-assets for which the AMF Ombudsman was requested to mediate tripled by comparison with 2021. Whereas in 2021, of the 44 requests for mediation concerning crypto-assets, 6 had been admissible (14%), in 2022 17 mediation requests were admissible out of the 54 received, i.e. 32%.

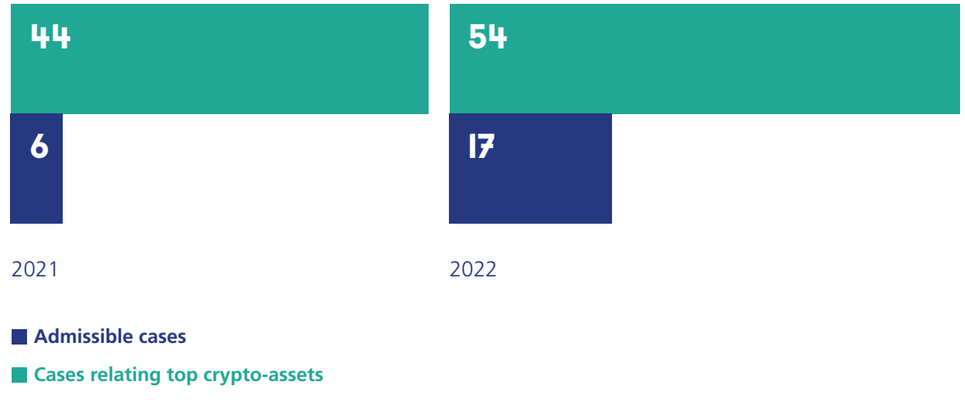
Of the 37 cases that were inadmissible:

- 1 related to an initial coin offering (ICO) without the optional approval of the AMF;
- 9 cases implicated digital asset service providers (DASPs) not registered with the AMF;
- 1 case implicated a DASP which was registered but for which the mediation applicant was a professional;
- 3 cases concerned the service of selling a portfolio of fiat crypto-currencies remaining under the sole control and responsibility of the client, and the sale of "mining machines";
- 23 cases potentially involved scams.

The increase in the number of cases admissible by the Ombudsman's Office (see Chart 10) can be explained mainly by the increase in the number of DASPs registered with the AMF at the end of 2022 (59 versus 28).

CHART IO

MEDIATION CASES RELATING TO CRYPTO-ASSETS



Regarding the admissibility of initial coin offering cases, it should be remembered that the ICO is a fundraising operation by the issue of "utility tokens" enabling investors to subsequently access the products and services of the issuer company. Any project promoter can submit their coin offering for the approval of the AMF. This approval, which is optional, does not concern the issuer company but the coin offering. Obtaining the approval means that the AMF has checked:

- that the information document and promotional communications relating to the offering present a content that is accurate, clear and not misleading, and make it possible to understand the risks related to the offering;
- the establishment of a process allowing monitoring and safeguarding of the assets collected via the offering.

Since the AMF's approval is optional, an ICO without one is still legal. However, a mediation procedure with the support of the AMF Ombudsman is not conceivable in the absence of an approval.

Regarding the admissibility of cases implicating a DASP, as mentioned in the Ombudsman's 2021 report, a mediation procedure at the instigation of the AMF Ombudsman cannot be envisaged if the DASP is not registered with or authorised by the AMF. DASPs which provide the services mentioned in paragraphs 1° to 4° of Article L.54-10-2 of the Monetary and Financial Code, namely services of custody for third parties or of access to digital assets; of buying or selling digital assets for legal tender; of trading digital assets for other digital assets or of operating a trading platform for digital assets must, before carrying on their business, register with the AMF if they are established in France or provide these services in France. Moreover, 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. As yet, no DASP has obtained an authorisation. However, the Ombudsman is worried by the temptation to develop a standard clause known as "reverse solicitation", which could, if it became systematic in the General Conditions, lead to claims that no service is provided in France, in order to evade mandatory registration.

When the DASP is registered for the services mentioned in paragraphs 1° to 4° of Article L.54-10-2 of the Monetary and Financial Code, this means that the AMF has verified the integrity and competence of the managers and of the owners of a significant proportion of the capital, the voting rights or control of the service provider. In addition, however, and this is what is most important, registration for services 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code implies that the AMF has verified, following approval by the ACPR (the bank regulator), that the service provider is capable of fulfilling its obligations with regard to anti-money laundering and combating the financing of terrorism, and asset freezing.

