ARBITER FOR FINANCIAL SERVICES

ANNUAL REPORT 2019

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Wherever used herein, the use of the masculine gender shall include the feminine and/or neuter genders and the singular shall include the plural and vice versa, unless the context clearly indicates otherwise.

Any use of words or phrases to similar effect shall have no significance in the interpretation of this Report, such use being solely for the sake of convenience.

ARBITRU GHAS-SERVIZZI FINANZJARJI
ARBITER FOR FINANCIAL SERVICES

18 June 2020

Prof Edward Scicluna B.A. (Hons) Econ, M.A. (Toronto),
Ph.D (Toronto), D.S.S (Oxon) MP
Minister for Finance and Financial Services
30, Maison Demandols
South Street
Valletta VLT 1102

Dear Minister

Submission Letter

In terms of article 20 of the Arbiter for Financial Services Act (Cap. 555), I have the honour to transmit to you the Annual Report and Financial Statements of the Office of the Arbiter for Financial Services for the year 2019.

Yours faithfully

Dr Reno Borg
Arbiter for Financial Services

The Office of the Arbiter for Financial Services in Malta:

Providing an independent and impartial mechanism of resolving disputes outside of the courts' system, filed by customers against financial services providers authorised by the Maltese financial services regulator.

Arbiter for Financial Services Act

Act XVI of 2016, the Arbiter for Financial Services Act (Chapter 555), came into force on 18 April 2016. The Act sets out the administrative, operational and jurisdictional framework of the Office. It also lays down the functions and accountability requirements of the Office. The Act provides the necessary legal framework for the appointment, functions, powers and competence of the Arbiter. It also provides for the appointment of a Substitute Arbiter, where this is necessary.

In 2018, amendments were made to the Act to rectify minor anomalies in the Maltese version of the Act, as well as to correct a mistake in the cross-referencing of an article in both versions of the Act. The Act was also amended to bring the pensionable conditions of the Arbiter in line with those applicable to Judges of the Courts of Malta. These amendments were published by means of Act No. VII of 2018.

Designated financial Alternative Dispute Resolution (ADR) entity

By virtue of Legal Notice 137 of 2017 (Arbiter for Financial Services (Designation of ADR Entity) Regulations, 2017), the Minister for Finance, as the competent authority for the purposes of the ADR Directive, appointed the Office of the Arbiter for Financial Services as the ADR entity for financial services in Malta.

As a result, and in regard to alternative dispute resolution bodies in relation to financial services complaints, Malta is fully compliant with the requirements of the said Directive 2013/11/EU, and has joined several other certified ADR bodies in the EU and EEA with similar competences in financial services complaints.

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Acronyms / Abbreviations

Act	Arbiter for Financial Services Act (Chapter 555 of the Laws of Malta)
ADR	Alternative Dispute Resolution
ASF	*Arbitru għas-Servizzi Finanzjarji* (Arbiter for Financial Services)
CBM	Central Bank of Malta
CRO	Customer Relations Officer
EEA	European Economic Area
EU	European Union
MFSA	Malta Financial Services Authority
OAFS or the Office	Office of the Arbiter for Financial Services

Report of the Arbiter for Financial Services

Dr Reno Borg BA (Hons.), MA, LL.D., ACI Arb.

During the year under review we faced new challenges, but we were also regaled with new opportunities to further discover ourselves, recognise our shortcomings, fortify our strengths and uphold our willingness to embrace suggestions and adapt to new realities.

Our staff gained more experience and reached new heights in their persistent efforts to give better assistance to consumers and service providers alike.

We continued to receive complaints spanning the whole spectrum of the financial services sector. Cases related to insurance, investments, banking and private pension schemes were filed by Maltese residents and others living in different parts of the world.

The number of enquiries and minor cases increased marginally over the previous year from 1,016 in 2018 to 1,062 in 2019. These numbers are evidence that consumers are becoming more aware of our service and are continuously seeking the assistance and support of our office in difficulties they may encounter in their relationship with financial service providers.

In quite a number of cases, our Customer Relations Officers managed to solve these disputes at their inception avoiding lengthy friction between customers and service providers. They encouraged sensible and fair solutions to the mutual satisfaction of both. Insurance-related cases topped the list amounting to 57 % of all cases; that is, 609 out of 1,062 cases. This reflected an increase of 51% from 2018 where the number stood at 404. The majority of cases related to motor insurance. However, other cases involved home, life, travel, health and pet insurance issues.

Our Customer Relations Officers report a worrying aspect in the motor insurance business; the problem motorists are facing to secure insurance cover for their vehicles. This is the result of the increasing trend applied by motor insurance companies to decline insurance cover to those with a poor claims record spread over a number of years; but there were also cases of other clients having registered just one big claim and being similarly refuted cover. This may lead to the undesired situation where we will have a good number of uninsured vehicles on the road.

An interesting development was the number of pet insurance claims we received but, unfortunately, a considerable number escalated to a formal complaint before the Arbiter. The Arbiter gave a number of decisions related to pet insurance cases involving health and accidental issues suffered by pets.

In regard to formal cases, during 2019, the OAFS registered 110 new cases reversing the trend of the previous three years when cases increased each year. The stabilization of numbers was something we were expecting because during the first years we were inundated with 'historical' cases since Chapter 555 of the Laws of Malta allowed submission of retroactive cases. It seems that, by now, these cases have been exhausted and the Arbiter's competence was limited by the legislator to bring to an end disputes which pre-date the establishment of the Office. Now, we cannot admit such complaints since they have become time-barred.

Mediation is the backbone of any Alternative Dispute Resolution (ADR) entity. Mediation is the preferred way of solving a dispute and the law itself lays down that the OAFS has to offer mediation. But it is up to the parties whether to accept the invitation to mediate or not. Mediation is held in private and the parties are given the opportunity to restart negotiation and if it fails, it will not compromise the parties' rights and interests. In 2019, 46 cases were referred to mediation and success was achieved in 12 cases. A further 17 cases were withdrawn or the parties agreed to settle prior to mediation. There were 47 cases where either the complainant or the service provider rejected mediation and preferred to refer their case for adjudication by the Arbiter.

During the year, the Arbiter delivered 112 decisions, of which 94 were final decisions and 18 were preliminary or follow-up decisions; meaning that by now all the backlog has been eliminated as anticipated in previous reports. Of the decisions delivered by the Arbiter during this year, 67% of the final decisions were not appealed and have become res judicata and enforceable at law.

In the banking sector, decided cases covered complaints concerning the refusal of the opening of a basic payment account, a facility encouraged and regulated by the Payment Account Directive (2014/92/EU) and the Financial Institutions (Payment Accounts) Regulations 2016. Decisions also covered the theft and fraudulent use of cards where the Payment Services Directives I (2007/64/EC) and II (2015/2366/EU) were invoked.

Complaints against operators in the banking sector also concerned alleged undue processing and commitment fees for a home loan, the clearing of fraudulent foreign bank drafts, and matters relating to the closing of existing bank accounts.

In the investments sector, complainants sought redress for the loss of capital investment due to the unsuitability of the investment itself, lack of proper advice and the investment of huge sums of retail money in investments suitable only for professional investors.

Insurance-related complaints comprised the simple case of damage to property, problems related to travel insurance and the refusal of claims in health insurance due to the non-disclosure of pre-existing medical conditions and the non-disclosure of other material facts. A number of decisions related to endowment policies which matured after 20 or 30 years. Complainants were dissatisfied with the maturity value of their policies which was substantially less than the amount they were indicated at the time of the purchase of the policy. A number of decisions given by the Arbiter in this respect were also confirmed by the Court of Appeal.

During the first and subsequent reports, we set for ourselves certain targets which we had to meet, amongst which the encouragement of amicable settlements of disputes. In this regard, we saw a slight improvement but we need to work harder to convince the parties that an early settlement of their dispute is of mutual benefit. However, we are confident that over the last three-and-a-half years we managed to establish an entity which is neither considered as a Court nor as a Government Department, where clients rightly expect our staff to assist them with speed, compassion, and efficiency.

Our strategy has been geared to provide an informal yet professional service with the least amount of bureaucracy, where the client rightly expects to be treated fairly and honestly by an independent entity.

Our aim is to continue to offer the best service possible to consumers and financial services providers alike, helping them to resolve their disputes on the pillars of fairness, equity and reasonableness.

We are modernising our systems, aiming to achieve more efficiency. We are always prepared to receive suggestions and to work on them, to pay back the confidence that the public has shown in us so far.

Our achievements so far are the result of the hard work, dedication and professionalism shown by our staff even in difficult times. The fact that we are financially supported throughout by the Ministry for Finance and Financial Services relieves us from the huge burden of raising our own funds, thus enabling us to concentrate fully on our core operations. For this we are very grateful.

I would also like to thank our staff for their valuable contribution; the Chairman and Members of the Board of Management and Administration for their work and continued cooperation, the media for their constructive support, and all those who in one way or another forwarded their suggestions which help us achieve our aims.

How we dealt with COVID-19

Although this report covers the year 2019, I consider it necessary to highlight the measures taken by our Office to deal with this extraordinary occurrence which affected the whole world and not least our country.

As soon as the first cases of COVID-19 were announced by the health authorities, we realised that we had to adapt ourselves to the new reality of coping with the threat of a virus that we had never experienced before. Our priorities were: the safety of our staff, the safety of stakeholders participating in our process, the safety of the general public and our cooperation to contain the spreading of the virus.

As an Office, remote working was not something new for us. Since our inception we had to use modern technology not only to achieve greater efficiency but also to satisfy the requisites of the law to conduct oral hearings also for persons residing abroad. Skype sessions for persons living in every corner of the world were the order of the day and, although technology creates challenges and sometimes extra efforts, we did not shy away from trying new methods to make our service as user-friendly as possible. During the pandemic even more technological possibilities, facilitating communication between us and our clients, came to the fore.

On the outbreak of COVID-19, a staff meeting was urgently convened and we took the decision for all members of staff to telework with immediate effect. They were briefed about interim measures that the Office would be taking to ensure continuity of service, such as phone re-direction and remote access to email and cloud-based file storage systems using two-factor identification.

Our website was updated with two new contact numbers for those consumers who wanted to get in touch telephonically rather than by email. As these contact numbers were not free calls, we also offered a call-back service if requested.

All members of staff were given the necessary support to enable them to adapt to the new work environment and to liaise with fellow employees and stakeholders from home. The early and expected teething problems, especially the use of software application features which for some members of the staff were completely new, were all managed successfully as from the first few days of telework.

For our Customer Relations Officers (CROs), the transition from office to home-working was nearly frictionless. Both officers continued managing multiple calls and email enquiries on a daily basis, besides following up with providers on some of the cases.

As expected, the CROs received several enquiries from anxious travellers whose travel plans were put in disarray as a result of closures of many airport and sea terminals, including Malta. No advance planning would have foreseen the unprecedented worldwide travel restrictions that led to a near standstill of travel in Europe and in many parts of the world. This impacted severely airlines, cruise ships, travel agents and many other tourism operators. The problems were further exacerbated by the fact that resumption of travel was an unknown factor, which lead many travellers to cancel their travels hoping for a refund of unrecoverable expenses from their insurance policies.

Indeed, the majority of enquiries received by the OAFS were in regard to claims for compensation relating to unrecoverable expenses for cancelled trips abroad due to the COVID-19 situation. The situation for some travellers was resolved as many agreed to accept vouchers for later travel in lieu of refunds. In such situations, a number of insurers cancelled the policy and refunded the insurance premium, or agreed to issue an endorsement to the existing policy in respect of new / alternative travel dates.

Several investors called to express concern following tumultuous variations to their investment portfolio. As the consequences of the 2008 financial turmoil is still a vivid (and not-too-distant) reminder, investors were rather preoccupied with the systemic uncertainties that were afflicting many economies worldwide, thereby possibly impacting their investment.

As to formal complaints, arrangements were made for their registration and submission to the provider on a weekly basis. We were able to receive replies from providers and exchange these with complainants via email. This was on the strength of changes to our legislation in early 2020 which enabled the office to also use email to exchange documents.

Where mediation is concerned, there was initial reluctance by some providers and complainants to accept mediation sessions to be done via online video conferencing applications. This led to some mediation sessions to be postponed as parties preferred to meet physically rather than virtually or over the phone. However, the unprecedented take-up of on-screen technologies lead some early dissenters to embrace such technology and mediation sessions that had been postponed, have now been lined up and will be conducted remotely.

Arrangements have likewise been made for a number of hearings to be conducted online and remotely. Online hearings will now also be conducted for local complainants. Remote hearings may bring new challenges and opportunities, and it is our task to encourage the parties to embrace technology as part of our new reality. The Office is mindful that some complainants may lack internet connectivity and alternative arrangements will be made for such eventualities. We have the technology in place to offer them the use of their telephone line instead.

As all complaint records are scanned on receipt, the Arbiter and all the members of the staff were able to access all documentation from home without the need of venturing to the office to peruse the relative case file.

The Arbiter had more time on his hands to finalise a number of decisions. The two case analysts employed by our Office assiduously assisted the Arbiter in his research and case reviews.

Each day proved a learning curve to all of us and, due to the dedication of our staff and their willingness to explore new challenges, we managed to provide basically the same efficient service as in the pre-COVID 19 era.

As a country we managed to control the pandemic in an excellent way, thanks to our health authorities and staff who dedicated their all to safeguard our health. Our thanks are not enough to register our appreciation for the untiring efforts of our frontliners and the civil authorities who made it their mission to keep us safe and healthy.

Dr Reno Borg
Arbiter for Financial Services

Statement from the Chairman of the Board of Management and Administration

Geoffrey Bezzina

This is the third annual (twelve month) Report since this Office incepted operations in May 2016. As for previous years, the year under review has been busy, challenging but equally rewarding.

Although the first few months of each following year are always eventful as preparations for the Annual Report would be in full swing, the extraordinary circumstances caused by the outbreak of COVID-19 during the first semester of 2020 have disrupted our normality but, in the process, mobilised us to adjust and adapt to a number of situations as they evolved. The Arbiter's report in the previous section provides a comprehensive picture of the manner our Office dealt with this unique situation.

Technology has helped in no small way to keep the Office team connected and to remain productive during these testing times.

Although we have good and reliable access to such mundane tools, like email and cloud storage, investing in a bespoke software solution to help us administer the increasing workload of enquiries, small cases and formal complaints has been a priority for the Board since 2018. The procedure that the Board has taken to identify the most suitable design for such software has been yearlong, commencing with the issue of a preliminary market consultation, followed by a competitive tender procedure. In parallel, we also secured funding for this project from the EU. Several discussions have been held with the chosen supplier and we are on track to have the solution successfully implemented in 2020.

It is also our duty to promote the Office's services to consumers and to inform all stakeholders about our role and processes. To this end, we will continue to use the media to inform consumers as to our services. We will also deploy a new website to better connect with all our stakeholders. Other than having a revamped user interface and a search feature for the Arbiter's decisions, the new website will enable complaints to be lodged online through a seamless process. The system will be scalable not only in terms of the number of cases it can handle, but also as regards the new features that may be introduced in future. Training will be provided to all staff members on the use of this consumer-friendly tool.

Technology is only a tool that can make us more efficient, but our personnel remain at the heart of our operations. We remain committed towards our staff through further training and improved conditions. The Arbiter and the Board are grateful for the hard work, loyalty and dedication shown throughout the year, including the disruptive period of the pandemic.

Although our Office is an independent setup, it relies on the valuable assistance of many persons and agencies. The Board is foremost grateful to the Ministry for Finance which provides the necessary funding.

Substantial work had necessarily to be put into the preparation of our successful application for EU funding as well as the tender that lead to the selection of the most competitive bidder. On behalf of the Board, I would like to thank officials from the information office of the Ministry for Finance, the Malta Information Technology Agency as well as the Malta-EU Steering and Action Committee who offered many hours of their time and professional advice to the Board throughout the whole process.

Lastly, I am grateful to the members of the Board for their collaboration and commitment, and to the Arbiter for his leadership.

The Office of the Arbiter for Financial Services – Overview

The Arbiter for Financial Services: *Competence and powers*

Functions

The Arbiter for Financial Services acts independently and impartially of all parties concerned and is not subject to the direction or control of any other person or authority. The law gives him the authority to determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. The Arbiter must deal with complaints in a procedurally fair, informal, economical and expeditious manner.

In the review of complaints, the Arbiter will consider and have due regard, in such manner and to such an extent as he deems appropriate, to applicable and relevant laws, rules and regulations; in particular those governing the conduct of a service provider, including guidelines issued by national and European Union supervisory authorities, good industry practice and reasonable and customers' legitimate expectations; and this with reference to the time when it is alleged that the facts giving rise to the complaint occurred. The Arbiter's powers under the Act are wide and include the power to summon witnesses, to administer oaths and to issue interlocutory orders.

Adjudication and awards

The Arbiter is empowered to adjudicate and resolve disputes and, where appropriate, make awards up to €250,000, together with any additional sum for interest due and other costs, to each complainant for claims arising from the same conduct. The Arbiter may, if he considers that fair compensation requires payment of a larger amount than such award, recommend that the financial services provider pay the complainant the balance, but such recommendation shall not be binding on the service provider. The decisions of the Arbiter are binding on both parties subject only to appeal to the Court of Appeal (Inferior Jurisdiction).

Collective redress

The Arbiter may, if he thinks fit, treat individual complaints made with the Office together, provided that such complaints are intrinsically similar in nature.

The Board of Management and Administration: *Role and functions*

The Board of Management and Administration is appointed by the Minister for Finance for a renewable five-year tenure. Its functions include:

- provision of support in administrative matters to the Arbiter in the exercise of his functions;
- monitoring the efficiency and effectiveness of the Office and advising the Minister on any matter relevant to the operations of the Office;
- recommending and advising the Minister on rules regarding the payment of levies and charges to the Office by different categories of persons, the amounts of those levies and charges, the periods within which specified levies or charges are to be paid, and the penalties that are payable by a person who fails to settle on time or in full the amount due; and
- collecting and recovering the levies and charges due.

The Board is not involved in the complaint process.

On an annual basis, the Board, in consultation with the Arbiter, is required to prepare a strategic plan as well as a statement with estimates of income and expenditure for the forthcoming financial year. The Strategic Plan for 2020 was presented to Parliament and is available on the Office's website.

The Board convened eight times in 2019; all members attended the meetings.

Composition

Chairman

Geoffrey Bezzina, BA (Hons.) Banking & Finance, MA European Studies

Members

Peter Muscat, BA, ACIB (London)

Anna Mallia, LL.D., LLM (Lond.), Dip. Tax (MIT)

Secretary

Bernard Briffa

Staff complement

Apart from the Arbiter for Financial Services, the Office is composed of the Chairman of the Board of Management and Administration; the secretary and registrar to the Arbiter; two customer relations officers (one of the officers is also the secretary of the Board); two case analysts; an officer in charge of mediation; an administrative assistant; a receptionist; a handyman and a messenger/driver.

Front Row (left to right): *Samantha Gatt, Rita Debono, Dr Reno Borg, Valerie Chatlani, Bernard Briffa, Geoffrey Bezzina*
Back Row (left to right): *Robert Higgans, Francis Grech, John Francis Attard, Paul Borg, Gaetano Azzopardi, Ruth Spiteri*

Administrative Report

Case and File e-Solution System

Several processes for the handling and processing of enquiries and complaints within the OAFS are manual and resource intensive. By time, a number of such processes have been fine-tuned as part of the learning curve that many organisations necessarily need to go through at every stage of their operations.

To increase efficiency, since 2018, the OAFS has been preparing to procure a robust and scalable software system not only to improve its internal processes and facilitate the collation and aggregation of data in a correct and timely manner, but also to encourage more consumers to seek the OAFS' services by enhancing its visibility through a revamped internet portal.

The Board, mindful of the limited availability of human and financial resources within the OAFS as well as its statutory obligations to follow public procurement rules, embarked on a number of gradual processes to procure the necessary systems to address its IT requirements.

Issue of a Preliminary Market Consultation

In December 2018, the OAFS issued a Preliminary Market Consultation (PMC) to gather information about systems that may be available on the market to enable automation of complaint submissions through the OAFS portal, the re-design of such portal and a back-end case and file management system.

The PMC was issued through the Government's official public procurement portal. Four local firms submitted proposals to this consultation.

EU Funding

In 2019 the OAFS was awarded sufficient funding to partially finance its IT project as explained above.

The award was made following a call for proposals by the European Commission under its 2018 Work Programme that provides grants for joint actions with Member states to support access to alternative dispute resolution mechanisms for consumers. Projects accepted for funding under this Programme were eligible to a co-financing rate of 50% of eligible costs.

The remaining funding requirement for the project will be sourced from reserves that the OAFS has accumulated, mainly emanating from consumer complaint fees and government subventions.

Issue of a public tender

Following a competitive public procurement procedure held during the first half of 2019, a supplier was contracted to design and implement this important project for the OAFS.

The project is made up of two main components: a new website and a Case and File e-Solution system. This entire project will be implemented fully in 2020.

The new website will make it easier for consumers to access information about the OAFS and the complaint process. The portal will also have a searchable facility for decisions issued by the Arbiter for Financial Services. Additionally, its interface will be designed to facilitate submission of enquiries to the OAFS. Consumers will also be able to lodge complaints online in a secure environment. This part of the website will be linked to the case and file management system.

The system will enable staff to register, follow-up and generate multiple reports for all incoming enquiries and complaints. The system will incorporate strong privacy features as required under EU and local confidentiality requirements.