The AMF Ombudsman's Office, competent to intervene in financial disputes coming within the jurisdiction of the AMF, has, however, agreed to question registered DASPs on broader issues. If mediation is accepted by the registered DASP implicated by the party requesting mediation, then the mediation process can be initiated. To date, only one DASP registered with the AMF has waived mediation, and this for a reason unrelated to the AMF's jurisdiction with regard to registration.

Moreover, the Ombudsman observes that the "reinforced" DASP registration recently enacted by parliament and which is set to come into effect for new entrants as of July 2023, pending the mandatory authorisation requirements for all crypto-asset service providers (CASPs), planned by the future European regulation on crypto-asset markets (MiCA - Markets in Crypto-Assets), stipulates requirements similar to those of the optional authorisation under the French system.

Eloïse Senkur, Legal Advisor

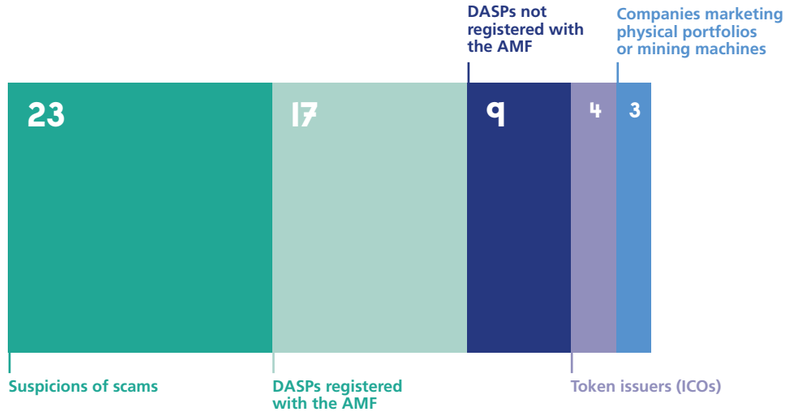
Regarding cases liable to involve scams, the AMF Ombudsman is not empowered to intervene in the event of an infringement or suspicion of infringement. The cases received by the AMF Ombudsman can be classified in two categories:

- crypto-asset scams in which the victims expected to receive one of the four services of provision of crypto-assets stipulated as part of the registration of DASPs;
- scams based on an offer of derivative financial instruments in which only the underlying is a crypto-asset, such as contracts for difference (CFDs).

A clear distinction must be made between these two offers, because by investing in derivative financial instruments an investor does not acquire the underlying crypto-asset and is therefore not governed by the regulations on crypto-assets (even if the financial instrument invested in aims to replicate them), but by the Markets in Financial Instruments Directive (MiFID II).

CHART II

PARTIES IMPLICATED IN CRYPTO-ASSET CASES



The difficulties faced by DASP clients are diverse

Marketing material is far from being accessible or easily understandable, and may even prove misleading. In some mediation cases still in progress, it appears that the service provider had stressed the assurance of non-volatility of stablecoins and the safety of the investment. The stablecoin is a crypto-asset which aims to maintain a stable value with reference to the value of legal tender (a "fiat currency"). But events in 2022, on the contrary, highlighted the very great risk involved in algorithm-based stablecoins (especially those related to Terra Luna). Another case brought to light an incorrect legal classification of the services rendered by revealing contradictions concerning the platform's obligations appearing in the marketing materials and those contained in the investment firm's General Conditions.

In other cases, some plaintiffs faced IT incidents either preventing them from finalising the verification procedure required within the AML/CFT framework, or from activating blocking of their account, which they wanted to do after discovering their portfolio had been hacked. In the first case, the damage is that of not being able to access one's funds and initiate transactions, while in the second case there is a loss of the crypto-assets held in the portfolio.

In another mediation case, in order to receive from the platform a reward described as "interest", a client had agreed not to withdraw his UST stablecoins whenever the latter were involved in an operation called "staking" (i.e. he had agreed to block his digital assets for a certain period of time in return for a reward), in order to participate in the validation of transactions on a distributed ledger system, or in other words a blockchain. These staking operations are based on a new type of proof, now using "proof-of-stake" and no longer "proof-of-work", which employs the speed of transactions on powerful computers that are heavy electric power consumers, in return for a reward. In this mediation case, each stage of the investor's digital path for subscription to this staking had been submitted for his acceptance in succession. Seeing the price of the stablecoin fall, the investor had withdrawn his assets early and had noticed that the reward had been deducted from the redemption value of the assets staked. Now, given that the stages of the user path stipulated that, in the event of early reclaiming, all the interest would be deducted from the capital reimbursed, the Ombudsman was unable to issue a decision in favour of full recovery.

In another case relating to a staking activity, a client did not understand why they could not recover their ethers (ETH, crypto-assets of the Ethereum protocol), even though it had been clearly indicated to him, before validation of the subscription, that "staking" withdrawals would be possible only after the final phase of a process of improvement of a blockchain.

The Ombudsman received requests relating to so-called "passbook savings" operations, using terminology which highlights the expected return more than the risks entailed by the nature of the loan that is in reality covered by these operations. These are indeed products involving the lending of digital assets, sometimes called "cryptolending" (an activity in which the client agrees not to dispose of their crypto-assets during a given period of time and accepts that they be lent in return for interest, to be shared between the client and the platform. During the loan period, the platform makes the digital assets available to another entity. However, usually the natural or legal person that undertakes to reimburse his crypto-assets after a given period of time is not known to the investor client, who does not know the precise borrower entity, called simply the "counterparty". The platform itself did not know the repayment capacity of its various counterparties. Now, the crypto-assets lent via cryptolending are subject to the risks specific to counterparties, as revealed by the numerous suspensions of reimbursement of these passbook savings accounts after the failure, in November 2022, of the US platform FTX, which was counterparty itself or had borrowed from counterparties.

In another case, a party requesting mediation was surprised, after the hacking of their account, that it had been used without two-factor authentication. In the case of authorised DASPs, the AMF policy stipulates that, by default, the service provider must allow users of its service to be authenticated using a second authentication factor in addition to the usual password. A clear message informing users of the risks associated with not using two-factor authentication must be issued to them, and their explicit consent must be obtained for them to waive this additional protection. However, in this case the DASP was not authorised but merely registered with the AMF. The Ombudsman could therefore not blame the registered DASP for the lack of two-factor authentication by default. Finally, the Ombudsman is concerned to see that through reverse solicitation, i.e. when the investor himself solicits the service provider, the latter eludes the obligation of registration and its client therefore does not benefit from the legal protection that this entails. Evasion practices similar to those seen with certain UK financial investment advisers or platforms are unfortunately starting to be also seen with regard to crypto-assets. They are due to service providers which claim they do not have to be registered on the grounds that they intervene only in this manner.

It is therefore clear how important it will be to watch very closely progress on the effective scope of crypto-asset regulation in the keenly awaited European MiCA Regulation.

5

THE OMBUDSMAN'S NATIONAL AND INTERNATIONAL ACTIVITIES

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 has been one of its vice-chairs since 2019.

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 2022, like each year, the Club's annual seminar was held, during which the Defender of Rights, Claire Hédon, outlined her practice regarding mediation and explained what, as a constitutional authority having a power of injunction in relations with the administrative authorities, distinguishes her from institutional ombudsmen.

Following on from the Club's annual seminar in the previous year at which the plan had been presented for the creation of the National Mediation Council, in February 2022, Marielle Cohen-Branche had an opportunity to discuss this subject with the Ministry of Justice.

In January 2022, the Ombudsman received all the members of the Club on the occasion of its annual general meeting, which Marie-Anne Barbat-Layani, AMF Chair, honoured with her presence. In her introductory speech, the AMF Chair expressed very great interest in the issues faced by the various ombudsmen in performing their duties.

Once again in October 2022, with the support of the Ombudsmens' Club, Marielle Cohen-Branche co-organised a training day on "Mediation from a legal perspective", with Amaury Lenoir, national mediation delegate for administrative jurisdictions.

Also, the Ombudsman continued the new training cycle that she organised in 2021 concerning contract law, intended for the ombudsmen of the Club and their collaborators. Thus, after examining unfair terms, consent to contract and breach of contract, a fourth workshop was held in May 2022, on the difficult question of contractual damage.

Lastly, in addition to the numerous working groups initiated by or with the AMF in which the AMF Ombudsman was involved in 2022 (investigation of the processing of complaints concerning employee savings schemes in conjunction with the Association Française de la Gestion Financière (French Asset Management Association AFG) and PEA plans, see page 21), she regularly 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.