International Engagement

University of Oxford conference on effective dispute resolution

Dr Reno Borg addressing the conference in Oxford

In March 2019, the Arbiter and the chairman were invited to participate in a conference organised by the Centre for Socio-Legal Studies (CSLS) at the University of Oxford on "Delivering Fairness and Justice for Consumers, Business and Markets". The invitation was made by Prof Christopher Hodges, Professor of Justice Systems, and head of the Swiss Re Research Programme on Civil Justice Systems at the CSLS at the University. The conference actively debated the importance of effective dispute resolution, of collecting data to feedback and drive interventions to change behaviour and culture, and the relevance of mediation in ADR.

During one of the sessions, at which a number of ombudsmen and arbiters were invited to speak about their respective organisations, the Arbiter delivered a presentation titled 'The Financial Arbiter – A new way of resolving financial disputes' that highlighted the OAFS' setup and its relevant processes. The Arbiter explained a number of features which the legislator had introduced in our legislation and which go beyond aspects which arise from the ADR Directive.

For instance, agreements that parties concur to follow in mediation are required to be examined and approved by the Arbiter to ensure fairness. An oral hearing is obligatory by law, with at least one sitting being convened. The Arbiter also has powers to enter and inspect any premises and to freeze a financial services provider's assets. The Arbiter observed that there were indications that some financial providers pursued settlement agreement with complainants following outcomes of decisions issued by the Arbiter that were confirmed by the Court of Appeal. The Arbiter also emphasised the importance of resolving disputes at mediation stage.

The chairman was the convenor and rapporteur of the sectoral group meeting on financial services. Participants highlighted how and to what extent information from redress bodies could be relayed to regulators and the public, and how regulators may also suggest ways such redress bodies can improve. Such feedback loop has the aim to increase trust and consumers will be encouraged to refer cases to the redress body.

The conference, held over two days, was attended by nearly 90 delegates from 18 countries, with approximately 40 Ombudsmen.

FIN-NET, the financial dispute resolution network of the EU

The Office is an active member of FIN-NET, the network of cross-border financial disputes between consumers and financial services providers in the EU and EEA. FIN-NET owes its existence to European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes. It was set up by the European Commission in 2001 to promote cooperation among national consumer redress schemes in financial services and provide consumers with easy access to alternative dispute resolution procedures in cross-border disputes concerning the provision of financial services. FIN-NET has 60 members in 27 countries.

The Office of the Arbiter for Financial Services became a member of FIN-NET in 2017 as it qualifies and complies with the principles set out in the ADR Directive.

Any resident of an EU and EEA state wishing to complain about a foreign service provider that is domiciled within this area can approach the complaints settlement scheme in its home country. The home scheme will assist to identify the relevant complaints scheme in the service provider's country and indicate the next steps that it should follow. The consumer may choose to contact the foreign complaints scheme directly or else submit the complaint with his home country scheme, which will pass it on to the respective scheme accordingly.

The Commission has a dedicated website to promote FIN-NET among consumers and financial services providers. For consumers, the website contains guidelines about the consumer redress bodies for financial services in every EU and EEA jurisdiction.

Similarly, a promotional campaign to promote FIN-NET, which includes a promotional video and a new logo, has been rolled out in every Member State through the websites of the respective redress schemes.

The chairman of the Board is also a member of the Steering Group, chaired by the European Commission (DG FISMA), which prepares the agenda for FIN-NET's bi-annual plenary meetings.

THE INTERNATIONAL NETWORK OF FINANCIAL SERVICES OMBUDSMAN SCHEMES (INFO NETWORK)

The Office is a full member of the International Network of Financial Services Ombudsman Schemes (INFO Network). The network is the worldwide association for financial services ombudsmen and other out-of-court dispute resolution schemes that resolve complaints brought by consumers (and, in some cases, small businesses) against banks, insurers and/or other financial services providers.

Formalised in 2007, INFO Network facilitates cooperation among its members to build expertise in external dispute resolution by exchanging experiences and information in areas including structures, functions and governance models of financial redress schemes, handling of systemic issues, staff training and continuing education.

The 2019 annual INFO Network conference was held in South Africa and was hosted by the Ombudsman for Banking Services of that country.

The Arbiter was one of the guest speakers at the conference being invited to make a presentation on the subject 'Applying fairness on Ombudsman rulings – Challenges and Successes'.

The Arbiter gave an overview of the OAFS' fairness framework, working definitions and challenges to the application of fairness in practice. In his presentation, he explained that procedural fairness means a process that is transparent (with an established set-up) and is explained in simple language. Key elements of the process include impartiality, a simple procedure, and a level playing field. He discussed the procedural fairness/substantive fairness interrelationship, and also fairness in the context of the law — observing that an ombudsman must strive to achieve substantive fairness even if the law is lacking. Ombudsmen have created their own jurisprudence; such ombudsprudence could even influence court decisions. An emphasis on fairness, rather than on strict legal interpretation, delivers justice in a better way. Stakeholders and legislators should find ways to discuss how legislation could be improved to make it fairer. Disputes could be pre-empted and amicably resolved if the culture of treating consumers fairly is actively pursued.

Dr Reno Borg delivering his presentation during the INFO conference

Operational Review

Enquiries and minor cases

A statistical analysis of the type of enquiries and minor cases processed in 2019 is available in Annex 1.

Our approach

Customers who have an enquiry about common aspects of financial services – that is, banking, investment services and insurance – or would like information about the Office's complaints' process may contact the OAFS for information and guidance.

This service is overseen by two experienced Customer Relations Officers (CROs) who are part of the OAFS staff.

Many customers contact the Office for the purpose of enquiring about its complaints' process. Although some customers seek the services of a professional person when lodging a complaint with the Office, several customers choose to submit a complaint unassisted. In such cases, the CROs address all enquiries that are made by such customers and would normally direct them to visit the Office's website or alternatively send them a complaint form, together with a leaflet explaining its complaints process in further detail.

Besides responding to customers' enquiries about the Office's processes, an informal yet effective service to customers who may require help or intervention on minor financial services issues is also offered.

When an enquiry is made, the CROs ask questions to seek further information about the issues which gave rise to the customer's contact, as well as to establish the level of complexity of the customer's claims.

At times, it may be 'a minor case' which may require the Office's intervention. Depending on the situation at hand, the CROs may suggest a possible remedy or a course of action. Such response would normally be based on similar experiences also brought to the Office's attention by other customers. There have been several instances in which the CROs directed the customer to contact the provider again, offering basic information which the customer could consider when dealing with the provider. There may be instances where customers may be asked to provide supporting documentation related to the situation in respect of which the OAFS was asked to intervene. The CROs assess the merits of such enquiries before approaching the provider concerned in an attempt to identify a practical solution to the issue at hand. In certain circumstances, the CROs may intervene to get a situation sorted out but at times, they may only be able to propose a specific course of action to the customer (such as seeking legal or other professional help).

Further discussion can ensue with the customer and the provider, in the hope of a compromise. Sometimes, the Office's informal intervention can break an impasse which might have existed between the customer and the provider. The stories that are reproduced in summary in this section are real situations in which the CROs have intervened and brought to a satisfactory ending.

Some enquiries or minor cases could also lead to a complaint being lodged with the Office, especially when the issue may be too complex to be resolved amicably or informally or when the provider declines the CRO's intervention.

Analysis

2019 was an important year in the further development of the OAFS.

Though it saw only a marginal 4.5% increase (year-on-year) in the number of enquiries received – from 1,016 in 2018 to 1,062 – the figures are testimony to the general public's increasing awareness of this Office to which it refers seeking assistance and support in respect of their 'problematic' relationship with the service provider concerned.

It is positive to note that, in many cases, the initial informal intervention of this Office with the said service providers resulted in the positive conclusion of the case; and this to the mutual satisfaction of the parties concerned. This practical approach would avoid the escalation of a case to a formal complaint status.

Insurance-related cases topped the list of enquiries handled by the Office – to the tune of 57%; that is, 609 out of 1,062 cases. This reflected a hefty 51% increase year-on-year – from 404 in 2018. The issues brought by the enquirers to the Office's attention were mainly related to motor insurance policies.

This is the logical result of the fact that motor insurance is the biggest single component of the local insurance industry; its legally compulsory nature accounts for over €70 million in annual premium.

However, there were also several enquiries related to other insurance classes, namely: pet, home, life and health policies.

In the motor insurance sector, the enquirers' utmost concern continued to focus on the respective market value of accidented vehicles; and this in the light of the motor insurers' apparently increasing practice to declare seriously accidented vehicles to be beyond economical repair. The insurers would then propose to offer the claimant a cash settlement based on their own estimate of the said vehicle's market value.

This approach usually results in the parties not seeing eye-to-eye; it generates never-ending discussion between the claimant and the insurer concerned and this particularly in cases where the damaged vehicle's insured value would be comparatively greater than the settlement being offered. In turn, the latter would fall short of the expense required for the claimant to repair the seriously damaged vehicle.

Of equal concern in the enquirers' eyes was the chronic unavailability of spare parts which seems to challenge the local motor sector in general; this can entail several months until such parts are sourced and delivered. This considerably delays the repair of an accidented vehicle, causing the enquirer to retain his vehicle in an unroadworthy (and unusable) condition.

The saga does not end there. This unwelcome situation would (logically) trigger a claimant's enquiry about 'Loss of Use'; that is, the possibility of being provided with an alternative vehicle until the much-awaited parts are finally delivered and the necessary repairs can commence.

The widespread misconception about Loss of Use entitlement, prevailing among local motorists, tends to add further fuel to the fire.

The overall situation within the motor insurance sector was complemented by the enquiries received by this Office from motorists who were unable to source insurance cover for their vehicles.

This is the direct result of the increasing trend implemented by motor insurers to decline the renewal of a policy as a result of a negative claims record; such record may have been registered over a number of years but there have been instances where policyholders were shown the door by the insurer concerned after a single large claim.

This state-of-affairs tends to be exacerbated by the claims database, maintained by the insurers, which records a policyholder's claims history; this results in the afflicted policyholders, who are 'desperately' going around the insurance market seeking alternative cover in the light of the ever-approaching termination date of their current policy, to encounter further declinatures.

This is a matter of serious concern which needs to be addressed since it could well lead to an unwelcome increase in the number of uninsured vehicles on the road.

An interesting development in the motor sector during 2019 was constituted by the number of enquiries handled by this Office related to rental vehicle insurance. This amounted to a sizeable 15% of all the motor cases handled. The OAFS's involvement in this situation stems from the fact that the insurance office of the insurer in this sector is duly authorised in Malta and is passporting its services throughout the EU.

One would explain that such vehicle rentals are carried out by holidaymakers who prefer to add an extra dimension to their holiday through the availability of a car; this would enable them to move around and visit more places of interest without having to rely on local transport.

Though such vehicles are regularly insured by the providers according to the relevant compulsory legislation requirements, the said providers offer the hirers the possibility of purchasing an additional policy that would compensate any shortfall in the cover provided by the compulsory policy.

The lack of agreement between policyholders and insurers in this sector tended to focus on the latter's insistence that no proper care was taken by the former vis-à-vis the rented vehicle concerned. There were also cases where the hirer's credit card was debited for the repair cost in respect of damage for which he/she was allegedly not responsible.

The Office receives enquiries of this nature over the phone or through electronic mail; and this because the enquirers concerned would be domiciled overseas.

Similar overseas enquiries were received by the Office in respect of pet insurance. This was a class of insurance business which reared its head during 2019, having been practically non-existent during the preceding years. As with the vehicle rental cases, the involvement of this Office is due to the fact that the underwriting office of the overseas pet insurer is located and duly authorised in Malta.

Pets tend to get into all sorts of scrapes; they also tend to suffer from sudden and unexpected illnesses. Hence, the availability of an insurance policy would prove quite handy to compensate the cost of the treatment required, which is usually not inexpensive.

The enquirers would tend to view their pet policy as an extension of the care they would normally have for their dog or cat.

The issues about which there tended to be disagreement with the insurer concerned centred on pre-existing medical conditions as well as an alleged misrepresentation and/or withholding of material information about a pet's allegedly aggressive behaviour.

In the home insurance segment, the enquirers' main concern centred on the availability of policy compensation for any damage sustained as a result of construction work being carried out in the immediate vicinity of a residence.

One can state that this was a manifest concern among enquirers which was triggered by the accidents which repeatedly took place at various locations in Malta throughout the year and which, in some cases, resulted in loss of life.

The enquiries received in this sector were complemented by cases involving damage to property installed in the open; namely, PV panels damaged by the weather.

In the life assurance segment, the enquirers' single bone of contention was the perceived considerable shortfall in the maturity value of investment policies (termed With Profits) when compared to what they had been allegedly led to believe at the purchase stage that would be actually provided on maturity.

These would all have been long-term policies, ranging from 20 to 30 years in duration, whose premiums would have, in many cases, been paid at a financial sacrifice by the policyholders concerned.

It was therefore logical that the latter would have been looking forward to the maturity date to reap the fruit of their periodic contributions over the years; it is equally understandable to note the disappointment when such maturity value would be falling well below expectations.
The final insurance class to be reviewed is health insurance. The OAFS handled several enquiries from both local and foreign enquirers; the latter would have purchased their policy from a major overseas market player whose underwriting office is located in Malta and is duly authorised by the regulator.

The vast majority of issues handled by this Office related to declined claims due to pre-existing medical conditions; there were also some cases where the cause of the injury sustained was excluded from the policy cover.

Unlike insurance, the OAFS received fewer banking-related enquiries compared to the previous year. In fact, the number of such enquiries was 242, a drop of 40% compared to 2018 but maintaining just about the same levels as 2017.

Banking enquiries mostly tend to relate to account management and operations; indeed, quite similar to previous year's issues.

Many customers continue to enquire about banks' requests for additional information about particular transactions passing through their accounts. Those who called our offices generally tended to question the 'legality' or intrusiveness of banks to ask for specific information about certain transactions, invoking 'confidentiality' as a main argument.

It is expected that such enquiries remain a recurring theme as consumers may not be aware that such additional due diligence processes are necessitated by new and updated anti-money laundering legislation.

A related issue that has also caused some to express consternation with our office concerned banks' updating of customers' personal records, including source of

wealth. Customers who called the OAFS enquired not only about the approach taken by banks to block accounts unless the requested information is provided in a timely manner, but also the relevance of the whole exercise especially if the customer's patronage spans many years.

Some customers also contacted the OAFS complaining that they had been refused a basic account by the bank that they approached for this purpose. Others also called to complain about their bank's decision to close their account. On many occasions, the motive behind a bank's decision to refuse the opening of an account, or terminate a banking relationship, boils down to the lack of cooperation by the customer to provide the necessary information as part of the bank's due diligence processes.

While the OAFS dedicates substantial time to respond to such individual and diverse enquiries, it is imperative for the financial services community to collectively explain to customers about such new processes and why they are being employed.

The number of enquiries/small cases relating to investment services was generally in line with previous years' levels. Customers who approach our offices with such queries would generally lament the loss of capital in their investments or allege they had been offered investments which were not suitable for their requirements.

In some cases, customers would not be able to lodge a complaint with the OAFS against their financial services provider as the temporal period set by law for such action to be pursued would have lapsed. In such circumstances, consumers are given an explanation as to the legal basis why their complaint would not be accepted.

Selection of enquiries and minor cases

Case 1: Mr Y, a retired pilot residing in an African country, asked the OAFS' CROs to intervene in regard to a refund he had been expecting from a local bank for over a month but which never materialised. Mr Y explained that he had transferred €1600 to an account held by a training company in Malta with a local bank as deposit for a training course. The bank refused to accept the payment and Mr Y was not given any further reasons. The training company arranged for Mr Y to have his money returned. The bank in Malta confirmed that it had returned the funds, but Mr Y's bank claimed that it did not receive any funds from Malta. Mr Y asked the training firm whether their local bankers could provide a copy of any documentation as proof that the funds had indeed been remitted. However, the bank refused to do so. Upon receiving Mr Y's detailed email, the CROs asked the bank's compliance team to investigate the claims that were being made. A few days following their email, the bank confirmed that it had returned the funds to Mr Y, who also acknowledged receipt of his delayed refund into his account.

Case 2: In May 2018, Mr Q purchased flight tickets for a trip to the United States, intending to visit his relatives. He was aware at the time that his domestic partner was scheduled to undergo surgery in July 2018. He therefore intentionally allowed more than a two-month buffer (so that he could assist his partner with her recovery) and scheduled his departure in the second week of October 2018. The medically established recovery period for the surgical procedure in question is six weeks. Unfortunately, the date of the surgical procedure was unexpectedly and unilaterally rescheduled by the hospital to a date in 2018; no specific explanation was provided for such rescheduling, other than pressure of work on the consultant surgeon's part. Mr Q submitted a claim for compensation in respect of the cost incurred following the unavoidable cancellation of his planned overseas trip but his claim was rejected as, according to the insurers, it did not fall within the policy cover.

Mr Q contacted our offices for the CROs intervention. The insurers claimed that it is a common occurrence for in-patient treatment, especially surgical interventions, to be re-scheduled. They were of the view that booking a holiday in such circumstances was risky and the two-month recovery period of his partner was arbitrarily set as numerous things could have gone wrong in the interim. Moreover, they claimed that the travel policy did not cover Mr Q as disclosure was a condition precedent to insurance cover and no disclosure was ever made. In addition, the policy specifically excluded the circumstances which led Mr Q to lodge a claim.

The CRO contacted the service provider and offered a reasonable option as to how the dispute could be resolved in the interest of both parties. However, further exchanges between the CROs and the insurer failed to resolve the impasse. But as Mr Q gave notice that he would be filing a formal complaint with the OAFS, the insurer proposed an amicable offer that would have covered 75% of the claim. Mr Q accepted the offer.

Case 3: Ms P sustained damage to her apartment that was caused by the entry of water from overlying premises. Both Ms P's apartment and the overlying premises were insured, but with different providers. Ms P reported her damages to her insurer, who in turn advised her to lodge a claim with the third-party insurer. Ms P did as she was advised and lodged a claim with the third-party insurer, who in turn accepted her claim and suitably compensated her for the damages. However, her claim in respect of the architect's bill (€100) was flatly declined. Ms P explained that she sought the expert advice of an architect to assess the extent of damages, and be guided by his recommendations.

The CROs intervened with the third-party insurer; they opined that, given the circumstances of the case in question, the appointment of an architect was a necessity and not an option. The third-party insurer however claimed that for claims arising from burst pipes, every party had to file a claim with their respective insurers. The insurers accepted to pay for the damages sustained by Ms P purely on a without prejudice basis and at no point liability was accepted. Although Ms P's insurer was contacted for their views on the matter, they failed to reply. Given this state of play, Ms P accepted payment for the damages she sustained, in full and final settlement.

Case 4: Ms J asked the CROs to intervene in regard to an insurance claim that had been repudiated. The insurer was contacted for their views on the matter. The insurer explained that the claims handler had reviewed the Architect's Report submitted by Ms J. The report attributed the collapse of roofing slabs to a definite sudden or accidental cause. Ms J's policy, however, was a Fire and Special Perils policy; therefore, neither such accidental damage nor damage for wear and tear were covered. Ms J, however, did not follow up the insurer's refusal until the day she contacted the OAFS. The account handler also contended that he had proposed upgrades to Ms J's insurance cover in the past, but she was not interested. As a gesture of goodwill, the insurer invited Ms J to a meeting at the insurer to review and discuss her case. At that meeting, Ms J, following advice from her architect, agreed to double the sum insured. The insurers also offered to pay the claim for the damages to the buildings, which she accepted in full and final settlement.

Case 5: Mr L called the CROs from the UK to ask for their help to contact a local bank on his behalf as he had been unable to do so himself despite several attempts. Mr L, a retiree, explained that he used to work in Malta until a few years ago. He had opened an account with this bank and kept it open to transfer some interest payment he used to receive from an investment he had acquired. He explained that one day, he received a call from an official at the bank informing him that his account would be closed as he was no longer working or resident in Malta. The bank official had sent him encrypted email messages, but Mr L was unable to open none of them. Although he asked for a letter to be mailed to him, this never materialized. Sometime later, he tried to use his local bank debit card but it was twice rejected for 'insufficient funds.' A day after the failed transactions, he received another call from the bank that his account would now be definitely closed and that the bank would be sending the balance on his account to his UK address in the form of a sterling bank draft by registered post. Mr L waited for over a month for the bank draft to arrive. When he thought that sufficient time had passed, he tried contacting the bank official but to no avail.

The CROs called the bank and asked them to investigate Mr L's concerns. Within less than three days, the bank mailed a bank draft to Mr L with an apology. The CROs and the bank continued to follow-up on Mr L's case as, at one point, he had encountered problems with encashing the bankers' draft in the UK (which was drawn on a major UK bank). The matter was eventually resolved to Mr L's satisfaction.

Formal complaints

A comprehensive analysis of the nature and type of complaints registered in 2019, and a statistical overview of the decisions delivered by the Arbiter, are available in Annex 2.

Registration and lodgement of cases

Broadly speaking, a complaint is an expression of dissatisfaction or displeasure made by an eligible customer (as defined in the Act) concerning the conduct of a financial services provider in respect of the type or quality of a product or service given by such provider: it would normally involve a claim by the customer that he has suffered, or may have suffered, financial loss. Sometimes, the customer may also allege material inconvenience or distress. All complaints accepted by the Office have to be in writing and should clearly specify the name of the financial services provider, the reason for the complaint and the remedy that is being sought.

When a completed complaint is received by the Office, it is assessed in line with a number of criteria as set out in the Act. Complaints which fall outside its scope are rejected and an explanation is provided to the applicant as to the grounds for which the complaint has been refused.