Photo taken on the occasion of the Club's annual general meeting, introduced by Marie-Anne Barbat-Layani, AMF Chair, surrounded by Jean-Pierre Teyssier, Chair of the Ombudsmen's Club and Ombudsman for the Tourism and Travel Sector, and Marielle Cohen-Branche, AMF Ombudsman. The following can also be seen on this photo, from the left: Bernard Jouglain, Water Ombudsman; Christophe Baulinet, Economic and Finance Ministry Ombudsman; Jean-Pierre Hervé, Ombudsman for Engie; Xavier Barat, Secretary General of the Club; Armand Pujal, Ombudsman of the Association française des Sociétés Financières (ASF); and Yvan Roth, honorary member in his capacity of former Ombudsman of Paris public transport operator RATP.

EUROPEAN AND INTERNATIONAL ACTIVITIES

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.

In April 2022, the Ombudsman attended the plenary meeting of the network and spoke to those present about the risks of fraud and mediation.

On the international level, 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. The Ombudsman presents in this network's review the Case of the Month of her Online Diary.

In July 2022, the Ombudsman spoke via a videoconference to the Central Bank of Gabon, at its invitation, on the draft legislation for the establishment of financial mediation in Gabon, expressing her views and recounting her experience.

THE OMBUDSMAN'S EDUCATIONAL INITIATIVES

The Online Diary

En 2022, the interest aroused by the Ombudsman's Online Diary persisted: 12,142 visits per month were counted, which represents a further increase, by around 25%, compared with 2021. Since 2014, 87 cases have been published on a variety of issues that are still topical.

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 Appendix XX** – Cases of the Month, classified by theme

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, Investment Services Compliance Managers (ISCMs) and Compliance and Internal Control Officers (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).

In particular, the Ombudsman runs a training cycle, in three sessions, with Paris Dauphine University for the certificate of "Internal control and risk management of financial institutions".

In 2022, the partnership entered into with the Chair of Consumer Law, created by the Foundation of Cergy-Pontoise University, continued and the Ombudsman received on a three-month internship a student 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 2022, at the request of the Compliance Department of a major banking institution, Marielle Cohen-Branche, accompanied by her collaborator Virginie Lavolé, took part in a roundtable discussion organised in the form of a masterclass, retransmitted to about a hundred collaborators. There the Ombudsman described all the components of the AMF Ombudsman's Office as well as a case processed with that institution in order to explain the methodology and predominant factors that motivated the opinion issued.

In addition to these speeches, Marielle Cohen-Branche regularly publishes articles and studies in the specialist press. For example, in 2022 an article was published in the Bulletin Joly Bourse (issue of September-October 2022) devoted to the twofold trap of "reverse solicitation" in which the Ombudsman reiterated the dangers inherent in such practices judged to be fraudulent by the AMF Enforcement Committee in its ruling of 30 April 2021 against a financial investment adviser. The FIA in question believed it could use standard clauses to allow its clients to acquire products that were prohibited from being marketed in France, when the sole purpose of these clauses was to *"artificially maintain the belief that these requests came from clients when in fact they were the result of the FIA's advice"*.

APPENDICES

ANNEXE I

Article L. 621-19 of the Monetary and Financial Code
(as amended by Act No. 2019-486 of 22 May 2019 - Art. 83)

ANNEXE 2

Organisation chart as at 1st April 2022

ANNEXE 3

Mediation charter

ANNEXE 4

Classification by theme of the AMF Ombudsman's cases of the month since launch (May 2014 to December 2022)

ANNEXE 5

For further information on mediation

APPENDIX I

Article L. 621-19 of the Monetary and Financial Code (as amended by Act No. 2019-486 of 22 May 2019 - Art. 83)

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 jurisdiction of the Autorité des Marchés Financiers and to resolve them appropriately.

The Ombudsman carries out his (her) consumer mediation duties under the conditions provided for in Title I of Book VI of the French Consumer Code.

Referral to the AMF Ombudsman suspends the statute of limitation of any civil or administrative action from the day the Ombudsman is contacted. Pursuant to Article 2238 of the French Civil Code, said statute of 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 his (her) foreign counterparts to facilitate out-of-court settlement of cross-border disputes.

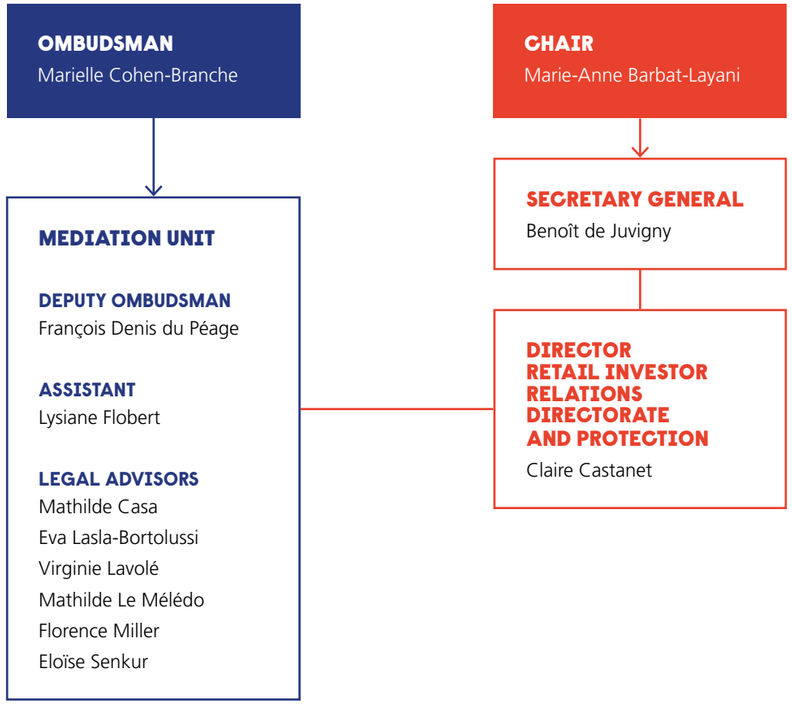
The Ombudsman publishes an annual report on his (her) activity.

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 and in units referred to in Article L. 229-7 of the Environmental Code, and assets referred to in paragraph II of Article L. 421-1 herein, and the status of 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 financial markets and reviews cooperation with the regulatory authorities of the European Union and of the other Member States.

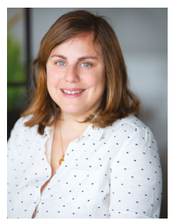
APPENDIX 2

Organisation chart as at 1 April 2022

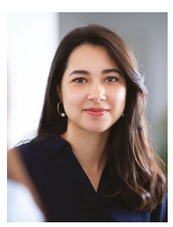


Le médiateur et son équipe









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 (her) consumer mediation duties under the conditions provided for in Title I of Book VI 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. 612-2 of the Consumer Code, the Ombudsman is not authorised to intervene when:

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

Article 4 - APPLICABLE PRINCIPLES

Independence

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

Impartiality

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

Voluntary

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

Confidentiality

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

Free of charge

No fees or expenses are charged to the parties to the dispute.

Suspension of the limitation period

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

Transparency

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

Article 5 - MEDIATION PROCESS

Examination

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

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

Duration

The Ombudsman issues 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 2022)