During the year under review, the OAFS registered 110 new formal complaints, 82 complaints less than the previous year and reversing the trend observed for the first three years of the Office's operations. Although there was a substantial drop in the number of investment complaints (30 new complaints were registered), one complaint comprises 56 individual complainants whose merits are intrinsically similar in nature. On the other hand, there was a hefty increase in the number of insurance complaints, from an average of 21 cases over the previous three years to 48 registered complaints in 2019. On average, the number of banking complaints remained at par with previous years.

Complaints may be lodged against all financial services providers, which are or have been licensed or otherwise authorised by the financial services regulator in Malta and have offered their financial services in or from Malta. The Office is therefore unable to accept complaints against providers which are authorized in any other EU member state, even if the service has been offered in Malta on a cross-border basis or through a locally established branch (under a freedom of establishment basis).

Natural persons and micro-enterprises – which the Act includes in its definition of 'eligible customers' - may lodge a complaint with the Office. A micro-enterprise is an enterprise which employs fewer than ten persons and whose annual turnover and/or annual balance sheet total does not exceed €2,000,000.

Such customers may either be consumers of a financial services provider, or to whom the financial services provider has offered to provide a service or who have sought the provision of a financial service from a provider. This means, therefore, that motor-insurance third-party liability complaints, or home damage disputes lodged against insurers of alleged tort feasors, cannot be lodged with the OAFS.

Complaints were predominantly submitted by natural persons (107 complainants). Slightly more than half of the overall number of complainants were resident in Malta (57 in all), while the remaining (53) were overseas residents, mostly from the UK followed by Spain and France.

Two-thirds (74%) of complainants chose not to be assisted during the complaint process.

The law prevents the Arbiter from reviewing complaints if the financial services provider has not been given a reasonable opportunity to review the customer's contentions prior to the latter's filing of a complaint with the Office. In this regard, a customer should write to the financial services provider outlining the contentions and allow a reasonable time (15 working days) for the provider to respond in writing. The complainant's letter, together with the financial services provider's response, should be attached to the complaint form. The Office may also consider complaints if the provider has been given the opportunity to review a customer's complaint but fails to provide a response within the said reasonable time period.

The Office is unable to accept complaints whose merits are or have been already the subject of a lawsuit before a court or tribunal initiated by the same complainant on the same subject.

Complaints submitted to the Office are required to be clearly legible and word-processed. Customers are required to submit a copy of their complaint letter to the provider and its reply (if available); they are also encouraged to attach copies of supporting documentation to their complaint.

The charge for lodging a complaint with the Office is €25, which is reimbursable in full if the complainant decides to withdraw the complaint or if the parties to the complaint agree on a settlement of the dispute before a decision is issued by the Arbiter.

Once a complaint is accepted and processed by the Office, it is transmitted to the provider by registered mail for its comments. The provider has 20 days from date of delivery to submit its response to the Office. Failure to do so would likely render the provider contumacious and the Arbiter may decree inadmissible any late submission of such response.

A copy of the provider's response is sent to the customer. Contemporaneously, the complainant and the provider are invited to refer the case to mediation. It is a requirement of the law that, where possible, cases should primarily be resolved through mediation.

Mediation

All complainants are offered mediation as an alternative method of resolving their dispute.

Mediation is a process whereby the parties to the complaint try to reach a consensual solution with the assistance and support of a mediator, rather than through a formal investigation and adjudication of the complaint by the Arbiter. The law states that, whenever possible, complaints should be resolved by mediation. Indeed, the Office strongly encourages parties to a complaint to refer their case to mediation and it has an official assigned to coordinate and conduct this process.

In 2019, 46 cases were referred to mediation. Mediation was successful in 12 cases. A further 17 cases were withdrawn, or parties agreed to settle, prior to mediation. There were also 47 cases where either the complainant or the service provider rejected mediation and preferred to go directly for arbitration.

Mediation is an informal process, that is confidential and conducted in private and if pursued, it will not compromise the parties' standing if it fails.

Mediation can only occur if both parties to the dispute agree to participate. It is, thus, not obligatory and either, or both, parties may reject it, in which case the file is handed over to the Arbiter for the next stage of the complaint process.

Mediation may not necessarily relate to an issue where compensation is being demanded. It may also serve for both parties to a dispute to seek further information from each other (mostly from the provider) in relation to the contentions being made. Most often, complaints arise because of inadequate communication or severe lack of engagement by the parties at the early stages of a complaint. Indeed, several mediation sessions held during the year had been successful because they served as forum for the parties to discuss and resolve their disputes informally and with the intent of finding a common ground. Mediation was rarely successful when any of the parties was unwilling to change its position notwithstanding.

If the complainant and the provider agree on a settlement during mediation, what has been agreed will be written down and communicated to the Arbiter. Once it has been signed by both parties, and accepted by the Arbiter, that agreement becomes legally binding on both the complainant and the provider. This concludes the dispute, thus ending the complaints process. The complainant will be reimbursed the complaint fee of €25.

A party to a mediation cannot be forced to accept a settlement or outcome. The mediator cannot impose a decision on the parties. Both parties must voluntarily agree to the outcome. If either party chooses not to engage in mediation, or if the mediation proves unsuccessful, then the complaint will be dealt with by of the Arbiter through investigation and adjudication.

Investigation and adjudication

If mediation is refused or unsuccessful, the Arbiter will commence the process for review of a complaint.

The law requires that at least one oral hearing is convened for each case that is referred to the Arbiter. The parties submit their case supported by oral and/or written evidence. They also have the possibility of bringing forward witnesses and filing a note of final submissions.

For the benefit of overseas complainants and in cases of persons with special needs, hearings are held via video conferencing.

A record of one sitting, including the oral evidence given under oath at the hearing, will be forwarded by the Arbiter to both parties to the dispute. A second hearing may be convened for cross-examination and/or final oral submissions.

The powers of the Arbiter to investigate are extensive. He may request witnesses to testify, request third parties to provide relevant information which may be required as part of the investigation and even carry out inspections at the premises of a provider.

The Arbiter can award compensation up to a maximum limit of €250,000, together with any additional sums for interest and other costs. He may also make recommendations for amounts exceeding this limit.

Early termination

Not all complaints lodged with the OAFS require review and adjudication. Some complaints may be resolved at an early stage or after mediation. There may also be situations where the complainant withdraws the complaint either for personal reasons or a private agreement between the parties would have been reached.

Findings and awards

The Arbiter's final decisions are accessible on the Office's website in their entirety, except for the complainants' name which is pseudonymised. The parties to the complaint are invited to a sitting in which the Arbiter delivers the decision.

Either party may request the Arbiter to give a clarification of the award, or request a correction to any computation, clerical, typographical or similar errors within 15 days from the date of the decision. A clarification or correction is issued by the Arbiter within fifteen days from receipt of a party's request.

Decisions reached by the Arbiter may be subject to appeal by either party to the complaint to the Court of Appeal (Inferior Jurisdiction). Appeals are required to be filed within 20 days from the date of the Arbiter's decision or from when a clarification or correction is issued by the Arbiter, as applicable. Details of the parties to appealed decisions are published in full on the Court of Justice website.

When no appeal is made by either party, the decision taken by the Arbiter becomes final and binding on all parties.

The Arbiter delivered 112 decisions during the year, of which 94 were final decisions while a further 18 were preliminary or follow-up decisions.

Preliminary and follow-up decisions comprise decisions on initial legal pleas (such as if the service provider is contumacious), clarification requests that the parties to a complaint might request the Arbiter to issue following delivery of a final decision, and decisions referred back by the Court of Appeal (Inferior Jurisdiction) following delivery of an appeal judgement. In such latter situations, the Court of Appeal would request the Arbiter to revalue the compensation award to the complainant regarding a financial instrument or instruments that would be subject to the dispute.

Around 67% of the final decisions (63 in all) were not appealed and are therefore res judicata.

Average duration of cases

The ADR Directive requires that dispute resolution proceedings should be concluded expeditiously within a timeframe of 90 calendar days starting on the date on which the ADR entity has received the complete complaint file including all relevant documentation pertaining to that complaint, and ending on the date on which the outcome of the ADR procedure is made available. In cases of a complex nature, it is not possible to respect this timeframe. In fact, in regard to complex cases, Article 26(2) of the Act gives the Arbiter one year from the date of receipt of a complaint to deliver his decision and no nullity shall ensue if such time limit is not met.

A complaint which is referred to the Arbiter for investigation and adjudication (that is when mediation efforts are unsuccessful) cannot possibly be decided within 90 days from the date of receipt of a complaint as, naturally, it would not be complete in terms of supporting documentation and information. In addition, there is a process that the law requires the Office and the Arbiter to follow during a case review (such as waiting for the financial services provider to submit a reply within 20 days from being notified of a complaint, arranging for mediation, convening at least one sitting, requesting parties to submit affidavits and further information, as well as allowing for cross-examination and filing of final notes of submission). Although the Arbiter has insisted

with parties' representatives to file brief submissions, the process as required by law to be followed usurps a substantial part of this period.

If one had to consider the time-frame for decisions as specified by the ADR Directive, the number of days taken from the date the file was complete up to the date of decision averaged 116 days and 182 days for banking and insurance complaints, respectively.

Investment complaints averaged 323 days, a clear indication of the number and complexity of such cases. Nearly all cases relating to investment services, alleging misselling or bad advice, are complex in nature and most often require analysis not only of the submissions that are made by the respective parties but also of the voluminous documentation that is submitted as part of the review process; such as contract notes, client confidential profiles, appropriate or suitability tests, terms of business agreements and valuation statements. In most complex cases relating to investment services, the Arbiter conducts his own research into the investment products that were the subject of the complaint. This is a process which inevitably takes time to mature and conclude.

Sometimes the parties themselves ask for a time limit to prepare their defence which goes beyond these time frames. The Arbiter has to balance the expediting of cases with the fundamental requisite of an adequate and fair hearing. Overall, cases are being decided in a reasonably short time considering the amount and complexity of cases and the limitations of a small office.

Highlights of decisions delivered by the Arbiter

Accessing the final decisions of the Arbiter

Our internet portal provides access to the full text of the Arbiter's decisions in the original language they are delivered. To respect the privacy of the complainants, the published version of the decision removes the full names of the complainants and replaces them with unrelated alphabetical letters.

A representative selection of cases in summary format

The Act requires the OAFS to publish a summary of decisions delivered by the Arbiter for the year under review.

In the majority of cases, the Arbiter delivers a final decision of which we summarise a representative selection. However, there may be occasions in which the Arbiter would first need to address and decide on a legal aspect prior to focusing on the merits of a case. In such situations, the Arbiter would first issue a preliminary ruling after allowing both sides the opportunity to state their case. A typical example of such a ruling would be that in relation to the late submission of a reply by a financial services provider following receipt of the complaint lodged with the OAFS.

Treatment of situations relating to late submission of replies by financial services providers

In terms of the Act, a financial services provider is required to submit a reply within 20 days from the date when it is informed by the Arbiter of a complaint lodged by an eligible customer.

In the majority of cases, the reply is indeed submitted within such 20-day time window. However, if a reply fails to be submitted on time (or no reply is submitted at all), the provider risks being declared to be contumacious.

There have been a few cases whereby the provider failed to submit a reply within the 20-day period required by law. During the first hearing, the Arbiter would give the opportunity to the provider to justify or explain why its reply was submitted beyond the time period required by law. The complainant, too, would be invited to state whether the reason(s) given by the provider for its late submission are admissible, or ought to be rejected, by the Arbiter.

The provider would, almost invariably, seek the Arbiter's consent to allow the reply to be admitted in the acts of the case by presenting a justification or an explanation for such its delay. Acceptance of the provider's plea in this regard is not automatic. Indeed, the Arbiter's first task in such cases is to consider the provider's plea in accordance with established jurisprudence of the Courts in Malta. In such cases, the Arbiter will issue a preliminary decision.

Typically, the Arbiter refers to a number of principles or parameters that the Courts in Malta had established when contumacy could be justified. Court of Appeal judgements on decisions given by the Arbiter regarding contumacy have confirmed such principles and observed that contumacy does not go contrary to equity and reasonableness; nor does it fall foul of the natural justice process. The justification of contumacy ought to be the exception and not the rule; furthermore, it does not contrast with the principle of audi alteram partem. Procedural time frames established by law have been considered by the local Courts to be of public order and cannot be derogated from, not even by agreement between the parties; apart from the fact that they are imposed to ensure that the procedure relating to a case hearing is not lengthened unnecessarily.

The Arbiter observed that, in line with Court jurisprudence, contumacy is contestation and not the abandoning of the case by the provider. Therefore, he would still continue to consider the case and the complainant would still need to provide evidence in support of its case. In addition, and by reference to procedural law, the provider would still be allowed to present a final note of submission concerning the case's merits.

Other legal pleas raised by financial providers

Other than challenging the merits of the case, some financial services providers have raised legal pleas in their submissions to the Arbiter aimed, primarily, to challenge his competence to handle the complaint and/or his jurisdiction over it. The following are the main legal pleas that the Arbiter has decided upon, and which the Court of Appeal (Inferior Jurisdiction) has repeatedly confirmed when confronted with appeals following delivery of the Arbiter's decisions.

That the service provider is not the legitimate counterparty

Some financial services providers claimed that the complaint, as lodged by the customer, ought to be rejected; and this because the provider was merely acting as an intermediary and was not the administrator of the financial product in relation to which the complaint had been made.

In rejecting this plea, the Arbiter observed that the complaint was in relation to the conduct of the provider, as an authorised licensee of the financial services regulator in Malta. The complaint was primarily related to the service given to the complainant by the provider, which had also sold a product that was not suitable to the complainant's requirements. Additionally, there existed a contractual relationship between the complainant and the financial services provider, as clearly attested by the confidential client fact find, the file note and the know-your-client documents that were drawn up by the same provider.

This legal reasoning was also confirmed by the Court of Appeal in various judgements following appeals from the Arbiter's decisions.

That the complaint was time-barred

Whenever financial services providers raise the issue of prescription, three specific articles in the Maltese Civil Code are invoked. These are articles 2153, 2156(f) and 1222(1). Each article is summarily discussed below within the context of the various financial services complaints that have been brought to the Arbiter's consideration.

Regarding article 2153, the Arbiter consistently maintained the view that the two-year prescription period envisaged by this article would only apply in cases of tortuous liability. In regard to contractual obligations, prescription would be five, instead of two, years. The sale of a financial product to a consumer signifies a contractual transaction between the financial services provider and the complainant; therefore, such article in the Civil Code would not apply. Indeed, this line of reasoning was confirmed by the Court of Appeal in judgements delivered following appeals against decisions delivered by the Arbiter.

Some providers also raised the issue of the applicable prescription period based on article 2156(f), that envisages a five-year timeframe. On prescription, the Maltese Courts established legal parameters regarding how prescription should be interpreted and applied. For instance, he who asserts that a party's action is time-barred should be able to prove such a claim. The prescription of an action commences to run from the day on which such action can be exercised by the person to whom the action is competent. Additionally, prescription should be given a restrictive interpretation and, in the event of doubt, the benefit of the doubt should lean against the party that raises such plea.

In one particular case, the Arbiter looked into a preliminary plea in which the provider claimed that the complainant had lodged the complaint beyond the five-year timeframe. As stated earlier, the provider has to prove that the complainant's action was prescribed.

In this case, the provider contended that the prescriptive period had to run from the date when the product was purchased by the complainant. The Arbiter observed that the sale of financial products is different from other products. A financial product consumer can properly gauge the performance and appropriateness of a financial product only after some time had passed following its purchase. It would not make sense for a consumer to be required to initiate legal proceedings within a timeframe running from the date of a financial product's purchase; and this apart from the fact that providers would invariably object, claiming that the action is premature and vexatious.

Indeed, the Court of Appeal observed, when upholding a decision of the Arbiter, that a complainant would not be in a position to lodge a complaint before he actually suffers a loss; this would not be the case on the date when the financial product is purchased.

In some cases, financial services providers would also invoke a two-year prescriptive period in accordance

with article 1222(1) of the Civil Code which deals with the rescission of an obligation. So far, the Arbiter has always rejected such legal pleas; and this because such a rescission was not being requested.

On Jurisdiction

The Annual Report for 2018 made sufficient reference to a legal plea which a number of providers had raised casting doubt on the Arbiter's jurisdiction to look into complaints when the Terms of Business Agreement, a contractual document that is signed by the provider and the complainant at the inception of their professional relationship, would have assigned such jurisdiction exclusively to the Maltese Courts.

In a number of decisions in which such legal plea had been repeatedly raised, the Court of Appeal (Inferior Jurisdiction) confirmed the Arbiter's line of reasoning. In summary, the Arbiter held that at the time of signing of the Terms of Business Agreement (preceding the coming into force of the Act on 18 April 2016) the OAFS had not yet been established and consequently the parties could not have intended to exclude the Arbiter's jurisdiction. In this regard, the Arbiter's jurisdiction could not be disputed or excluded.

A selection of banking-related complaints

Opening of basic payment account I (ASF 057/2018)

COMPLAINT UPHELD

Basic payment account; application of EU Directive 2014/92/EU and the Credit Institutions and Financial Institutions (Payment Accounts) Regulations 2016; due diligence process.

The complainant lamented the refusal by the bank (or service provider) to provide the client with a basic payment account in terms of EU Directive 2014/92/EU (the Payment Accounts Directive, PAD); and this despite the fact that he had submitted all the background information requested by the bank. He contended that the reasons provided for such refusal fell outside the terms of the said Directive.

The complainant was therefore requesting the Arbiter to order the bank concerned to provide him with the said account.

On its part, the bank contended that:

a) As part of the account opening procedure, the complainant had indeed initially submitted a certain amount of information for its consideration. Nevertheless, the bank felt that this data was insufficient from a due diligence perspective and therefore decided to probe further and request additional information; and this in accordance with its money laundering prevention obligations.

b) As the replies received from the complainant did not meet its due diligence procedure, the complainant's request was therefore declined.

In his deliberations, the Arbiter noted that:

1. The said PAD has been duly transposed into Maltese legislation through Legal Notice 411 of 2016 titled 'Credit Institutions and Financial Institutions (Payment Accounts) Regulations 2016'.
2. These Regulations are intended inter alia to delineate a framework that would grant a right for consumers to open and use payment accounts with basic features in Malta.
3. The complainant had provided the bank with complete information about the source of his income; such income ranged from an eight-year employment in a bank to investment gains, and including profits made from a betting platform (namely, winnings from online poker tournaments).
4. The complainant had supplemented the foregoing with statements of an account held with another local bank (dating back to 2014) showing transfers to his German bank account; the latter was intended to be used to fund the basic payment account to be opened with the service provider.
5. In addition, the complainant had also provided other documentation concerning his monthly rental income (from two apartments he owned in two German cities) as well as his investment portfolio.
6. The bank concerned had indeed been provided with sufficient information.
7. The bank had initially confirmed to the complainant the adequacy of the submitted data to apply for the opening of a basic payment account; nevertheless, it had elicited further information about the complainant's current employment and income. Following the receipt of the complainant's response, the bank had initially granted the requested basic payment account. However, it subsequently reversed its decision contending that it still required additional information.
8. On receipt of such additional information, the bank informed the complainant that it was closing the account application from its end citing money-laundering legislation.

In further deliberating on this case, the Arbiter acknowledged that all credit institutions should scrupulously observe anti-money laundering legislation.

Nevertheless, this should not be used as a pretext to unjustifiably decline the opening of a basic payment account; and this particularly for European Union citizens for whom the PAD had been specifically intended. However, each case had to be considered on its respective merits.

The Arbiter noted that the service provider had initially accorded the requested account to the complainant; and this on comparatively less comprehensive information than what the complainant had subsequently provided at the bank's bidding.

The Arbiter further noted that the complainant had already held an account with another bank registered in Malta; though this had been closed, such closure was because the bank had ceased its operations and not because of any misdemeanour on the complainant's part.

In concluding his deliberations, the Arbiter noted that the bank had not substantiated its contention, submitted late in the proceedings, that it was not bound by the provisions of the PAD; and this because it no longer had five branches and did not offer any cash withdrawals.

In the Arbiter's view, quoting a decision of the Court of Appeal, any changes taking place while proceedings are in progress should not affect the original claim.

In the light of the foregoing, the Arbiter concluded that the bank was not justified in its decision to decline the complainant's application for a basic payment account.

He therefore ordered the service provider to provide the complainant with a basic payment account, which it should nevertheless monitor in accordance with applicable legislation for combating money laundering and the funding of terrorism. The decision has not been appealed.

Opening of a basic payment account II (ASF 006/2019; ASF 074/2019)

COMPLAINTS REJECTED

Due diligence process; application of Directive 2014/92/EU; know-your-customer obligations; alleged discrimination; presentation of valid and updated identification documents; banks' obligations to adhere to anti-money laundering and anti-terrorism funding laws and regulations.

The complainant lodged a complaint against the bank claiming it had refused to open a basic payment account in terms of Directive 2014/92/EU (Payment Accounts Directive, PAD). He claimed that this refusal had been based on his religious beliefs.

When asked for his identification documentation by the bank, the complainant advised that his Maltese identity card and/or passport had been withdrawn by the police in view of his pending criminal proceedings. The complainant insisted that this had nothing to do with activating his account.

In its reply, the bank contended that:

a) It needed proof that the complainant was 'legally resident in Malta or in another Member State'.

b) It refuted the allegations that it had acted in a discriminatory manner when it did not re-activate the complainant's account held by the bank in the complainant's name. The bank pointed out that, had it been motivated by the reasons which the complainant alleged, it wouldn't have opened the account in 2010.

c) The bank was legally unable to reactivate the complainant's account after having duly considered the obligations imposed on it by the Prevention of Money Laundering Act (Chapter 373 of the Laws of Malta) and the Prevention of Money Laundering and Funding of Terrorism Regulations (S.L. 373.01).

In his deliberations, the Arbiter established that:

1. In 2010, the complainant opened a savings account with the bank. The complainant never credited any salary to this account. Five years later, the account's status changed from active to idle after 36 months of inactivity.

2. In October 2017, the complainant emailed the Arbiter's Office claiming that the bank failed to activate his account based on his religious beliefs. The Office forwarded the complaint to the bank.

3. The complainant's identity card expired in 2013 and in order to reactivate the account, the bank was required to repeat its customer due diligence measures. The bank invited the complainant to visit one of its branches and provide his identification documentation. The complainant, however, failed to submit the identification documents.

4. In January 2019, the complainant contacted the Arbiter's Office once again, making unfounded allegations. He claimed that the bank failed to reply to his emails and refused to activate his account because he is a "Maltese Muslim permanent diplomat at Ministry of foreign affairs Malta" and that the bank held "illegal instructions from government of Malta not to open my account." The complainant did not provide any proof to substantiate his said allegations.

5. The complainant did not produce any solid evidence to show that the bank was discriminating against him because of his religious beliefs. As correctly stated by the bank, it had already opened a bank account for him in 2010 and was prepared to renew it had he presented the identification documents as required by law.

6. At the time of the complaint, the bank confirmed that the complainant was being accused of fraud, forgery and/or falsification of public documents and certificates, making false declarations, making use of such documents and certificates and holding himself out to be a public officer at a time when his engagement had already been terminated. According to the bank, such criminal proceedings have not yet been concluded. The complainant had every opportunity to contest this allegation but did not.

The Arbiter noted that the complainant was basing his grievance on EU Directive 2014/92/EU known as the *Payment Accounts Directive* transposed into Maltese law in virtue of Legal Notice 411 of 2016. This directive defines a framework for rules whereby Malta is required to guarantee a right for consumers to open and use payment accounts with basic features in Malta.

The Directive stipulates that a credit institution shall not discriminate against consumers legally resident in Malta or in another Member state because of their nationality.

It also makes it clear that an application for a basic payment account can be refused if in breach of any anti-money laundering and combating of terrorism funding statutory obligations.

Anti-money laundering rules require banks not only to carry out customer due diligence checks but that they should ensure that any documents, data or information provided as part of such process are kept up to date.

The Arbiter observed that, as the complainant failed to produce the updated identification documents, it could not conduct the client's due diligence check in conformity with its statutory obligations.

The Arbiter rejected the complaint. The decision was not appealed.

In another complaint, quite similar to the preceding one, a complainant contended that a bank had refused to open a basic payment account in terms of the PAD because he was a Politically Exposed Person (PEP). The complainant claimed that he was a Maltese citizen and had a permanent employment with two entities, one of which was the Ministry of Foreign Affairs.

In its reply, the bank submitted that:

a) During the due diligence process conducted in terms of law, it transpired that in May 2018 the complainant was arraigned in the Criminal Court and charged with forgery and using falsified documents.

b) It transpired that the complainant was no longer employed with the Foreign Ministry since 2015. That gave rise to tangible doubts as to the authenticity of the documentation he had submitted to the bank.

c) It had declined the application to open a basic payment account in view of these findings and its obligations in terms of law.

During the case hearing, the bank's representative testified that since the complainant had declared that he was a PEP, the bank wanted to meet the client. However, the complainant failed to visit the bank and filed a complaint instead.

When the complainant applied to open a basic payment account, he did not inform the bank about the criminal proceedings against him. Due to the complainant's misgivings, the bank could not conduct a proper due diligence check as required by law.

The Arbiter made several observations in regard to banks' responsibilities in terms of law to conduct a proper due diligence process for its new and existing customers.

He noted that the complainant made false declarations by stating he was employed as an envoy with the Ministry of Foreign Affairs when it was not the case. The complainant also did not reveal to the bank that he was being prosecuted for forgery and fraud. Thus, the bank could not establish a proper banking relationship with a person that was making false declarations and blocking it from carrying a proper due diligence check as required by law.

In this regard, the Arbiter had no hesitation in deciding that the complainant did not co-operate with the bank to carry out a true and proper due diligence exercise by failing to visit the bank when requested, and by making untrue declarations in his application form. The Arbiter rejected the complaint. This decision has not been appealed.

Unauthorised and fraudulent withdrawal from a debit card (ASF 152/2018)

COMPLAINT UPHELD

Fraudulent use of card; chargeback; card stoppage; lex generalis, lex specialis, application of Payment Services Directive 2; gross negligence; exorbitant charge for using card's arbitration system.

The complainant lodged a complaint against a bank after her card was debited with more than €1000, which she claimed was fraudulent.

She described the events which led to her complaint as follows:

a) On a particular day in January 2018, she received an overseas phone call and a person introduced himself as an official from a renowned IT company. He told her that her computer had multiple viruses and had to be cleaned up. She asked him for his number, called him back and gave him access to her PC for a charge of €29 in return for the clean-up he had promised. When he finished his task, she gave him her card details on condition that he would only deduct €29 as agreed.

b) In effect, two amounts had been withdrawn from the card: €359.92 and €821.86. She tried calling the bank's customer service a number of times as she had second thoughts, but it was to no avail as she could not get through. When she finally did get through to the bank, the official she spoke to confirmed that it was too late as the funds had already been debited to her card account.

c) Concerning the purported clean-up, a local IT company she subsequently contacted had confirmed to her that no such clean-up of her PC had actually taken place.

d) She asked the bank to reverse the transactions but, in its reply, the provider claimed that – despite its efforts - the foreign bank (which processed the transaction at the other end) could do nothing and if she wanted to continue with the claim, she had to file a case with the card provider's arbitration service.

She held the bank responsible for not answering her calls when she needed the bank's support to stop payments and to deactivate the card. The complainant requested a refund of €1181.88 that were withdrawn fraudulently from her card account.

The provider, in its response, submitted that the complainant's requests could not be accepted for the following reasons:

a) The complaint should have been lodged against the foreign IT firm that had been paid by the complainant.

b) The amount that had been withdrawn from the card account was the result of the complainant's actions as it was she who provided the card number over the phone, along with confirming the transaction using 3D authentication.

c) The complainant did not suffer financial losses as a result of the bank's actions.

The Arbiter observed that this was a clear case of internet fraud. The bank confirmed this but affirmed its position that it followed procedures correctly; it was the complainant that had divulged the card's security details to the fraudster.

As to the juridical context, the Arbiter observed that the bank's defence was based on two aspects: it claimed that it had done nothing wrong and thus it ought not to pay as it was the complainant's actions that led to her losing money. Such defence was based on general civil law considerations (lex generalis). However, in this area, lex specialis applies. The special law that applies is Directive 2015/2366 (the Payment Services Directive 2) that came in force on 13 January 2018. This EU Directive became law through a Central Bank of Malta (CBM) Directive in accordance with Chapter 204 of the Laws of Malta.

According to article 50 of the CBM's Directive, the consumer has to bear the loss suffered on his card if acting fraudulently, with intent and with gross negligence. In such case, the complainant would not be refunded with the loss.

The Arbiter was morally convinced, and even on the basis of the evidence provided, that the complainant did not act fraudulently as it was she who was defrauded. Neither could it be stated that she had the intent not to carry out her duties in accordance with her card's terms and conditions, or that she acted with gross negligence.

In this context, the Arbiter noted - quoting from a publication of the UK's Financial Services Ombudsman that handles several fraud-related complaints - that similar cases of fraud were occurring frequently and that fraudsters were creating scenarios that appear to be genuine, when in fact they were not.

It was true that the complainant had entered the 3D secure code to authorise the payments. However, one must understand the mindset of the complainant who, when told that her computer was about to crash, was simultaneously provided with the chance to have the issue resolved; and this for a mere €29. Anyone can encounter such a situation, especially elderly people who, like the complainant, are not conversant with technology. The fraudster is always one step ahead of the person who falls victim to a scam and who may not be able to think fast enough to distinguish between a genuine or fraudulent action.

The complainant could neither be faulted for not using the card issuer's arbitration system. Requesting the complainant to pay €1,080 (which was only payable had the complainant lost her case) when the amount withdrawn amounted to €1,181.78 was not a viable remedy. For such a redress system to be realistic and fair for a consumer, it has to be offered at a nominal price or for free.

The Arbiter concluded that the complainant, in her vulnerable age of 86 years, was not in a position to realise that she was being defrauded, and the fact that she entered her 3D secure code did not amount to a fraudulent act on her part or that she had the intention not to follow the terms and conditions of her card. Neither could one claim that she acted with gross negligence.

The Arbiter thus ordered the bank to reimburse the complainant the amount of €1,181.78, which was the amount that had been fraudulently withdrawn. The decision has been appealed.

Failure to protect security features of a card (ASF 007/2018)

COMPLAINT PARTIALLY UPHELD

Stolen card; unable to get through bank's card support services; terms and conditions; use of card and PIN; Payment Services Directive 1; gross negligence; culpa lata.

The complainant and his wife were having breakfast in their hotel during a holiday in Brussels in November 2017. At one point, they noticed that the complainant's bag – which they had left on their table at which they were seated – was missing. The bag contained his bank cards, among other things.

They immediately informed hotel staff, who in turn called the police. The complainant also tried calling the bank to stop the cards but, as he was unable to get through, he called his daughter to do so on his behalf. The bank took 329 seconds to respond to the daughter's call.

Some moments later, a bank official called him and told him that at that same moment, a transaction to withdraw €600 was being made. He instructed the official to stop the cards immediately.

The complainant claimed that after this call, he received two messages relating to ATM cash withdrawals of €600 from a bank.

The bank rejected the complainant's claims on the following grounds:

a) The loss sustained by the complainant through the amounts that had been withdrawn from his card was a consequence of his leaving the bag on the table when he was helping himself to breakfast and was not a result of the bank's actions/omissions. The said loss was clearly the result of the complainant's negligence in leaving the bag unattended.

b) According to the bank's chronology of events, the complainant's daughter got through to the bank's customer care department more than one hour after he became aware that his bag went missing.

c) At 9.37am, the daughter got through to the call centre. The phone call took 5 mins 29 seconds. A few moments after, the amount of €100 was withdrawn from an ATM followed by an SMS alert to the complainant barely a few seconds after. A couple of minutes after that, a further €500 were withdrawn from the same ATM. A further SMS alert was immediately sent. One credit card was blocked.

d) Each time an attempt was made to withdraw from the ATM, the correct PIN was inserted. Thus, there was no attempt to withdraw using an incorrect PIN. The card used at the ATM was the actual card, and not a cloned version.

e) The card's product information document, which incorporates the bank's terms and conditions,

reimburses unauthorised transactions only in particular circumstances, as indicated in the said documentation. The complainant's situation would not fall under any of the situations as described and therefore the bank refused to refund the withdrawn amounts.

The Arbiter noted that the transaction occurred on 27 November 2017 and therefore Directive 2007/64/EC (the Payments Services Directive 1) was in force at the time. The Directive was implemented in Malta by way of Central Bank of Malta Directive 1. According to the Directive, the consumer is required to use the card in accordance with agreed terms and conditions; to inform the bank immediately the card is lost, stolen, misappropriated or used in a manner that would not be authorised by the cardholder; and to take reasonable measures to keep its personal safety features as secure as possible.

On the other hand, the provider is obliged to keep the cardholder secure and indemnify him as provided in the same Directive. The service provider refused to refund the amounts withdrawn as, in its view, the complainant was negligent when leaving the PIN in the wallet along with the card.

According to the Directive, an alleged unauthorised use of a card requires to be supported by evidence that the cardholder either acted fraudulently or had the intention to do so, or was grossly negligent not to have observed his obligations in terms of the Directive. According to the same Directive, a cardholder would not be entitled to a refund if acting *'fraudulently or by failing to fulfil one or more of his obligations … with intent or gross negligence'*.

The Arbiter, having heard and analysed the evidence provided, ruled out that the complainant acted fraudulently. Accordingly, the criterion that required to be assessed was whether the complainant either acted *'with intent'* not to observe his responsibilities to keep the card secure or that he was *'grossly negligent'* in this regard.

The Arbiter, by making reference to Maltese jurisprudence, observed that in the case under review, it could not be stated that the complainant acted to cause damage to a third party or that – taking it to extremes – he wanted to be negligent. If he left the PIN together with his cards, as was probably the case, he was negligent, but this is distinguishable from *gross negligence*. If the Directive wanted to punish pure negligence, it would have stated so, but the Directive envisaged the maximum penalty only in the case of *gross negligence*.

The Arbiter, by referring to the Directive, observed that while the cardholder "*shall bear the losses relating to any unauthorised payment transactions, up to a maximum of €150, resulting from the use of a lost or stolen payment instrument or, if the payer has failed to keep the personalised security features safe from the misappropriation of a payment instrument*", in the event of '*gross negligence*' "*The payer shall bear all the losses relating to any unauthorised payment transactions if he incurred them by acting fraudulently or by failing to fulfil one or more of his obligations under paragraph 35 with intent or gross negligence. In such cases, the maximum amount referred to … above shall not apply*'.

From the facts of the case, as it was likely that the complainant *'failed to keep the personalised security features safe'*, he should not expect to recover the full amount withdrawn. As things happened, he might have acted negligently, but could not be deemed to have acted with *'gross negligence'*.

In addition, the Arbiter observed that the withdrawal of €500 occurred after the complainant had already informed the bank, which fact was confirmed by the bank itself. In addition, the complainant had made several attempts to call the bank without success, until he had to resort to instruct his daughter to do so (and even she did not manage to get through immediately). This delay, too, contributed further towards the fraudster's actions.

The Arbiter observed that this was not the first time that the Arbiter had heard complainants claim that they were unable to get through to the bank at the first instance in such situations. In this case, the bank cannot claim that it is not completely to blame to stem the cash withdrawal transaction. In this regard, the Arbiter recommended that the bank takes all remedial actions so that, in similar cases, initial contact with the bank is immediate so that cards are stopped from being misused with minimum delay.

The Arbiter upheld the complaint in part and determined that, as the complainant failed to keep the personalised features of the card secure, the amount of €150 should be deducted from the €600 withdrawn and ordered the bank to pay the difference of €450. The decision has been appealed.

Processing and commitment fees for a home loan (ASF 141/2017)

COMPLAINT PARTIALLY UPHELD

Commitment fees on home loan; deferral of home loan drawdown; refusal of bank's partial refund of fees.

The complainant requested from her bank the refund of processing, commitment and legal fees relating to a home loan which, she claimed, were not due.

The complainant claimed that the bank official, with whom she discussed her banking requirements, had failed to inform her of a processing fee for taking up a home loan, and that there was a commitment fee if she failed to draw down the amount by a certain date. She also claimed that, upon transferring an outstanding home loan from another bank, she was charged a further amount in legal fees, of which she was also not made aware of. Although she was refunded half of the commitment fee, she was still dissatisfied with the bank's handling of her case and had therefore lodged a complaint with the OAFS.

In its reply, the bank claimed the following:

a) The complainant's sanction letter was issued in February 2011 and signed by the bank and the complainant the following month. In June 2011, the bank informed the complainant that if she failed to draw down the loan by the end of August 2011, commitment fees would be charged in terms of a provision in the sanction letter. However, the transfer of another loan from another banking provider occurred in February 2012, on which date the facility with her bank was utilised. The bank agreed to refund half the commitment fees on an *ex gratia* basis following an objection filed by the complainant.

b) According to the information held by the bank, the client had always been informed of the terms and conditions of the loan, including the relative fees and charges. It, therefore, rejected the complainant's request for a refund of the fees.

During the course of the complaint review, the complainant explained that she had first approached the bank in 2010 merely to check if she would be eligible for a home loan. She and her former partner already had a loan with another banking provider, but she was in discussions with her former partner to buy his share of the property and transfer the loan to the bank. She claims, however, that she had informed the bank that she would not need the loan before a further three years; and this due to the fact that, if she transferred the other loan before a particular date, she would have incurred an early repayment charge on that other loan.

Although she had signed the sanction letter, the complainant claimed that she was not given an explanation of its contents. When she drew down the loan in 2012, she noticed that she was being debited with an amount which she later found out were commitment fees for the failure of utilising the loan within a specific time frame. Although the bank refunded half of the fee, she was still not satisfied with the redress given.

The branch manager, who submitted a detailed sworn statement, recalled going through each provision in the sanction letter with the complainant during a meeting. The manager made a note on her copy of the sanction letter to reflect the complainant's request that she would not need the loan before February 2012. She said that her superiors promised that they would assist the complainant.

The Arbiter observed that the complainant had claimed that no one had read the sanction letter to her and that she was told to sign it before she could read it. The Arbiter expressed reservations at this claim. It was evident that, on the sanction letter, there was a note by the branch manager indicating that the only reservation that the complainant had was that in relation to the commitment fee, which was subsequently substantially reduced. Had the complainant held other reservations, those too would have been indicated on the sanction letter.

The Arbiter observed that it was standard practice for a bank to charge processing and legal fees for such loans. Had the complainant refused the loan and sought an alternative package from another bank, she would still have had to pay processing and legal fees as these charges were standard practices.

In regard to the commitment fee, however, the Arbiter observed that the bank had confirmed that the complainant had informed it that she would avail herself of the amount loaned in February 2012. The Arbiter therefore could not understand why the sanction letter mentioned an earlier date as the drawdown date and

that charges would be applicable if drawdown was not affected by that date. Even if commitment fees may be applicable in certain cases, in this case, the bank had been informed in advance of the actual drawdown date, as confirmed and noted by the branch manager.

The Arbiter upheld the complaint in part and ordered the bank to refund the complainant the remaining half of the commitment fee, that is €253.14. The decision has been appealed.

Fraudulent foreign bank drafts not honoured by a bank (ASF 173/2018)

COMPLAINT REJECTED

Clearing period of foreign bank drafts; fraudulent bank drafts; the bank as mandatory of the customer.

The complainant claimed the following:

a) In April 2019, she received a banker's draft drawn on a UK bank for the amount of £3,700. She deposited the bank draft in her sterling account with her local bank and her account was duly credited.

b) She subsequently received two further bank drafts, one for £4,800 and another for £4,950. Both drafts were deposited in the same sterling account held with the local bank. A bank staff member assured her that the funds had been credited into her bank account.

c) On the basis of the assurance that she had been given, she had made a number of payments amounting to €11,700.

d) She claimed to have suffered financial damages as a result of negligence attributable to the bank employee who had assured her that funds had been credited into her account before effecting payment to third parties. She also claimed that the bank ought to have had the means to check the veracity or otherwise of a bank draft issued by an international bank. She had been subsequently told by an employee that, at a glance, it would have been obvious that the bank drafts were fraudulent.

The complainant was claiming reimbursement of €11,700.

The Arbiter noted that both parties had confirmed, during a hearing of the case, that the bank drafts were fraudulent.

In a sworn statement presented during the case's proceedings, the complainant explained that, in September 2017, she had come across an advert in a local newspaper for the post of a personal assistant. She had emailed her interest and was subsequently informed that she had been given the job.

She was informed that the person with whom she would be working was visiting Malta and had asked for someone to assist with travel logistics. To that end, the complainant had to have funds to carry out such duties. Sometime after, her employer sent an email informing her that he sent the complainant a draft for £3,700, that included her pay. The bank draft was issued by a bank in the UK.

The bank draft was deposited in her sterling bank account and the bank employee informed her that funds would be credited to her account between four and 40 days after their deposit. In fact, she received a bank document confirming that the funds were credited to her account.

When the complainant was assured of the funds' availability, she started executing her employer's instructions. She subsequently received two further bank drafts, which were all deposited and for which the bank confirmed that funds were credited to her sterling account. The complainant provided a list of payments to third parties she had done on instructions of her employer.

Some days after the drafts had been presented to the bank, a bank employee had informed her that the sterling account had been reversed by the amount of £3,700 (the amount on the first draft) as the draft was found to be fraudulent.

The bank sent her an official communication that confirmed the reversal of the first bank draft. She immediately referred the matter to her branch manager, who revealed to her that the draft had a number of characteristics that clearly indicated it was fraudulent.

She subsequently lodged a report with the police fraud section and requested that her sterling account be closed. In the meantime, the bank confirmed to her, in writing, that her two subsequent bank drafts were also fraudulent.

In her note of submission, the complainant acknowledged that the bank was her mandatory. The Arbiter, in reviewing the case, had to assess whether the bank, as the complainant's mandatory, had executed its responsibilities or had been negligent in her regard.

The Arbiter observed that, as the complainant's mandatory, the bank was executing a banking transaction that reflected certain banking practices. The Arbiter referred to a number of court decisions similar to the complainant's case.

The Arbiter observed that, in line with established case law, the Courts had already determined that when a bank accepts a cheque, it is established banking practice that this is done on the pretext that if the cheque is not cleared, the bank has a right to claim refund. The bank did, in fact, make this clear in the advice that it provided the complainant when the drafts had been deposited.

The Arbiter also said that it would not be reasonable to expect a bank cashier to identify the veracity or otherwise of bank cheques, as the complainant was claiming.

Although the complainant had repeatedly claimed that she had been reassured by bank officials that the funds had been received by the bank, the Arbiter observed that she failed to provide sufficient evidence to this effect. Moreover, this claim could not be upheld as none of the bank staff would ever be in a position to confirm the validity of a foreign bank draft before it is submitted for clearing.

The fraudulent bank drafts were the acts of a third party and the fact that the complainant presented fraudulent bank drafts which were accepted by the bank did not imply that the bank was negligent. Rather, the complainant was too trusting and had failed to properly verify the honesty of the person with whom she was corresponding.

The Arbiter, on the basis of evidence as provided, was unable to find that the bank had acted negligently and had followed banking practice.

The complaint was thus rejected. The decision has not been appealed.