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
	Transfer of a retirement savings plan (PER): when incomplete information results in a blockage situation	03/10/2022
	Employee savings: construction of a building that is not attached to the main residence does not entitle beneficiaries to early release	07/12/2022
FOREX AND BINARY OPTIONS	The risks of believing in the tempting promises of online Forex trading	13/10/2014
	Evidence kept by the client helps the Ombudsman obtain compensation for binary options and Forex, if the company is authorised.	01/04/2015
	Virtual gains but real losses: if extraordinarily the Forex trading reveals gains, when it comes to withdrawing them from the account everything gets complicated…	02/09/2015
	Binary options and telephone training in 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
	Alert in the event of a 10% fall in the value of a leveraged financial instrument: an obligation for the intermediary	01/09/2022
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
STOCK MARKET ORDER	A stock market order and an abnormally long execution time	21/05/2014
	Execution of stock market orders at the end of the year: beware of the tax implications!	01/12/2014
	The detachment of a dividend may have consequences on your stock market orders	06/01/2015
	Note that one stock exchange order may hide another: what about the priority order execution rules?	04/05/2015
	Poor execution of a stock exchange order: when the actual harm to the complainant is not what he considers…	02/10/2015
	"Best execution" of orders or the primacy of the total cost paid by the client	02/12/2016
	"Penny stock" and "market" orders: note the possible price lag when placing an order on shares with a very low value.	03/05/2017
	Stock market order executed at an "aberrant" price: Euronext can cancel transactions in special circumstances	03/10/2017
	Prohibition of short selling: who had to ensure compliance with this ban, and for which securities?	02/06/2020
	In the event of an incomplete questionnaire, the bank must alert its client but transmit their stock exchange orders	01/10/2020
	Full community of property regime: What are the consequences on the death of a spouse holding securities?	02/11/2020
	Stock exchange orders: precautions to be taken so that transactions may be registered before 31 December	01/12/2020
	Stock exchange orders: when the validity period of an order has an impact on the likelihood of its execution	01/04/2021
	In a management mandate, the client cannot base their claim on the absence of instructions from them	01/06/2021
	Stock exchange orders: when the suspension of trading… reserves surprises…	01/07/2021
	A stock exchange order must be able to be cancelled or altered as long as it has not been executed	03/11/2021
	A stop loss order does not give investors control over the execution price	01/04/2022
	Stock market orders: a financial institution may reject an order that it deems to be "aberrant"	03/11/2022
COLLECTIVE INVESTMENTS	The older a dispute is, the more difficult it is to obtain compensation: the media example of a formula fund	30/06/2014
	On what basis should a delayed redemption of SICAV shares be regularised?	06/07/2015
	Deadline for centralising orders on UCITS: beware of confusion!	02/02/2016
	Why is the request to redeem mutual fund units on the basis of "known price" unfounded?	04/07/2017
	Failure by a firm to update the address of its clients can be costly	01/09/2017
	Note that in the event of a merger of mutual funds, the fee-free exit is the only right available to unitholders	01/12/2017
	Attention: the possible lockup period for your assets placed in an FCPI	04/05/2018
	Why it is necessary to read the Key Investor Information Document (KIID) carefully in the event of a dispute about the fees charged on UCITS	01/07/2020
	The poor performance of an investment fund is not sufficient to constitute a management fault	01/10/2021
	Not being able to subscribe to a fund does not necessarily imply a refusal to sell	01/03/2022

PEAS	Investing an ineligible security in a "traditional" Equity Savings Scheme (PEA) – who is responsible?	02/02/2015
	Disposal of unlisted securities held in a PEA: do not forget to pay the proceeds from the disposal into the cash account of your plan and inform your bank!	04/04/2016
	The transfer of an Equity Savings Scheme (PEA) to another bank: still an obstacle course	08/11/2017
	Transfer from a bank PEA to an insurance PEA: note the special conditions	03/09/2018
	A specific point worth knowing when selling unlisted securities in an equity savings plan: what to do in the case of a deferred payment?	01/07/2019
	Can an account-keeping institution be held liable for the ineligibility of securities held in a PEA after subscription?	07/10/2019
	A "PEA" (personal equity savings plan) must be closed on the holder's death, but its closure is not equivalent to a liquidation order	03/03/2020
	Personal equity savings plans: unlisted securities of a company in court-ordered liquidation may be withdrawn from the plan without entailing its closure	02/05/2022
	Inheritance: an abnormal execution time may sometimes prove profitable	01/06/2022
SECURITIES ACCOUNTS	Estates: What are the rights of the beneficial owner of a securities portfolio?	01/06/2016
	When an ordinary securities account cannot be transferred because it contains securities of companies in court-ordered liquidation	03/03/2017
	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	When a holding disappears from an equity savings plan: understanding better how preferential subscription rights (PSRs) work	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?	03/04/2018
	Beware of the five-year limitation period for dividends	01/06/2018
	The need to use the AMF Ombudsman's Office properly: neither too early nor too late…	01/10/2018
	Capital Increase: Note that a share subscription on a "reducible" basis is only possible if the shareholder has previously subscribed to them on an "irreducible" basis	05/12/2018
	Regarding bond purchases and redemptions: what exactly does "par" mean?	01/04/2019
	Preferential subscription right: 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
	IPOs: the loss may be more than just the non-execution of the subscription order	01/02/2022
MARKETING	SCPI real estate investment companies: when a bank fails to send its customer's subscription form	01/07/2022

APPENDIX 5

For further information on mediation

→ FIN-NET website
(network of European Financial Ombudsmen)

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

→ Club of Ombudsmen website

→ 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 part, Book VI, "Dispute Resolution", Title I, 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: 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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