A selection of investment-related complaints

Entire investment portfolio composed of 35 structured notes (ASF 433/2016)

COMPLAINT UPHELD

Misselling of investments, investment in structured instrument; portfolio diversification; misrepresentation of risks, product suitability, marketing of product fact sheets.

The complainant, aged 83 years and an expatriate resident in Malta for over 25 years, lodged a complaint against a financial services provider following losses to her investment portfolio composed of 35 structured notes.

The following is a summary of the main points arising from the complaint:

a) The complainant held a number of foreign bank accounts and was concerned that, if any of the banks with which she held funds were to fail, her funds would not be safe. She therefore asked the provider for something more secure.

b) The provider prepared an investment proposal in writing outlining its initial recommendations. He suggested a range of capital-protected structures and funds to enable her to diversify her portfolio. He promised to monitor and actively manage her portfolio. The portfolio was duly incepted in April 2011.

c) Each time an investment into such portfolio would be made, the provider would ask the complainant to sign a declaration stating that the product being recommended was deemed to be complex and that it was deemed to be suitable for her investment needs. According to the complainant, the investment products concerned were actually intended for professional investors.

d) The complainant claimed to have suffered substantial investment losses and therefore requested the Arbiter to grant her compensation, with interest, for such losses.

On its part, the provider countered as follows:

a) The complaint was time-barred by the lapse of five years since the contractual relationship between the company and the complainant was concluded on 20 April 2011.

b) Any losses suffered by the complainant were exclusively the result of factors inherent in the investment product(s) purchased by the complainant and were not the result of omissions by the provider.

c) Statements in the products' Key Information Documents (KIDs) concerning investor eligibility and retail distribution unsuitability related to the marketing document and not to the underlying product.

d) The products offered to the complainant were actually lower in risk than holding the actual equities (which the complainant acknowledged to be familiar with) and, therefore, fitted within her risk tolerance and investment objectives.

The Arbiter rejected a number of legal pleas, such as those relating to nullity and prescription.

As to the merits of the case, the Arbiter observed the following aspects:

1. The complainant received advice from the provider between April 2011 and December 2015 in regard to 35 structured notes.

2. At the time her portfolio was incepted with the provider, the complainant held an investment portfolio comprising equities and bonds managed on discretionary basis by a foreign stockbroker; she claimed that it was not high risk and that her portfolio was simple and straightforward.

3. The provider claimed that the complainant's portfolio in structured products was not composed of aggressive investments, it was not high risk but was a suitably balanced portfolio.

4. Neither the Client Fact Find nor the investment recommendation refer to any structured notes the complainant might have held previously. There were no indications that the complainant was knowledgeable and experienced in such investments. Although some structured notes had equities as underlying

investments and she already held a portfolio of such securities managed on a discretionary basis, it would not render her knowledgeable about such structured notes simply because of her portfolio of equities.

5. It was evident that the complainant's main purpose in investing was not income but growth; but, more importantly, the protection of her savings which were held in bank deposit accounts and which attracted a limited level of protection in case the bank in which she held funds was declared insolvent. Capital protection was, therefore, a primary consideration and of foremost importance.

6. None of the structured products were capital protected in the true meaning of the term and in the way a retail investor would have ordinarily interpreted it.

7. As to portfolio diversification, neither was the asset allocation diversified nor was it balanced. The asset allocation was over-exposed to a class of structured products with limited capital protection aimed at professional/sophisticated investors. Neither was there any active management as promised in the investment proposal.

8. Regarding the contents of the products' key information documents, the Arbiter noted that these documents were issued purposely for those investors who were eligible to invest in the product. It would have served no scope for an issuer to restrict distribution of such fact sheets to particular investor categories (such as professional investors) but then allow the actual sale of such products to be unrestricted and open to retail investors. None of the fact sheets relating to the structured products recommended to the complainant were meant for retail distribution.

It was evident, the Arbiter concluded, that the advice that had been given by the provider to the complainant in 2011 was not in her best interest and that the provider failed in his fiduciary obligations towards the complainant as the recommended products were unsuitable to her circumstances.

The provider misrepresented the risks inherent in the structured notes – all complex products – besides offering such products to a retail investor when it was clearly evident that the products were intended for professional or sophisticated investors as clearly labelled on the marketing documentation.

The Arbiter declared that the complaint was fair, equitable and reasonable in the particular circumstances and that the complainant ought to be reimbursed for the losses she actually sustained on her portfolio, including the dealing charges paid. The complainant's legal rights were preserved as regards a few investments in her portfolio which had not yet matured. The decision was not appealed.

Investment in securities of a private company (ASF 408/2016)

CASE PARTIALLY UPHELD

Discretionary portfolio management; unlisted securities; provision of information; disclosure and transparency in relation to the underlying investment; previous investment experience; risk attitude.

This complaint against the provider related to an investment of £90,000 in the shares of a private company in December 2008. The company was set up in Guernsey by the financial services provider itself. The unlisted shares formed part of a portfolio, one of three, belonging to the same complainant and managed by the provider on a discretionary basis.

In her complaint, the complainant submitted the following:

a) The provider had failed to follow her instructions for investment to be made in Malta Government bonds and shares of a low-risk nature. The investment in shares of such private company was contrary to the complainant's wishes that investments should be made in listed financial instruments.

b) She wanted reassurance that her money was not being used in projects in which one of the senior officials of the provider was personally involved in.

c) The financial provider had acted abusively and irregularly in its business relationship and in regard to a number of financial instruments that comprised her portfolio. She claimed that the provider was not authorised to invest in shares issued by a private company.

d) As her investment was shown to have nil value, she had not been given sufficient reason why this was so and whether there was a secondary market for such investment.

e) The service provider did not provide full information in regard to the business venture and structure relating to this private company.

The complainant requested that she be reimbursed the amount of €118,167 (equivalent to £90,000), with interest from the date of acquisition of the contested shares.

The provider raised a number of legal pleas. On the merits of the case, the provider submitted the following:

a) It disagreed that it was unlicensed to invest and trade in unlisted shares of a private company.

b) it was not true that it failed to provide reasonable and transparent information to the complainant.

c) It had always acted in the best interest of the complainant and honoured its fiduciary obligations in her regard. It also disagreed that the complainant was exposed to considerable and unauthorised risks.

d) On the basis of the information which it had on the complainant, the investment was consistent and compatible with the investor's personal and financial objectives, and within her risk attitude. As her investment was managed on a discretionary basis, in terms of an agreement which the parties had consensually agreed and signed, the performance of the contested investment had to be seen in the light of the performance of her overall portfolio. Any losses which the complainant might have suffered from this investment were compensated from gains made on the entire portfolio, as managed by the service provider.

e) The contested investment constituted a small part of her overall portfolio – less than 2.4% of the entire value of the portfolio managed by the provider. The portfolio had been valued at around €4,500,000.

The Arbiter, after rejecting the legal pleas put forward by the provider, considered the substantive merits of the case.

The complainant held two types of investments in her own name in the said company. The provider had purchased 90,000 shares in the company in December 2007 for a total value of £90,000. After some time, an acquisition was made of £300,000 in bonds issued by the same company, bearing 7.5% interest that were to mature on December 2014. The bonds were repaid in full, with interest.

The complainant claimed that she had entrusted the management of her portfolio entirely to the provider as she was not knowledgeable on investments. She confirmed having many meetings with the provider, during which she had always instructed him to invest her portfolio in cautious and safe investments.

According to the provider, the complainant held investments which were comparable to the one she was contesting. It claimed that from one such investment, the complainant had made a return of 291%.

The private company, of which shares were held by the complainant, was incorporated in Guernsey to purchase land and to convert a hotel into an apartment block consisting of eight residential units. Income would have been generated from the sale of such units.

Although the complainant requested a copy of the company's audited financial statements for a span of years starting from the year in which the company had been set up, the provider claimed that – as the company was registered in Guernsey – there was no requirement for the company to produce accounts. The last set of accounts available was dated 2009.

The provider confirmed that there were several delays and challenges relating to the company's project. At one stage, the provider had notified investors that although the company was still operating, its debt level was approximately at the same level to that of its assets, which explains why the complainant's shares were declared to be of no value.

Based on the evidence presented, the Arbiter observed the following:

1. The provider's licence to offer portfolio management services allowed it to invest in transferable securities and permitted portfolio management discretion in a wide range of instruments, including unlisted and listed shares. The discretionary portfolio management agreement that existed between the complainant and the provider had no restrictions which limited the provider to only invest in quoted instruments.

2. The complainant's portfolio consisted of a wide range of instruments, which also included listed and unlisted shares.

3. The provider had been managing the complainant's portfolio on a discretionary basis for quite a number of years. Evidence suggests that the provider had long known the complainant and was familiar with her personal and financial circumstances.

4. On the basis of the evidence presented, there were

no convincing and concrete arguments that the investment was inappropriate or inadequate.

The Arbiter, however, observed that the complainant's claim relating to a lack of transparency, accountability and adequate valuation of her investment required further consideration.

During the review process of the complaint, a number of aspects relating to the project remained unclear. The unavailability of financial statements as well as inconsistencies in the provider's written and verbal evidence regarding the project's status deprived the complainant from information she was entitled to receive. There was lack of transparency and accountability.

It was evident that the project was always under the direct control and direction of the service provider, and it was therefore in its remit to appoint independent third parties to give full financial accountability for the whole project.

The Arbiter, while rejecting arguments that the provider was not duly authorised to invest in shares of a private company or that it had exposed the complainant to considerable and unauthorised risks, partially accepted the complainant's claim that the provider failed to supply information and financial statements as required by rules it was bound to follow when servicing investors.

Although the Arbiter did not have a precise quantification of the provider's shortcomings in this regard, he exercised his discretion as provided in the law and awarded the complainant the sum of €10,000. The decision was not appealed.

Investment in a structured product (ASF 005/2017)

COMPLAINT REJECTED

Investment advice; execution only; structured products; risk and return; capital at risk; previous investment experience; risk attitude.

The complainant claimed that he and his (late) wife had been advised by the provider to invest in a structured investment product ('the contested product') for the amount of $19,600. He claimed that they lacked knowledge and experience to be able to grasp the risks inherent in such equity-linked derivative structured notes. The complainant claimed that he suffered losses as his capital had not been repaid; rather, he received a number of shares in a company which were worth $5,600, representing a 71% loss of the total capital initially invested. The complainant claimed that he and his wife had not been informed of the risks inherent in the investment, not even that a part or all of the capital could be lost.

The complainant also made the following submissions:

a) He claimed that before investing in the contested product, he had only made investments in bonds, bond funds and shares, all against financial advice.

b) He and his wife had invested in three similar equity-linked derivative structured notes over a period of two years. In 2011, they bought two products, in GBP and USD (one was called before maturity, while the other matured on its due date). The latter investment was called by the issuer a mere two months following purchase, paying the capital in full ($19,000) and $600 in interest. The proceeds ($19,600) were then invested in the contested product.

c) As to such structured products, the complainant held that the risks were skewed in favour of the bank and against the complainant, rendering such products unsuitable.

d) The provider had been negligent and failed to act in their best interest, whilst also being in breach of the regulatory requirements.

e) They rejected the classification made by the provider that they were of a high/aggressive risk categorisation.

The complainant requested the Arbiter to declare that the provider had failed in its contractual obligations. To this end, he requested his capital to be reinstated to its original position prior to the investment in the contested product, with interest.

On its part, the provider rejected the claims that were being made by the complainant in its regard, such as those relating to failings in its contractual obligations or that it failed to act in their best interest. On the substantive merits of the case, the provider claimed that:

a) Over a period of 13 years, the complainants had transacted over €1,600,000 in a number of investment instruments that included collective investment schemes and bonds. From these investments, the investors received around €141,205 in dividends, of which €17,900 were reinvested on the complainant's instructions. When the portfolio was recently transferred to another financial intermediary, the complainants had over €750,000 in net assets, of which more than half in various investments.

b) When the complainant requested to reinvest in the contested product, he had already invested a substantial amount in two similar products, apart from previous experience he had accumulated from past investments. Indeed, on the first two investments in similar products, the investors had received substantial interest. As to the third investment, the terms of which had been explained to the complainants, the investors were offered shares in a company whose value was constantly improving. There were no indications that these shares had been sold and losses had been sustained.

c) It had merely acted on instructions of its clients on an Execution Only basis whereby the complainant, in full knowledge and good will, signed all documents in confirmation of his requests.

d) The inherent nature or quality of these products were of a lesser risk than the equities that the investors had in their portfolio, even before they had established a professional relationship with the service provider which spanned 16 years. It claimed that they had previous investment experience and adaptation to risk tolerance.

After rejecting the legal pleas put forward by the provider, the Arbiter considered the substantive merits of the case in accordance with the evidence provided throughout the case review. In summary, the Arbiter made the following observations:

1. At the time the complainant had invested in the contested product, he was 67 years of age. Together with his wife, they had invested for a long number of years, so much so that, in 2000, they had transferred their portfolio to the provider following losses they had sustained to their portfolio as a result of Argentina's bond default.

2. According to the documentation supplied by the provider, the nature of the service provided to the complainants was on Execution Only basis, whereas in the Appropriateness Test, there is indicated that the complainants had experience in a range of investments, including equities, bonds, complex products, money market funds and other investments.

3. The Arbiter reviewed the Appropriateness Test that had been conducted by the provider in regard to the complainant. He noted that the complainant had already made two transactions in the same product and it was him that had approached the provider to invest in it again following positive performance. There was, therefore, nothing inherently wrong for the third transaction to have been done on Execution Only basis.

4. On the basis of the evidence at hand, the provider had full knowledge of the investors' personal and financial situation, their status, the frequency and type of investments they had carried out in the past, their investment objectives and attitude to risk, among other aspects.

5. They were also able to absorb capital losses ($19,000) on their investment portfolio (€275,000) as a result of the inherent risks from the product.

6. Concerning the complainant's claim that he did not wish to have high, but rather low, risk investments comprised in his portfolio, from the list of investments held over the years it was evident that the complainant was inclined towards high yielding investments. The contested product was not the only high yielding investment he had held.

The Arbiter was not morally and legally convinced that the contested investment was inappropriate or unsuitable to the complainant. He acknowledged the provider's version that the characteristics of the product had been explained to the complainants, and that the complainant wanted to invest again in the same product. As the product was not new to the investors, the complainant could not point fingers at the provider just because he suffered a loss.

As to the shares the complainant received in lieu of his investment in the contested product, the Arbiter observed that the value of such equity had improved over a span of years. The Arbiter was unable to quantify the complainant's actual financial loss as it had not been conclusively proven by the complainant that these shares would not appreciate in value.

The complaint was thus rejected. The decision was not appealed.

Investment in an asset-backed security (ASF 167/2017)

Complaint upheld

Loss from investments; inexperienced investors; misselling; knowledge and experience; promotion and selling.

The complainants stated that:

a) They suffered capital losses from an asset-back security which invested in life insurance products, and in which they invested following repeated pressure from the service provider. They had already invested in a bond fund, but the service provider repeatedly contacted them recommending the asset-backed security as the fund was not yielding any results.

b) The service provider defined the alternative product as secure and the complainants trusted him completely since they had no expertise in financial products. They had placed the majority of their life savings with the service provider.

c) After failing to receive any dividend for a number of years, the service provider informed them that they would only receive a marginal part of their capital investment.

d) This constituted a case of misselling and churning, which was also confirmed by the MFSA.

The service provider stated that:

a) It was not the legitimate defendant as it was only an intermediary for the products involved.

b) The complainant had not proven that there is a direct link between the service received and the damage suffered by the complainant. The loss was related to the investment carried out and the service provider was not responsible for the performance of the investment product.

c) There was no misselling in this case and no case of churning as it merely acted in its responsibilities as an MFSA licence holder.

In his deliberations, the Arbiter observed the following aspects:

1. Despite the service provider claiming to be just an intermediary, the service provider was clearly giving advice and selling investment products as an MFSA licenced service provider. Moreover, the complainants were not alleging bad management of the product but rather complaining on the advice provided and the way the product had been sold to them. There was a contractual and legal relation between the two parties.

2. The complainants had only completed secondary education and were not literate. They came in contact with the service provider as the latter called them regularly to entice them to invest. When placing the original investment, they were rather concerned, since it was the first time they had invested in such investments, and the monies included their life savings and monies passed on from their parents. After a few years, the service provider got in touch again, suggesting a change in product. This new product was described by the service provider as an award-winning bond; he insisted that this was a secure product – since this term was also part of the product's name.

3. The complainants failed to receive interest for a number of years, but the representative of the service provider dismissed this as a mere bureaucratic hiccup which would have been settled shortly, only to inform them later that the investment had practically collapsed.

4. The product in which the complainants invested emphasised high returns. It was classified as an asset-backed security that invested in securities whose underlying assets were life insurance policies sold in the Americas. This product failed due to incorrect analysis by experts in the field, so it was hardly surprising that retail investors could not carry out such complex analysis.

5. Contrary to what was notified to the complainants, the product involved a number of risks, including the fact that capital was not guaranteed. It was based on the performance of other products. It carried a medium to high investment risk and was considered as complex.

6. Considering the educational background and employment history of the complainants, it transpired that the complainants relied completely on the advice given by the service provider. Moreover, the representative of the service provider who sold the product was not licenced to give investment advice, a fact which he had himself acknowledged. Given the lack of knowledge and experience of the complainants, the service provider lacked responsibility when appointing a person who could not give advice to sell such product.

7. Although it was another person who signed the documentation on behalf of the service provider, it was clear that this person was not involved in the transaction so much so that this person was not called to testify.

8. It was clear that this product should have been sold on the basis of an advisory service and a suitability assessment should have been carried out. The complainants sought income from this investment and did not seek profit from the capital. They were described by the service provider as cautious investors and therefore the product sold did not match their requirements.

9. The service provider failed to prove that the complainants had the necessary experience and knowledge in order to understand the risks involved in the transaction.

The complainants should not have been sold such investment and thus the Arbiter ordered the provider to pay the capital losses suffered by the complainants, less any recoveries from capital that such investments may have disbursed. The decision has been appealed.

Investment in a property fund and a bank subordinated bond (ASF 036/2017)

COMPLAINT UPHELD

Losses from a number of investments; bank subordinated bond; property fund; inexperienced investors; non-disclosure of fees; inappropriate investments; risk and return; conduct of the provider's duties.

The complainants stated that:

a) They suffered losses from three separate investments held in a property fund and a subordinated bond.

b) This loss was suffered owing to the fact that the service provider failed to act in their best interests and recommended investments which were inappropriate or unsuitable for them.

c) They were inexperienced investors and were forced to sign documentation intended to protect the provider from instances of investment misselling.

d) The provider failed to point out the inherent risks emanating from such complex investments and did not provide them with copies of the documents which they had signed.

e) The provider also failed to indicate the remuneration it would be receiving as required for licensed service providers.

f) This was a case of misselling since the investment sold was not compatible with the investors' personal circumstances, financial objectives as well as their risk appetite.

g) The complainants requested the Arbiter to award them compensation by putting them in the same financial position they enjoyed before these investments, together with interest.

On its part, the provider contended that:

a) It was not the legitimate defendant and the complaint was time-barred.

b) The claims that were being made on capital losses and those being made in the complaint were conflicting. Although the complaint related to loss in capital, the claims that were being made related to regulatory shortcomings that may not lead to compensation for suffered losses. The complaint should therefore be declared null as the claim did not reflect the complaint.

c) It was not the case that the complainant suffered losses in the two investments in the property fund as these effectively matured in 2012. The complainant's investments in the property fund were re-invested in a bank bond which was subsequently redeemed. The second investment, in which the complainant invested a further sum, also matured in 2012.

d) Regarding the bond, it was not responsible for the losses arising from the nationalisation of the bank which had issued such bond and the subsequent expropriation of the investment.

e) It had not carried out any misselling of investments and the complainants were aware of the risks associated with investing.

In his deliberations, the Arbiter observed the following:

1. Despite the provider claiming not to be the legitimate defendant, it failed to give proof to substantiate such claim. Moreover, documented evidence had shown a contractual relationship between the provider and the complainant.

2. It was not the case that the provider was solely an intermediary, thus freeing it from responsibility. In fact, the provider gave investment advice and invested the money in its capacity as a licensed service provider.

3. The complainant was claiming that the product which had been offered to him was not as promised. Thus, the complaint was based on the provider's contractual obligation and whether it had acted fairly, reasonably and equitably.

4. The property fund in which the complainant was invested had inherent risks. Indeed, the home regulator where the fund was established required that, if sold to its local investors, only wholesale and experienced investors would have been eligible to invest in it. While this requirement was not imposed for investors located outside its home territory, such aspect should have been prioritised in the product assessment by the service provider.

5. As to the bond, the depreciation of the portfolio value of the issuing bank led to its nationalisation through a decree by the state in which it was based. Over and above the inherent risks of investing in a subordinated bond, the issuing bank had already been reported to be facing difficulties when the complainant was recommended this investment.

6. These products were sold to the complainant when the latter was 78 years old, and with a poor educational background. It also transpired that both the complainant and his wife had few investments before investing with the provider, which products were not of a complex nature.

7. The provider had claimed that the complainant had invested in other complex products sold by it. The Arbiter argued that these products should not have been sold to the complainant in the first place. The property fund was intended towards sophisticated and experienced investors in the country where it was based, and should not have been sold to retail clients, and particularly to the complainant who did not have the level of education and experience to be able to understand the complexity of such products.

8. The provider had not only failed to provide the prospectus and financial statements to the client, but it had also failed to bring evidence that a suitability test of the complainant had been carried out.

9. The property fund failed to meet the complainant's objectives since it was not directed at retail clients, and particularly at the complainant who did not intend to risk his money. The same argument applied to the subordinated bond investment, which was similarly not suitable for the complainant.

The Arbiter concluded that the complaint was fair, equitable and reasonable. The complainants should not have been sold such investments and thus he ordered the provider to pay the capital losses they had suffered. The decision was not appealed.

Loss of investment capital (ASF 121/2017 and ASF 125/2017; ASF 067/2018)

DIVERSE OUTCOMES

Risk and return; attitude to risk; high yielding bonds; nature and type of investment service; knowledge and experience.

1. ASF 121/2017 and ASF 125/2017

In view of their close similarity, these two cases were considered and treated together by the Arbiter who gave a single decision binding the two cases; and this by mutual agreement between the parties concerned, in view of the fact that the cases concerned a complainant as well as the same complainant jointly with his wife.

The complainants lamented the treatment received at the hands of the service provider which ultimately resulted in the loss of their entire invested capital.

They stated that:

a) They had collectively invested the amount of €15,000.

b) The provider had advised them to invest this amount in two high-yielding and unrelated bonds.

c) In view of their limited financial and investment experience, they had relied completely on this professional advice; and this also because the said bonds were presented to them as being solid and safe. The provider never informed them about any inherent risks or offered them any alternative investments at lower rates of return.

d) The provider was well aware of their modest financial status and their low risk profile; it should therefore have been more prudent in selecting the products offered to them.

e) One of the bonds had failed after paying just a single annual dividend. The other bond had similarly failed, but without even paying a single dividend.

f) The unusually high rates of return should have alerted the provider to the highly risky nature of the said investments and induced it to offer them safer alternatives.

g) In the light of the foregoing, the complainants requested the reimbursement of the entire invested capital as well as of the related interest.

On its part, the service provider contended that:

a) It could not adequately defend itself from the allegations made by the complainants; and this because the complaint(s) did not specify any specific shortcomings on its part. The said complaint(s) should therefore be considered as null; and this in terms of Article 789(1) (c) of Chapter 12 of the Laws of Malta.

b) The complaint(s) were replete with baseless allegations intended to portray an untrue provider-client relationship.

c) It was the complainants themselves who had decided to make the investments, without any pressure on its part; and this even though it had repeatedly explained that the high rates of return necessarily implied a high investment risk, inclusive of the possible invested capital loss.

d) The complainant's wife was an existing client who was experienced and knowledgeable in bond investments; she was the one who took the investment decisions, also on behalf of her husband. Furthermore, in the preceding investments, she had always sought returns of between 6% and 8% in the investments she had already made.

e) The bonds provided to the complainants were suitable to their requirements. It had never guaranteed their performance nor the invested capital.

f) The complainant(s) could have withdrawn from the investments rather than persevere in the hope that they might eventually improve.

g) Any financial losses sustained by the complainants were the result of external factors which were beyond its control; namely, the risks inherent in any investment.

h) It had provided solely a Non-Advisory and Execution Only service to the complainants; that is, the ultimate investment decision rested with the latter.

After considering and rejecting the preliminary pleas, the Arbiter noted the following in regard to the substantive merits of the cases:

1. It was the provider itself who had suggested the products in question to the complainants; hence, the service provided could not be described as Execution Only but as an advisory service.

2. It was clear that the female complainant had accumulated investment knowhow and experience over a number of years; this was evident in the number of investments held in her own name as well as in correspondence exchanged with the provider. She was therefore quite able to make an informed decision about the joint investment undertaken with her husband. Moreover, as shown by the several investments she had made, her risk appetite was certainly not a low one.

3. Furthermore, the Arbiter was of the view that the provider did not breach its responsibilities when selling one particular high-yielding bond to the two complainants jointly.

4. However, this observation did not apply to its sale of the other bond solely to the husband; and this because, contrary to his wife, he lacked the necessary investment knowledge and experience to truly understand the implications of this investment.

5. The investment was certainly unsuitable to the male's complainant's personal circumstances and it should have never been offered to him. The provider should have carried out a suitability assessment of the complainant on his own; no evidence that this had actually been carried out was presented by the provider.

In the light of the foregoing, the Arbiter decided to decline the joint complaint made by the complainant and his wife in case ASF 125/2017 but to accept the complaint made by the male complainant on his own in case ASF 121/2017.

He noted that the invested amount was €4,300. The complainant had received a single dividend of €371.19, which amount was to be offset against the investment.

Therefore, the Arbiter ordered the provider to refund the complainant the amount of €3,928.81 in all. The decision was not appealed.

2. ASF 067/2018

In a separate case against the same service provider similarly concerning the loss of invested capital, the complainant submitted that:

a) At the termination of an existing investment with the provider, she had visited its offices with the intention of requesting the withdrawal of her capital but was informed by the provider that it had already invested the amount for her in a bond issued by an Eastern European bank for three years; she insisted that this had been implemented without her consent.

b) At the end of this three-year period, she had again attempted to collect her capital but was pressured by the provider to maintain the investment for another year.

c) During this overall four-year period, the provider had never informed her about the performance of her investment or about its safety; nor was she advised to withdraw her investment or informed that she could lose it (or parts of it).

d) It was only at the end of this four-year period, when she had attempted once again to reclaim her money, that the provider informed her that the investment had meanwhile failed.

In the light of the foregoing, the complainant requested the reimbursement of the entire invested capital, amounting to €18,000.

In his deliberations, the Arbiter noted that:

1. There were manifest contradictions in the complainant's testimony during the proceedings; these concerned the investment's actual performance as well as the maturity date of the preceding investment and her signature of certain documents.

2. The provider's version of the case and its testimony were comparatively more coherent and credible; this related to its specific advice to sell the preceding investment (in view of the capital gain entailed) as well as to reinvest the proceeds. There was no need for the signature of any document since the complainant's instructions were made over the phone.

3. The complainant could indeed have opted out of her investment at any time by instructing the provider to sell her holding in the product while it was performing well.

4. The complainant had been investing in products of this nature over several years. She was happy to receive the returns from the product in question for a number of years; and it was only after the onset of problems that she alleged that the provider had kept her in the dark and that it had acted without her consent.

The Arbiter declined the complaint. The decision was not appealed.

Reimbursement of lost invested capital and unpaid dividends (ASF 122/2017)

COMPLAINT REJECTED

Disclosure; type of service provided; portfolio of bonds; recorded phone conversations.

The complainant submitted that the provider had failed to inform her in good time of the investments' negative performance as well as to advise about any remedial measures to offset such performance. She suffered a financial loss in her investments.

She contended that the provider had actually informed her that, on maturity, she would be getting only €7,981 instead of the €16,123 initially invested.

The complainant further alleged that the provider had failed to furnish her regularly with a statement of account

as well as with the dividends that were due to her; and this over a number of years.

She was therefore requesting the Arbiter to award her the full reimbursement of the invested capital as well as of the unpaid dividends.

On its part, the service provider contended that:

a) The complaint was replete with baseless and inconsistent allegations intended solely to portray a specific business relationship with the complainant which did not actually exist.

b) Throughout its exchanges with the complainant, it had acted in accordance with the established regulatory requirements exercising the highest standard of diligence required of it at law.

c) It was the complainant who had decided on the products in which to invest; and this without any pressure on its part. She had opted to choose products with a high interest; and this despite the fact that she had been made amply aware that this signified a higher investment risk, inclusive of the possible entire or partial loss of the invested capital.

d) There was no misselling on its part. The complainant had been provided with all the information about the products concerned which were simple bonds, suitable for retail investors, whose investment risk implications were easy to understand. Furthermore, at the time of their selection, there wasn't the slightest indication of their subsequent negative performance.

e) Any financial loss sustained by the complainant was due to the investment risk inherent in the chosen products, over which the provider had no control. No guarantee was ever given to the complainant about the products' actual performance.

f) The service provided to the complainant was of an advisory and not of a discretionary nature. The duty of the provider was to furnish professional advice based on the information available at the time. The ultimate investment decision lay with the complainant who had been regularly kept informed by the provider through meetings, telephone calls and correspondence; and this inclusive of the notification made by the provider to the complainant that the products were being restructured as well as its advice to withdraw from the investments in question so as to minimise her loss.

g) The complainant could have opted out of her investment at any time while requesting information from the provider about feasible alternatives; and this by issuing the appropriate instructions.

After rejecting all legal pleas raised by the service provider, the Arbiter noted that in regard to the substantive merits of the case:

1. The complainant was a retail client who was seeking investment advice in order to maximise her income from medium-risk investments.

2. This profile was borne out by the confidential client fact find for the suitability test which also showed the complainant to be quite familiar with bond investments as well as with investment advice.

3. The complainant had chosen to invest in a portfolio of bonds, consisting of four separate underlying bond investment products, set up by the provider itself.

4. In the nine recorded telephone calls between the complainant and the provider, which took place between June and December 2016, the former had never raised the issue about the latter's failure to provide a regular statement of account.

5. In her exchanges with the provider, when the latter had informed her about the negative performance of two of these products and advised on the remedial action to be taken, the complainant had chosen and repeatedly insisted that she would wait for the payment of the outstanding dividends from these products.

6. In one of the recorded telephone calls with the complainant, the provider's representative had clearly informed her about the non-performance of the products in question and the potential financial consequences; he had explained that this already signified a loss of €6,000. He had repeatedly insisted that a future recovery could not be guaranteed and advised her to withdraw from these investments and possibly to reinvest the proceeds in other products so as to recoup the said loss.

7. Yet the complainant had decided to disregard such advice stating that she was not prepared to forfeit the said amount from her invested capital. She chose to bide her time and to retain the investments unaltered until the next dividend distribution; and this also in the hope that the products would recover in the interim.

8. The complainant's decision to disregard the representative's clear advice, which had been given in good time, signified that she was assuming full responsibility for her decision.

In the light of the foregoing, the Arbiter decided to reject the complaint. The decision was not appealed.

Reimbursement of lost invested capital and unpaid dividends (ASF 127/2017; ASF 128/2017)

DIVERSE OUTCOMES

Risk and return; attitude to risk; high yielding bonds; nature and type of investment service; knowledge and experience.

The captioned two cases are being integrated in a single summary in view of their similarity and the familial proximity of the complainants. The complainant in the first case (ASF 127/2017) is the son of the complainant in the second case (ASF 128/2017).

1. ASF 127/2017

The complainant submitted that he had lost the invested capital in two investments which he had undertaken on the advice received from the service provider.
He contended that he had intentionally not sought a high-risk investment with equally high rates of return but had wanted a normal risk investment in order to supplement the income from his comparatively low wages.

He further contended that, though he was aware of the fact that the value of any investment could fluctuate, he had never been informed by the provider that he could lose his investment but had actually been assured that the invested capital would be returned to him in its entirety at the end of the investment period. He was therefore requesting the provider to reimburse the amount of €16,000.

On its part, the service provider contended that:

a) Throughout all its exchanges with the complainant, it had acted in an advisory capacity and in accordance with the established regulatory requirements exercising throughout the highest standard of diligence required of it at law.

b) It was the complainant's father who had actually chosen the investment products; and this in terms of a power of attorney granted to him by the complainant. He had wanted a high rate of return, in excess of 6%, even though it was explained to him that this implied a comparatively higher investment risk.

c) It had not exercised any pressure on the complainant's father to choose the investment products concerned. Moreover, the latter were simple bond investments which were easy to understand, and which were entirely suitable to the complainant's investment profile.

d) Any financial loss sustained by the complainant was due to the investment risk inherent in the chosen products as well as to the internal fraud committed within the firm which had issued one of the bonds. The provider could not have any control over these factors.

e) The complainant was ignoring the fact that his overall investment portfolio with the provider was profitable. It was therefore unacceptable that an investor retained the profit from an investment but then expected the provider to make good for any loss sustained; and this despite the risk warnings given by the latter both verbally and in writing.

f) The complainant's allegation that he had sought a normal investment was untrue; as was his statement that he had not been kept informed about the performance of his investments. In fact, he had been regularly provided with six-monthly statements while his father had held twice yearly meetings with the provider's financial advisor. The latter's repeated advice to consider switching to alternative safer investments was ignored by the father.

g) It had never guaranteed the performance of the complainant's investment or the return of the invested capital.

h) It was unclear how the complainant's alleged loss of €16,000 had been calculated; and this because this amount exceeded the capital invested in the two failed investment products that he was complaining about.

In his deliberations, the Arbiter noted that:

1. One of the two securities in question – a bond paying 7.875% annual coupon– was initially assigned a rating

of B+ by Standard & Poor's when it was issued in January 2013. However, it performed badly and its rating started to gradually decrease; to the extent that, in July 2014, the dividend due was not paid.

2. The provider had duly informed the complainant about this as well as about the restructuring exercise carried out whereby his bond investment was to be exchanged with alternative securities whose value was, however, about 45% of the complainant's original investment.

3. The other security – a bond paying 7.75% annual coupon – had been assigned a rating of BBB- when it was sold to the complainant in August 2013.

4. However, in November 2013, the firm applied for insolvency proceedings. This had taken the investment market by surprise, particularly in the light of the firm's recent announcement about its positive sales performance during the initial nine months of the year as well as its expansion plans through the acquisition of two internet sales platforms. This statement subsequently turned out to be false.

5. The provider had duly informed the complainant about this as well as about the fact that the dividend due in November 2013 would not be paid.

6. A review of the investments made by the father (under his power of attorney) on behalf of the complainant consistently showed high rates of return, ranging between 6.5% and 9.875%. This contradicted the complainant's assertion that he sought low-risk investments.

7. At no stage had the complainant denied the provider's repeated contention that the father had consistently sought investments providing a rate of return in excess of 6% and, where possible, that could be purchased below par so as to ensure capital gains.

8. The complainant's assertion that he was seeking a small return to supplement his wage was contradicted by the client fact find as well as by the term sheets submitted by the provider in respect of preceding investments made by the complainant which consistently showed the complainant's appetite for high rates of return and capital gains.

9. Prior to the purchase of the securities in question, the complainant had already invested in bonds which carried a comparatively higher rate of return and, therefore, a higher investment risk.

10. The complainant had not substantiated his contention that the provider had not properly looked after his investment. Rather, the facts of the case showed that the provider had not defaulted in its duties towards the complainant.

11. The complainant, through his father, was not a prudent investor who was seeking a normal rate of return to supplement his modest income; rather, his actions showed that he sought to maximise his investment return through high dividends and capital gains.

In the light of the foregoing, the Arbiter felt that this was a clear case where the complainant was ready to undertake high-risk investments but then resorted to the submission of this complaint when such investments did not perform as expected.

He therefore dismissed the complaint, which was not appealed.

2. ASF 128/2017

The complaint related to the entire loss of the invested capital in three investments which the complainants had undertaken on the advice received from the service provider. They submitted that they were not knowledgeable in investment matters.

They further stated that although they wanted to supplement their pension income, they had not sought a high-risk investment with equally high rates of return but had instructed the provider to invest their money in a normal investment which would have provided an adequate return.

They stated that the provider had never informed them about the performance of their investments; though they had been made aware that investments could fluctuate in value, they had been reassured that the invested capital would be returned to them in its entirety when the investments matured.

The complainants further declared that, on the advice of the provider, they had sold some existing profitable investments and invested the proceeds in alternative ones recommended by the provider. However, they were subsequently informed that the latter had performed badly and the issuer of one such investment had actually filed for insolvency.

However, such notification by the provider had been made too late for them to remedy the situation.

They therefore requested the Arbiter to order the provider to reimburse them the invested capital – amounting to €50,000 – as well as the related unpaid dividends.

On its part, the service provider submitted that:

a) It was the complainant, also acting on behalf of his wife, who had chosen the investments.

b) The complainant had a consistent appetite for a high rate of return, in excess of 6%, even though it had been explained to him, verbally and in writing, that this implied a comparatively higher investment risk that could result in the loss of the invested capital.

c) The said products were suitable to the complainants' investment profile.

d) The service provider could not control or influence the performance of any investment; any alleged financial loss sustained by the complainants was the result of the investment risk inherent in the freely chosen products.

e) Moreover, the overall investment portfolio with the provider was profitable and that it was consequently unacceptable that profit is retained by an investor while a loss must be borne by the provider.

f) It was not true that the complainant had sought a normal (low risk) investment and that he had not been kept informed about the performance of his investments.

g) It had never guaranteed the performance of the complainant's investment or the return of the invested capital.

h) It was not clear how the reimbursement request of €50,000 had been calculated by the complainants.

In his deliberations, the Arbiter observed that:

1. The complainants' insistence that they sought low-risk investments was contradicted by the fact that a review of the investments made by them, in their overall business relationship with the provider, consistently showed their choice of investments with high rates of return and, therefore, a consequent high investment risk.

2. The complainants' assertion that they were seeking a normal investment return to supplement their pensions was contradicted by the client fact find which rated their investment profile as medium/high.

3. Prior to the purchase of the investment products in question, the complainants had already invested in bonds which carried a comparatively higher rate of return; they were therefore knowledgeable in this type of investment as well as of its related risks.

4. In addition to the said rates of return, the complainants' investment record also showed their preference to purchase investments below par so as to ensure capital gain. Their actions showed clearly that they were aggressive investors who actively sought to maximise their income through unusually high rates of return and capital gains.

5. They had profited from their investment portfolio but had resorted to submit this complaint when an investment failed to meet their expectations.

6. The investment products were suitable to the complainants' requirements and investment profile.

7. The provider's advice to the complainants to increase their (already substantial) holding in a long-dated bond paying 7% annually was quite questionable and certainly not in its clients' best interests; and this because it had been given when:
   - The investment was being restructured;
   - The credit rating was CCC;
   - The price, at just over 60%, was well below par.

These were clear and unequivocal indicators of the dire financial situation of the bond's issuer.

In the light of the foregoing, the Arbiter decided to partially uphold the complaint; and this only in respect of the aforementioned further investment. He therefore ordered the provider to pay the complainants the amount of €4,267.93; that is, the amount of the additional investment (€4,757.93) net of the return received (€490). The decision was appealed.

Investment in a fund completely lost in less than a year (ASF 474/2016)

COMPLAINT UPHELD

Suspended fund; fiduciary obligation; bonus paterfamilias; disclosure; regulatory action; gross negligence; negligence; functionaries' duties.

Between March 2014 and January 2015, the complainant invested over a quarter of a million pounds in a global equity fund (the fund). In November 2015, the complainant received a notification that the fund was in suspension. Barely a few months after this notification, the complainant received a further letter stating that the fund would be closed, and investor shares redeemed at nil value.

The complainant pointed out that no audited accounts had been published by the Scheme (the fund was one of three funds comprising such a Scheme) to show where the money had been invested and the residual value of the fund's investments. The complainant claimed that the Scheme's investments could not have been lost in less than a year and alleged that this appeared to not only show gross negligence but also suggest criminal activity.

The reply to the complainant's contentions was provided by the two directors of the Scheme who were appointed to administer the Fund in December 2015 following the resignation of the Scheme's former directors, administrator, auditor, compliance officer and money laundering reporting officer. They explained that:

a) Their role was largely that of arranging an orderly winding down of the Scheme in accordance with its constitutional documents, since all of its underlying assets were considered by the investment manager as irrecoverable.

b) The underlying assets had nil value and the only assets held by the Scheme were bank balances. They had settled all outstanding fees and expenses, with the exception of their own.

c) The financial regulator in Malta had carried out a review of what happened and held the view that, in so far as the counterparty to the underlying investments, which were all investments in Asian companies, the funds invested had been misappropriated. The fund was suspended.

d) None of the underlying investments were recoverable and an attempt to trace such assets through various counterparties in Asia failed. No further attempts were being considered, given the huge expense. The fund had a minimal bank balance (approximately €1,000) which was not enough to re-appoint either an administrator, auditor, liquidator or registered office nor to retain an attorney.

In his deliberations, the Arbiter described the outcome of his investigations into the fund's setup and the substantive merits of the case, as per the following points:

1. The Scheme was an open-ended investment company incorporated and licensed in Malta as a professional investor fund. On inception in 2013, three sub-funds were established. The licences of two of the Scheme's three sub-funds were surrendered voluntarily in 2016, whilst the licence of the last remaining sub-fund, in which the complainant had invested, was suspended by the regulator following a series of regulatory breaches. The investment manager of the Scheme, too, was suspended by the financial regulator following regulatory breaches. The Scheme's latest accounts were dated 31 March 2013.

2. The complainant primarily highlighted the complete loss of his investment within a short period of time of less than a year, the lack of audited accounts submitted by the Scheme and the claim that the fund was now being wound up and had no value as reasons justifying his claims. No further elaborations were made, or evidence provided, to prove the claim of gross negligence.

3. The Arbiter determined that it was not necessary to prove gross negligence. The proof of negligence or the proof of lack of diligence was enough to prove the service provider's responsibility towards its customer.

4. Since the provision of financial advice and investment rests on the fiduciary obligation that exists between the customer and the service provider, the service provider had the duty to act diligently like a *bonus paterfamilias.*

5. The Arbiter, after taking into account the evidence provided and the publicly available information in relation to the Scheme and the public notices published by the MFSA in regard to its regulatory action against the Scheme and the investment manager, considered that there was sufficient detail indicating, at the very least, negligence on the part of the Scheme and its investment manager in the carrying out of their functions. The Arbiter observed significant breaches of duty and misconduct on the part of the Scheme and its manager which also gave rise to breaches of the provisions of the Scheme's constitutional document.

6. The complainant was justified in making the complaint against the Scheme given that the said breaches could reasonably be linked as having had a material bearing with respect to the losses he had suffered.

7. In addition, the Arbiter considered it incomprehensible for the Scheme to be left without sufficient funds to enable it to maintain or appoint relevant service providers to protect the interests of its investors. Moreover, adequate and timely information regarding the Scheme and its sub-fund ought to have been provided to investors in good time.

The Arbiter concluded that the complainant should be compensated for the loss of capital he suffered as a result of the fund's collapse. The decision was not appealed.

Trading in binary options (ASF 027/2018)

COMPLAINT PARTIALLY UPHELD

Binary option trading; knowledge and experience; enhanced consumer protection.

The complainant, 58 years of age and employed as an engineer, held a trading account in binary options. She claimed to have suffered losses on her trades with the provider as the provider had cheated on her.

The complainant submitted that:

a) Under the pretext of trading binary options, the provider undertook an activity similar to a game of chance and to a controlled, manipulated game through the application of several parameters that the provider itself had set.

b) For over three years, she had been cheated by the provider as she had not been made aware of the risk of not achieving a profit.

c) The provider should have stopped her from trading as it was aware that she had borrowed money from various banks so as to trade with the firm.

d) She had provided evidence to the provider of various instances and episodes of wrongdoing on its part, such as discrepancies in price information, wrong price trends and manipulation with time and time displays.

In its reply, the service provider countered with the following:

a) It rejected the complainant's claim that she was not aware of the game character of binary options trading. The provider claimed that the complainant had first opened an account in 2014 with a group company that had an online gaming licence.

b) It denied that there was any manipulation within its trading platform highlighting that it was subject to local regulations and that it had always been in full compliance with all such requirements.

c) At no time did it have any information that the complainant had borrowed money to trade on its platform.

d) Over the years, the complainant had familiarised herself with the nature of such financial products.

e) It had provided all the required disclosures in a comprehensible and accessible form on its online platform. Its portal featured several warnings about the risks relating to gambling and it warned players about the addiction of options trading and not to trade with borrowed money.

f) In a financial assessment questionnaire that the provider required its clients to compile at account opening stage, the complainant had disclosed over three years trading experience in binary options or other financial derivatives.

The Arbiter considered that:

1. The complainant's trading activity occurred from June 2014 till 16 November 2017. Between June 2014 and May 2015, the complainant held a gaming account with a firm that was eventually closed and a new account, an investment account, was created in 2015 with the provider.

2. The majority of the complainant's binary option trades, over 27,000 buy and sell transactions, were done through this investment account over a span of nearly 2 ½ years; between June 2015 till November 2017.

3. From an analysis of her account over a one-year period from June 2015 to July 2016, the Arbiter determined that the complainant purchased multiple binary option contracts with small amounts, typically ranging between €10 to as high as €300 or more. She withdrew money from her account on less than 10 occasions whilst she deposited money on more than 300 occasions during the said one-year period. The positions taken by the complainant in the binary options contract were typically of short duration.

4. The complainant had herself consciously carried out thousands of trades in binary options over a period of a few years. Overall, she had made more losses than profits. The Arbiter refuted the complainant's claim of not being aware or having been misled about the 'gaming nature' of binary options, noting that the complainant had operated the gaming account for nearly a year prior to the commencement of her trading with the provider.

5. With respect to the alleged mistakes and issues with the provider's trading platform, no sufficient and convincing evidence had emerged to prove that the issues raised by the complainant with respect to the provider's systems were the actual causes of the losses she had incurred.

6. The Arbiter noted that the MFSA considered binary options as complex products and, prior to EU initiatives in this field, it had required providers to undertake measures with the aim of ensuring enhanced consumer protection due to the particular nature of binary options. The complainant, as a retail client, was eligible and merited due enhanced protection. Whilst from the information provided, there was no reason to believe that the provider had not applied certain specific consumer protection measures – such as the provision of information - such measures were just part of the initiative that a provider of binary options had to take for the protection of consumers.

It was clear from the case in question that the complainant needed protection even from her own actions. The Arbiter stated that it had not been demonstrated, for example, that adequate measures were taken by the provider to ensure that the complainant was not trading with borrowed money. It was only reasonable to expect adequate checks on aspects involving also the source of money used for trading of such instruments.

In this case, the Arbiter was factually, legally and morally convinced that whereas many allegations made by the complainant were not supported by the circumstances of the case, on the other hand, the service provider did not satisfy all the measures as expected from it as a binary options trading company for enhanced consumer protection.

Although the Arbiter rejected the complainant's claim for a total refund of losses suffered on her investment account, the Arbiter concluded that it would be fair, equitable and reasonable in the particular circumstances and substantive merits of the case to award the complainant €9,500 in compensation as a result of enhanced consumer protection shortcomings for which the provider was responsible and which indirectly also contributed to the loss suffered by the complainant. The decision was not appealed.

Trading in Contracts for Differences (ASF 143/2018)

COMPLAINT REJECTED

Deduction of dividends; dividend adjustments; knowledge and experience; disclosure.

The complainants claimed that in April 2018, the service provider had made unlawful deductions without warning or justification from their trading accounts with respect to trades on Contracts for Differences (CFDs) undertaken in the first quarter of 2018.

The complainants claimed that this occurred when:

a) Such deductions were not reflected or provided for in the service provider's documentation. The same adjustments for the same type of trades and in the same type of instruments were never done in the previous years the complainants had been trading with the service provider.

b) The complainants received no prior notifications regarding the change in the service provider's approach and the adjustments that were carried out.

c) No explanation was provided as to the reasons why such adjustments were made at the end of the quarter, rather than when actually due.

d) The service provider had set its own specifications and not applied universal practice crediting long trades with a fraction of what short trades were debited with.

e) There was no transparency about all the costs associated with the CFD products entered with the service provider.

The complainants requested the service provider to pay back the full amount deducted amounting to just under €160,000.

In its reply, the service provider submitted the following:

a) The complainants were experienced traders and had been customers of the service provider since January 2015. An appropriateness test, as required by the regulator, had been carried out.

b) At the time of on-boarding, one of the complainants had informed the provider that he had been trading stocks for over 24 months prior to becoming its client. The complainant was a frequent and experienced trader on the service provider's platform.

c) The adjustments made to the complainants' accounts reflect debits and/or credits made to accommodate corporate actions in line with industry market conventions.

d) It confirmed that it had debited and credited the accounts of all its customers after the payment date of the said dividend attached to the stocks became due (or matured) with this being done in accordance with its internal operational procedures.

e) The adjustments related to dividend variations on CFD trades involving stock/stock indices. The service provider claimed that there was no industry standard which dictates specific timeframes within which such credits/debits are to be applied as this depended on the specific payment dates of the said dividends.

f) The adjustments that had been made to the complainants' trading account had not been done previously due to an error on their system, and that it decided to start applying such adjustments from the first quarter of 2018.

In his decision the Arbiter considered that:

1. The complainants were experienced traders. They were aware that other brokers applied dividend adjustments and were, or should have been aware, that they were taking an advantage on the lack of adjustments made by the service provider. The complainants were receiving material benefits on their short positions from the lack of adjustments made by the service provider where such extraordinary benefits, however, only arose as a result of the system errors acknowledged by the service provider.

2. The complainants stood to benefit on their short positions from the drop in value of the shares/stock indices underlying the CFDs as a result of the dividends declared by the issuers of the stock, as well as from the lack of dividend adjustments which typically apply on the short positions; theoretically, this lead the complainants to make higher gains on their short positions due to the lack of dividend debit adjustments. Dividend adjustments, thus, had a material bearing on the trading accounts.

3. The application of dividend adjustments for positions in CFDs involving stock/stock indices is a common practice by other brokerage companies, as evidenced by the disclosure publicly available on the website of a number of EU regulated brokers.

4. The complainants were, in the circumstances, not considered to be entitled to the lack of application by the provider of the dividend debits to their trading accounts with respect to the short positions taken as from 2018.

5. The Arbiter, however, observed that the service provider's position on dividend adjustments could have been more adequately and clearly documented. The online manual on CFDs, provided by the service provider as a guide to investors, did not have any disclosures on dividend adjustments in early 2018. A disclosure about 'corporate events' was only introduced at a later stage.

6. The disclosure on dividend adjustments should be strongly unequivocal as to what, when and how such dividend adjustments are to be made rather than withholding certain information as an internal operational process.

7. Dividend adjustments should be carried out within a reasonable time and in line with industry practice and, hence, relevant disclosure as to the timings when such adjustments are to be made need to be likewise clearly disclosed.

8. With respect to the complainants' claim, and despite the fact that certain deficiencies of a regulatory nature were apparent concerning the manner in which dividend adjustments were handled, the Arbiter, however, was not provided with convincing grounds on which to determine that the complainants were entitled to the contested dividend adjustments.

9. There was no evidence to suggest that the complainants experienced a net loss on their original investments following the trades undertaken in the first quarter of 2018; and this due to the dividend debit adjustments that were applied from 2018.

The Arbiter thus rejected the complainants' request for compensation. The decision was not appealed.

A selection of insurance-related complaints

Business insurance - compensation for water-damaged stock (ASF 039/2017)

COMPLAINT PARTIALLY UPHELD

Stock coverage on a floating basis; ingress of water; adherence to policy conditions; disclosure; policy endorsement; requirement to inform the insurer.

The complainant lodged a complaint against the insurance provider about the loss of stock items, consisting of auto parts amounting to €22,472, following the ingress of water in one of his stores. He contended that such amount was well within the overall stock sum insured of €400,000 spread over a number of premises at different locations. He was therefore dismayed that the insurer concerned was offering only a partial compensation of €5,878 and demanded to be compensated fully for his loss.

On its part, the insurance provider contended that:

a) In accordance with the policy terms and conditions, the complainant was required to look after his property diligently; yet it had transpired that the ingress of water from neighbouring premises had been ongoing for three years. Despite not solving this problem, the complainant had continued to store his stock at the same property.

b) The said policy terms and conditions required the complainant to store his stock on *"racks, shelves, pallets and/or stillage at least six inches above floor level"*; this did not appear to have actually taken place.

c) In the light of such breaches by the complainant of the said policy terms and conditions, the insurer could have declined from the outset the complainant's compensation claim in its entirety; yet it had opted to equally handle it but had contested solely the extent of monetary compensation to be provided.

d) The overall stock sum insured was indeed of €400,000; but this was spread over four separate premises each of which had a pre-determined stock limit that could be stored there. The amount of stock that could be stored at the premises in question was €5,000.

In his deliberations, the Arbiter considered that:

1. The stock had been insured on a floating basis; the complainant was contending that this insurance concept allowed the unrestricted movement of stock between different premises without any limitation on the stock value kept at each premises.

2. The complainant was further contending that the actual implications of this insurance concept were only explained to him after the incident in question. Provided that the overall floating stock value did not exceed €400,000, he was therefore entitled to full (not partial) compensation for his loss.

3. Such contention was not credible; and this in the light of the testimony given by the complainant himself in which he had specifically mentioned the stock value to be insured at the premises in question.

4. The complainant's original insurance policy – termed 'Exclusive Business Cover' – had been substituted with the latest policy version promoted by the insurer concerned – termed 'Business Guard Small Business Solution. A new proposal form was completed, specifying the stock value per premises as provided by the complainant himself, and the latter duly signed it.

5. In their testimony, two separate representatives of the insurer concerned had insisted that the complainant had been made aware that the stock coverage on a floating basis allowed the movement of stock between the several insured premises; but this provided that the specified stock value per premises was not exceeded. Any such excess would not be insured but had to be notified to the insurer so that the policy could be amended accordingly. Since no such notification had ever been received, the stock insured value at the premises in question had therefore remained unamended at €5,000. All the foregoing was borne out by the policy documentation provided to the complainant.

6. A specific policy endorsement listed the maximum value of stock insured at each separate premises; its format was clear and easily understandable, even by a person with limited insurance knowhow.

7. It was possible that the complainant had not fully understood the implications of the stock coverage on a floating basis and/or the relative policy wording; however, he was certainly aware of the stock value insured per premises.

8. The stock coverage on a floating basis, comprising a predetermined stock value per insured premises, allowed the policy to cater for stock fluctuations caused by business trends and/or seasonal variations; it also enabled the policyholder to pay a premium that was commensurate with the overall risk. Nevertheless, it was clear that any increase in the stock value per premises, or in the insured overall stock value, had to be notified to the insurer, which was entitled to implement any underwriting measure(s) that it deemed fit for such variation. The lack of such notification signified that any increase would not be insured.

In the light of the foregoing, the Arbiter declined the amount of compensation claimed by the complainant, but ordered the insurance provider to pay the complainant the amount of €5,000 covered by the policy for the damaged stock. The decision was not appealed.

Travel open cover insurance - claim for compensation (ASF 120/2017)

COMPLAINT REJECTED

Late notification of claim; notification of policy benefits; knowledge of policy and respective terms and conditions; gesture of good will.

The complainant lamented the allegedly unfair treatment received at the hands of the bank and the insurance company concerned; and this in respect of her submission of a claim for compensation following the death of her husband while abroad.

As far as the bank was concerned, the complainant submitted the fact that the bank had failed in its duty to inform her that her husband, as a premium cardholder, was automatically insured under a travel open policy underwritten by the insurance company.

Concerning the said insurance company, the complainant highlighted the refusal of her claim for compensation on the grounds of late notification; and this despite the fact that she had submitted the claim as soon as she had become aware of the travel insurance cover linked to her husband's credit card.

The complainant was therefore requesting the Arbiter to remedy this unjust state of affairs by according her compensation of €270,280.

It is to be noted that the bank was declared contumacious by a preliminary decision of the Arbiter. Its reply was therefore struck from these proceedings and could not be considered; nevertheless, according to established case law, this was not to be taken as an admission by the bank.

On its part, the insurer contended that:

a) The complainant's claim had been declined because it had not been submitted during the notification period as established in the policy, and it was submitted after six months of her husband's death; well after the 30-day timeframe specified in the policy for claim notification. Such time-barring was clearly stated in the policy.

b) Cardholders are routinely notified of the several benefits attached to their credit card, including the travel insurance policy, in respect of which they are referred to the policy booklet containing the terms and conditions of the insurance cover in force.

c) The complainant's contention that the bank had not informed her of the travel policy's availability was unfounded; it was the responsibility of the cardholder to inform herself (and all persons who could benefit from such policy) about its existence.

d) Unawareness of the policy's existence could not be used to justify the late submission of a claim.

e) In the case at hand, the late notification of the claim had deprived the insurer from seeking toxicology and other medical reports during the autopsy that would have assisted it in determining the eligibility of the claim; this prejudiced its interests.

f) The issue of late notification was compounded by the fact that the complainant and her husband had worked as insurance consultants and should therefore have been aware of the availability of travel insurance as well as of its terms and conditions.

In deliberating on the case, the Arbiter considered that:

1. The cause of disagreement in this case was the issue of late notification of the claim. The complainant tried to justify late notification by contending that the bank had never informed her of the policy's existence as well as of the eligibility of premium cardholders (and their next of kin) to claim compensation in respect of the range of benefits it provided. The complainant further contended that the insurance company acted unfairly in her regard when it declined her claim for compensation on the grounds of late notification.

2. There were different schools of thought about the concept of late notification:

    a) The first one implements a strict contractual approach; delayed notification is considered to be a breach of the insurance contract and the non-breaching party (that is, the insurance company) is therefore exempted from honouring the said contract.

    b) The second one is based on the reasonableness of the delay and whether this could be justified. Basing himself on the specific circumstances of the case, whilst applying the test of the prudent reasonable person, the adjudicator would need to determine whether there was justification for the delayed notification. If there was, the insurance company cannot avoid the claim.

3. The legislator has tasked the Arbiter to decide a complaint according to what in his view is *"fair equitable and reasonable in the particular circumstances of the case"*; this allows the Arbiter a wide margin of appreciation as upheld by a recent decision of the Court of Appeal.

4. The said contractual approach assumes that the parties to the insurance contract were free to negotiate and agree the terms and conditions of their agreement as outlined in the contract. This was not actually the case since the insurance policy, under which the complainant's claim for compensation was submitted, had been agreed in advance between the bank and the insurance company; there was no possibility for the complainant, or for her deceased husband, to influence its terms.

5. The reasonable approach analyses the facts of the case in order to determine whether the claimant had justified reason(s) for the delay in notifying the insurer of the claim.

6. The complainant had not produced any evidence that her deceased husband was not aware of the insurance cover attached to his premium credit card, which card he had held for eight years prior to his demise; and this all the more so since he was an insurance consultant. Moreover, it was established that, at least since June 2014, the bank had formally informed its premium credit card holders of the availability of insurance cover; that is, about two years before the husband's demise.

7. The six-month delay by the complainant to notify the insurer concerned of her claim was not a reasonable one; and this in the light of the 30-day period specified in the policy wording.

The Arbiter also considered that both the complainant and her husband had worked as insurance consultants and had travelled before using the same insurance cover. So it was unlikely that the complainant was not aware of the insurance cover.

In the light of the foregoing, the Arbiter decided to decline the complaint deeming it not to be fair, equitable and reasonable in the particular circumstances of the case. Nevertheless, he recommended – but this in a non-binding manner – that the insurance company compensate the funeral cost of the deceased; and this purely as a gesture of good will considering the unfortunate compounded circumstances the complainant was facing as a result of her husband's sudden death. The decision was not appealed.

Health insurance - refusal to honour claim (ASF 161/2018)

COMPLAINT REJECTED

Disclosure of material facts; utmost good faith; ex-gratia payment; pre-existing medical condition; questions in a proposal form.

The complainant contended that he was insured with the insurer concerned from July 2016. In January 2018, he submitted a claim for medical expenses incurred for an initial check-up with the doctor, a surgical operation and a post-operative check-up. In April 2018, the insurance paid for the operation but refused to pay for the check-ups, although they were an integral part of the surgical procedure. The complainant also claimed that, during the period of insurance, the insurer changed the terms of the insurance by imposing restrictions.

The complainant thus requested the insurer to pay him €155.85 for the initial check-up and €576.81 for the post-operative check-up.

The service provider refused the complainant's contentions and submitted the following:

a) It had provided the complainant with clear information about the health insurance policy and the extent of cover. The complainant had consciously selected cover for In-Patient and Day-Care Treatment, excluding any form of Out-Patient treatment.

b) According to the terms of the policy, tests and investigations done prior to surgery are considered as Out-Patient Treatment. The patient was not admitted as an In-Patient or Day-Care Patient.

c) The complainant failed to inform the service provider of a pre-existing medical condition when purchasing the policy, which would have been specifically excluded from cover had it been reported. Details of this medical condition transpired from medical reports which were sent to the service provider together with the claim. The costs claimed related to the afore-mentioned pre-existing medical condition, which the policy expressly excludes from payment if it is identified.

d) The change in terms alluded by the complainant referred to such pre-existing medical condition. Upon becoming aware of such condition, the insurer imposed this exclusion retroactively, which is standard practice.

e) The partial payment made to the complaint was a gesture of goodwill, which the service provider had absolutely no obligation to make.

In deliberating on the case, the Arbiter considered that:

1. The Arbiter's appointed medical expert reported that when the complainant took out his insurance policy, he seemed to have omitted to disclose his significant past eye problems which included cataract extraction and anterior vitrectomy in the right eye (January 2011), and left retinal surgery (undergone around 30 years previously).

2. The complainant, in his telephone testimony during the case proceedings, referred to a question wherein he was asked whether he had undertaken any medical procedure in the previous five years before enrolment, to which he correctly answered in the negative. Nonetheless, the complainant should have disclosed this pre-existing medical condition (and others, if present), on the assumption that it was a requirement in the said policy documentation to state all pre-existing medical conditions.

3. Maltese Courts had, on various occasions, dealt with the question of disclosure of pre-existing medical conditions. Quoting from a 2016 Court of Appeal judgment, it was held that a contract of insurance is one based on the utmost good faith of both parties. An insurer carried risk when issuing a policy and it was expected from the insured to inform the insurer about any material fact that could impinge on the risk insured.

4. The existence of a pre-existing medical condition is a material fact that should be disclosed by the insured prior to the purchase of a policy. The Court added that the insured should respond correctly to all the questions asked in the proposal form and inform the insurer about all the material facts that are relevant to the insurer.

5. The Arbiter accepted the conclusions of the medical expert and concurred with the service provider that relevant pre-existing medical conditions should have been disclosed to the insurer.

6. The Arbiter noted that under the health policy, the complainant could only be reimbursed for pre-existing medical conditions after five years continuous insurance cover with the insurer, as long as during such period, the insured does not seek medical treatment for such a condition.

7. The complainant had been insured for less than two years (July 2016 – January 2018) and, therefore, did not qualify for the five-year period as indicated in the policy. That stated, the service provider, as a gesture of goodwill, paid for the In-Patient treatment part of his claim, even if such claim was excluded from cover.

The Arbiter was morally convinced that the insurer had acted fairly, equitably and reasonably with the complainant and rejected the complaint. The decision was not appealed.

Motor insurance - payment of claim for theft of vehicle (ASF 117/2018)

COMPLAINT REJECTED

Utmost good faith; claims history, disclosure at policy inception; withholding of material facts; cancellation of policy ab initio.

The complainant stated that the service provider refused his claim because it alleged that he did reveal preceding claims at the time of insuring the said vehicle.

He contended that the requirement to reveal preceding claims should have been brought to his attention at the time of insuring the vehicle concerned and not when he submitted a claim.

The complainant explained that the proposal form, in respect of the insurance of the said vehicle, had been submitted to him by the provider's salesman through his son; it had been already completed and he simply signed on trust without checking its content.

Since the insured value of the vehicle was €11,800, he was therefore demanding the payment of this amount by the provider.

On its part, the provider submitted that:

a) It acted on behalf of the insurance company and not in its own capacity.

b) The complainant had breached the principle of *Uberrima Fides* (utmost good faith) which was an integral part of any insurance contract; and this by failing to disclose that he and his son (who was a named driver in the policy relating to the stolen vehicle) had previously been involved in ten road accidents, one of which had resulted in the serious injury of a road user. The provider had discovered the existence of such accidents only when the complainant had submitted his claim for compensation.

c) The proposal form, as signed by the complainant, specifically solicited him to read and understand its content before signing it; and this even if the form had been completed by a third party. It further stated that such signature confirmed the proposer's understanding of the form's content as well as that he had revealed all the material information relating to his case.

d) The existence of the preceding road accidents was a material fact that affected not just the premium to be charged by the provider but also its consideration as to whether to insure the complainant or not.

e) The complainant's withholding of such a material fact, relating to his (and his son's) driving record, rendered the policy null *ab initio*. Being invalid from its very beginning, the policy could not therefore entertain any claim for compensation.

In his deliberations, the Arbiter observed that:

1. The complainant had not disputed the fact that the provider had acted entirely as an agent on behalf of its principal, the insurance company. The provider's representative had testified that it was its principal which, when the claim was submitted, had made it aware of the complainant's (and his son's) negative driving record. He had further testified that it was the said principal which decided on the acceptance (or otherwise) of any claim. This confirmed the provider's role as an agent for the mentioned principal.

2. Local case law had repeatedly stated that, as long as an agent did not exceed the authorisation limit(s) granted by its principal, the ultimate responsibility for the former's actions would devolve on the insurer.

3. The letter sent by the provider to the complainant in December 2017 about his claim clearly stated its agency role on behalf of the insurance company. Similarly, the proposal form signed by the complainant as well as the claim form relating to this case equally showed that the actual underwriter and payor was not the provider but its principal.

4. The complainant's contractual relationship under his policy was not with the provider but with the insurance company, whom he could have called into this case.

In the light of the foregoing, the Arbiter decided that the complaint should have been lodged against the insurance company and not against its agent as was the case. However, this was without prejudice to the rights which the complainant might have against the insurance company. The decision was appealed.

Life insurance - payment of maturity value (ASF 132/2017; ASF 064/2018; ASF 112/2018)

DIVERSE OUTCOMES

Estimated maturity value; utmost good faith; reasonable and legitimate expectations of the consumers.

1. ASF 132/2017

In the first case, the complainant complained about the drastic decrease in the maturity value of his three separate endowment with profits policies issued separately in respect of his three children. He contended that, at the time of their purchase, the provider's representative had promised and assured him that the said maturity value would amount to €49,149.78 (converted from the old Maltese currency) instead, the provider had offered a mere €27,000 in all.

The complainant further contended that he was never informed by the insurance representative about the possibility of such a drastic shortfall; he was therefore legally entitled to the promised amount and not to the reduced one.

On its part, the provider submitted that:

a. The proper maturity value of the policies was €29,197.59; this was to be offset against the premiums paid during the policies' 20-year term, which amounted to €19,426.80 in all.

b. The maturity value quoted to the complainant was not guaranteed but estimated; this amount was based on the general economic and investment conditions prevailing at the time. During the currency of the policies, such conditions had deteriorated.

c. It had regularly provided the complainant with annual bonus statements, from which he could have monitored the investment progress of his policy from year to year.

d. Additionally, the policy also provided the complainant with life cover were he to die before the maturity date; and this with a guaranteed benefit of €16,303.

e. It had not committed any irregularities. Rather, in its view, the policy had met its objective of being a medium-term tax efficient investment.

The Arbiter decided that:

1. Through his behaviour, the provider's representative had undoubtedly raised the complainant's expectations and belief that he would indeed have secured the promised maturity value at the termination of the policies.

2. Due to his limited scholastic background, the complainant had relied entirely on the advice received from the provider's representative; he had not understood the content of the papers which the latter read to him. Nevertheless, he genuinely believed that the promised maturity value (€49,149.78) was guaranteed; he equally believed that his expectations would be honoured.

3. This was fully supported by his wife's testimony; she further contended that, at the time of purchasing the policies, they had repeatedly asked the representative whether there would be any future problems; to which he had replied in the negative.

4. The provider's representative stated that, at the inception of the policies, the investment return had been quite stable over several years; hence, policyholders whose policy matured at around that time tended to get the amount promised at inception.

5. This statement indirectly confirmed and supported the complainant's contention that he had been promised a maturity value of €49,149.78 by the representative at the termination of the policies.

6. It was neither reasonable nor equitable that, at the purchase stage of an endowment policy, no explanation was given to the prospective policyholder regarding the eventual maturity value's dependence on the performance of the underlying investments. This breached the concept of utmost good faith which bound the parties to an insurance contract and would otherwise have enabled the prospective policyholder to make an informed decision about his purchase of the policy. This was due to the provider's conviction that the promised maturity value was attainable, as had been the case over several years.

7. The representative was also manifestly confident that the promised maturity value would be attained; and this because the calculating table supplied to him by the provider had remained unchanged over

a number of years. The emphasis he made on this amount was so strong that it practically equalled a guarantee.

8. The provider, through its representative, had not explained to its prospective client that the promised maturity value depended on the investment return; it was therefore responsible for the promised amount.

9. The complainant was a retail client with a modest educational background who was certainly not conversant with the insurance sector and with the workings of an endowment policy.

In the light of the foregoing, the Arbiter accepted the complaint and, due to the particular features of the case as well as the discretion accorded to him by the relevant legislation, he decided that the complainant was to be provided with compensation that was as close as possible to the promised maturity value.

He therefore ordered the service provider to pay the complainant the amount of €43,000 in all. The decision was not appealed.

2. ASF 064/2018

Similarly to the preceding case, the complainant did not accept the drastic decrease in the maturity value of his two separate endowment with profits and accidental death benefit policies. He contended that, at the time of their purchase in 1993, the provider's representative had quoted an estimated maturity value of €45,301.65 and €30,050.57 (converted from the old Maltese currency) respectively.

The complainant further contended that, though the aforementioned amounts were estimates, the maturity values offered by the provider showed drastic shortfalls of 43% and 45% respectively.

On its part, the provider essentially submitted the same contentions as for the preceding case. It further contended that the decision to purchase the policies was taken by the complainant himself, without any pressure on its part.

In his deliberations, the Arbiter held that:

1. The complainant had testified under oath that the provider's representative had not informed him that the maturity values of his policies could fluctuate in accordance with the provider's investment return over the years. Nor had he provided him with a copy of the documentation which the representative himself had completed in respect of the application procedure.

2. The complainant further submitted that the representative had informed him that the maturity values might actually increase due to the addition of a terminal bonus.

3. The complainant's testimony was corroborated by his wife who had attended the meetings with the provider's representative.

4. The provider contended that both policies had performed relatively well when compared to other investments of this nature, having provided a 4% return on the amount invested.

5. The provider further stated that, in addition to the annual provision of the bonus rates, it had been keeping the complainant informed about the performance of his policies as from 13 years before their maturity; and this as evidenced by the correspondence exchanged by the parties on several occasions.

The Arbiter further noted that:

1. The complainant's contentions about the representative's behaviour during the sales procedure had not been rebutted by the provider which failed to summon its representative to testify.

2. Any explanation about the workings of the policies should have been provided before they were purchased and not submitted during the proceedings.

3. Though the policies in question might appear simple to the provider, they were not necessarily so for the complainant who was not conversant with the insurance sector.

4. The option to surrender the policies during their term, in the light of the bonus rates received, was not practical since the complainant would have ended up losing money.

The Arbiter had no doubt that, at the time of purchase, the complainant was convinced that he was availing himself of an investment scheme that would have provided him with the quoted maturity values. The policies had, therefore, not met the complainant's reasonable and legitimate expectations as provided by law.

In the light of the foregoing, the Arbiter accepted the complaint and, after considering all the circumstances and aspects of the case, ordered the provider to pay the complainant compensation of €29,194.29 for one policy, and €18,533.40 for the other. The decision was not appealed.

3. ASF 112/2018

This case differs from the preceding ones, in that the complaint was submitted well before the maturity date of the policies concerned; nevertheless, the underlying concept is the same.

The complainant did not accept the drastic decrease in the maturity value of the two policies he and his wife had purchased from the provider for the benefit of their two children; these were due to mature in 2025.

He contended that, at the time of purchase, he had been presented with a maturity value of €64,800 (converted from the old Maltese currency) for each policy. However, during the currency of the policies, the provider had revised this amount to between €25,712 and €31,101 in each case, thereby unilaterally changing the terms of the contract.

The complainant further contended that the provider's representative had not made him aware of such volatility in the product's actual return as otherwise he would not have purchased the policies for his children's future benefit. While he accepted a possible variation in such return over the policies' 30-year term, this should not be to such an extent.

On its part, the provider submitted essentially the same line of defence as for the preceding cases. The provider further contended that the complainant had acted prematurely when instituting these proceedings (in 2019) since it was too early to determine the actual maturity values which would be maturing in 2025.

In his deliberations, the Arbiter acknowledged that the policies in question were due to mature in 2025; that is, a full six years later.

He further observed that the two separate letters, by which the provider had informed the complainant of the policies' revised maturity value, had clearly underlined the fact that the maturity values mentioned therein were merely illustrative and not definite or final.

Therefore, in the Arbiter's view, it was only on the maturity date of the policies that one could establish with certainty whether the provider had actually honoured its contractual obligations or not.

In the light of the foregoing, the Arbiter declined the complaint, ruling that its submission was premature given that the policies still had another six years to mature. The decision was not appealed.

Pet insurance – claims for payment of veterinary fees (ASF 155/2018; ASF 169/2018; ASF 020/2019; ASF 038/2019)

COMPLAINTS UPHELD

Delays in processing of a claim; utmost good faith; legitimate and reasonable expectations of the complainants; pre-existing medical condition; pet's behaviour.

In view of their close similarity, the captioned four separate cases are being reviewed as follows:

1. ASF 155/2018

The complaint concerned the treatment the complainants received by the service provider in the handling of their claim for compensation. They stated that:

a) On 4 September 2017, they had purchased a pet insurance policy providing a maximum benefit of £4,000 in respect of veterinary fees incurred by their pet dog in case of sickness or accident.

b) On 13 September 2017, while being prepared for a walk, the dog slipped its lead and ran onto a main road where it was clipped by a passing car; the severe injury sustained to its left hind leg required its amputation.

c) The claim form in respect of the cost of the procedure, amounting to £2,351.31, was completed and submitted by the vet.

d) The provider took over five months to process the claim, at the end of which it declined compensation

on the grounds of two conditions in the policy requiring a policyholder to *"take all reasonable precautions to prevent accidents"* and to ensure that the dog is kept *"under control at all times and due care must be maintained to prevent the dog from escaping"*.

e) The incident was not properly investigated by the provider; nor was the claim appropriately assessed by it.

f) The claim was rejected because it had been submitted just a few days after the inception of the policy.

g) This was an accident which they could not foresee or prevent; in fact, it was for such an eventuality that they had purchased the policy.

h) The foregoing contention was entirely supported by their vet who had cared for their animals during the preceding fifteen years.

On its part, the provider refused the claim on the grounds that:

a) Though the claim had initially been indeed declined because of the two policy conditions, after reviewing the case it had subsequently refused to pay, namely that the dog was not kept under control nor was due care exercised in order to prevent the accident.

b) The claim was not rejected because the policy was a new one.

Furthermore, the provider acknowledged that:

a) It had not investigated the incident properly; in its exchanges with the claimant, it had in fact stated that the dog *"was being walked on a public highway"* when this was not actually the case.

b) The time taken to process the claim was indeed inordinate and unwarranted: the provider had already apologised to the policyholders about this.

In his deliberations, the Arbiter concluded that:

1. The parties agreed on the facts of the incident.

2. The provider acknowledged its mistake in basing its refusal of the claim on one of two policy conditions.

3. The only reason brought by the provider to reject the claim was that the claimant did not keep the dog under control at all times and proper care was not exercised to prevent the dog from slipping its lead; however, it had not explained how and why the claimant had failed to meet these requirements.

4. The circumstances of the case clearly showed that it was an accident. The complainants could not foresee or prevent it; nor did the provider contradict this.

5. The claim itself was not handled professionally. The provider discarded one of the conditions of the policy after initially including it and misjudged the circumstances of the accident; it then took a long time to decline the claim.

6. The dog escaped not because it was not under control but because it panicked and forced its way out of its harness since it was not accustomed to the ambient noise of an urban area (having been raised in a rural setting).

7. Maltese case law had repeatedly stated that the parties to an insurance contract were bound by the concept of utmost good faith. This required the insurer to treat its insured's interests as if they were its own while looking for reasons to pay a claim and not for reasons to refute it. The claim-settling procedure was not to be viewed as the insurer versus the claimant but as honest partners to the same contract. The insurer should process a claim professionally as well as fairly while bringing it to a conclusion within a reasonable time frame; payment should then follow promptly, if owed.

The Arbiter concluded that the complainant did not breach the conditions of the policy and there were no justified reasons why the provider had to decline the claim.

In the light of the foregoing, the Arbiter accepted the complaint and ordered the provider to pay £2,351.31 to the complainants. The decision was not appealed.

2. ASF 169/2018

The complainant filed the complaint because the insurer failed to accept her claim, amounting to £3,023.56, in respect of the veterinary expenses incurred to operate her dog following the rupture of its cruciate ligament. The complainant contended that she was never aware of the existence of such medical condition and therefore the provider could not state that it was a pre-existing condition. This fact was supported by her vet who had written to the provider accordingly.

In his deliberations, the Arbiter observed that:

1. The provider had not filed a formal reply to the complaint despite being duly notified to do so. Nevertheless, for the sake of administering justice, he would consider as a reply the email sent by the provider to his Office in which it justified the refusal of the claim on the grounds of a pre-existing medical condition – that is, a condition which pre-dated the purchase of the policy – in respect of which no coverage existed.

2. The provider further stated that the clinical history of the pet showed that it had manifested a symptom of the condition – namely, limping – prior to the policy's purchase date. However, the complainant's vet disagreed and contended that there was no cruciate injury prior to the policy's inception.

3. The Arbiter observed that the provider had failed to submit any sound or expert evidence that the said symptom was actually related to a cruciate injury. Its refusal of the claim was therefore based solely on opinion. This contrasted with the professional opinion provided by the complainant's vet which clearly excluded any pre-existing condition.

4. The clinical notes do not prove that the complainant failed to diagnose the symptoms manifested by the pet. Rather, they show that the complainant looked after her pet and was never informed that the symptoms were caused by a cruciate injury.

5. The amount claimed as compensation by the complainant had not been disputed by the provider.

In the light of the foregoing, the Arbiter accepted the complaint and ordered the provider to pay £3,023.56 to the complainant. The decision was not appealed.

3. ASF 020/2019

Similarly to the preceding case, the complainant asked for the payment of her claim, amounting to £945.50, in respect of the veterinary expenses incurred to investigate her dog for arthritic changes in its front leg, which resulted in limping. The provider refuted the claim on the grounds that it was a pre-existing medical condition.

The complainant explained that she had the dog examined twice by the vet, both before and after her purchase of the policy.

The first examination – which had occurred almost nine months prior to the policy's inception – established that the apparent limping of the pet was simply due to elongated toenails which, once clipped, returned the dog to a sound condition.

The second examination – which had taken place almost two months after the policy's inception – required both x-rays and a CT scan in order to investigate and to properly determine the pet's medical condition, namely arthritis. The claim for their aforementioned cost had been declined by the provider.

The latter's contention that the pet's medical condition pre-dated the inception of the policy was contradicted by the vet who had examined the dog twice; he had clearly stated that the two visits were not related in any way.

On its part, the provider contended that:

a) The two medical examinations of the pet by the same vet related to the dog's same limb; namely, its front left leg.

b) The first examination showed that the dog manifested lameness / limping; and this well before the policy's start date.

c) The second examination was in respect of the same symptom. Therefore, this was a medical condition that pre-dated the start of the policy which did not provide cover for pre-existing medical conditions.

In his deliberations, the Arbiter noted that:

1. The provider interpreted the first veterinary examination as a prelude to the second one; and this because they both related to limping.

2. The policy wording would enable the provider to avoid the claim if both examinations of the dog were related one to the other. Such a link would prove the presence of a pre-existing medical condition.

3. However, the complainant was not basing her claim on lameness but on a specific medical condition – namely, arthritis – which was diagnosed with certainty only after the policy's inception date.

4. The provider had not submitted any proof that the lameness manifested in the first vet examination was actually due to arthritis; rather, it had based its refusal of the complainant's claim on its opinion that a causal connection existed between the two vet examinations.

5. The letter submitted by the vet who had examined and treated the dog on both visits clearly showed that there was no relation between the two examinations (which happened almost a year apart), even though they concerned the same limb; and this to the extent that the second examination evidenced crepitus and swelling of the dog's joints which were not present in its first examination.

The Arbiter therefore concluded that the condition complained of was not a pre-existing medical condition and upheld the complaint. He ordered the provider to pay the complainant the amount of £945.50 by way of compensation. The decision was not appealed.

4. ASF 038/2019

The complainant objected to the cancellation of her policy, and the consequent refusal of her claim (amounting to £1,911) in respect of the veterinary expenses incurred to treat her dog for diabetes; and this on the grounds that her dog was aggressive. The complainant disagreed with the insurer's contention that her dog was aggressive, insisting that the pet merely got nervous in unfamiliar surroundings, such as while at the vet.

She had supported her stance by means of two letters issued by two separate vets as well as by another letter issued by her dog sitter; in reply, the provider had unethically requested that the vets alter their clinical notes on the pet.

On its part, the provider contended that:

a) Its decision to void the policy was correct and was based on separate clinical notes which repeatedly stated that the dog manifested aggressive behaviour on four separate occasions, between April 2013 and July 2015, when under the care of the vet concerned.

b) These instances of aggressive behaviour pre-dated the inception of the cancelled policy. Furthermore, at the time of purchasing the policy and when renewing it, the complainant had answered in the negative two specific questions which related to her pet's possible aggressive behaviour. This amounted to misrepresentation, in terms of the relevant legislation, which entitled an insurer to void the respective policy and refund the premium paid for it (which it had duly done).

c) The provider did not insure dogs that were aggressive or had shown to be aggressive. Therefore, had it been made aware of such behaviour from the outset, it would not have accepted to insure the complainant's pet.

d) The clinical notes on the dog clearly evidenced its aggressive behaviour; even if such behaviour may have been temporary, the provider was still entitled to void the policy.

Through his analysis of the case, the Arbiter deliberated as follows:

1. The provider did not submit the proposal form in which the complainant had answered negatively to two specific questions relating to the possibility of aggressive behaviour. This precluded the Arbiter from seeing the whole context in which these two questions were made and answered.

2. The letters issued by the vets confirmed that it is normal for a pet to be scared and nervous when in unfamiliar surroundings, such as while at the vet. It may have been handled incorrectly by the vet concerned, for example when replacing its microchip; this would have heightened its nervousness.

3. The dog's behaviour improved when it was brought to the vet on later occasions; and this to the extent that a full oral examination could be carried out. The latter would certainly not have been possible in the case of a habitually aggressive animal.

4. The letter issued by the dog sitter similarly asserted that the complainant's pet was not an aggressive dog; and this after having known it for about four years.

5. The provider had not submitted the clinical notes, compiled between April 2013 and July 2015, on which it had based its decision to void the policy and to decline the complainant's claim; it had merely quoted from them. This precluded the Arbiter from verifying them and that they were quoted in the context in which they had been written.

6. The policy itself did not define the terms 'aggression' and 'aggressive behaviour'; nor does it support the provider's contention that a temporary aggressive behaviour is sufficient for it to void the policy.

7. Furthermore, the pet's overall nine years of insurance coverage, with the provider and other insurers, were entirely claims-free. This showed that the dog had behaved well and had not been involved in any incident, inclusive of acts of aggression.

8. The voidance of a policy was an extreme measure to which a provider could resort only when it had solid evidence that the insured was trying to cheat and/or to defraud it; the complaint in question was certainly not the case.

In the light of the foregoing, the Arbiter upheld the complaint and ordered the provider to pay £1,911 to the complainant, less any excess applicable under the policy. The decision was not appealed.

Annex 1 - Enquiries and minor cases' statistics

Figure 1 - Enquiries and minor cases (by sector)

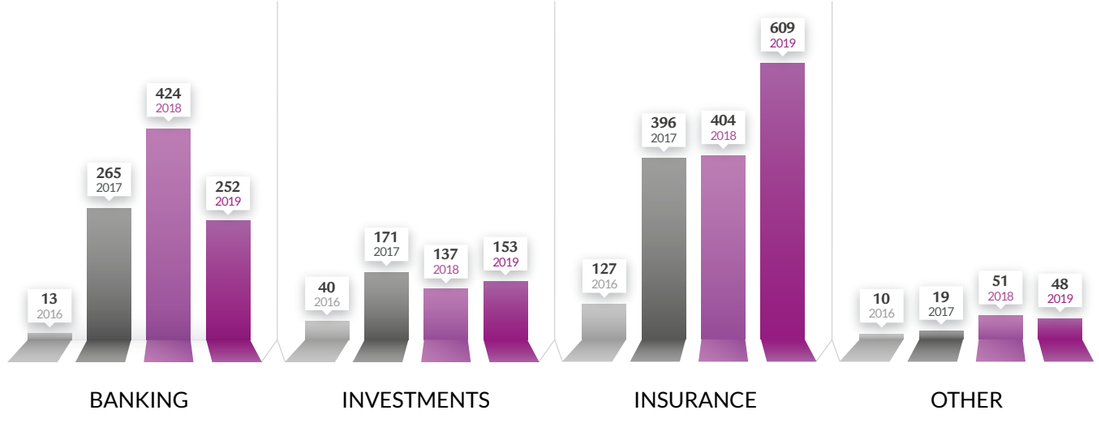
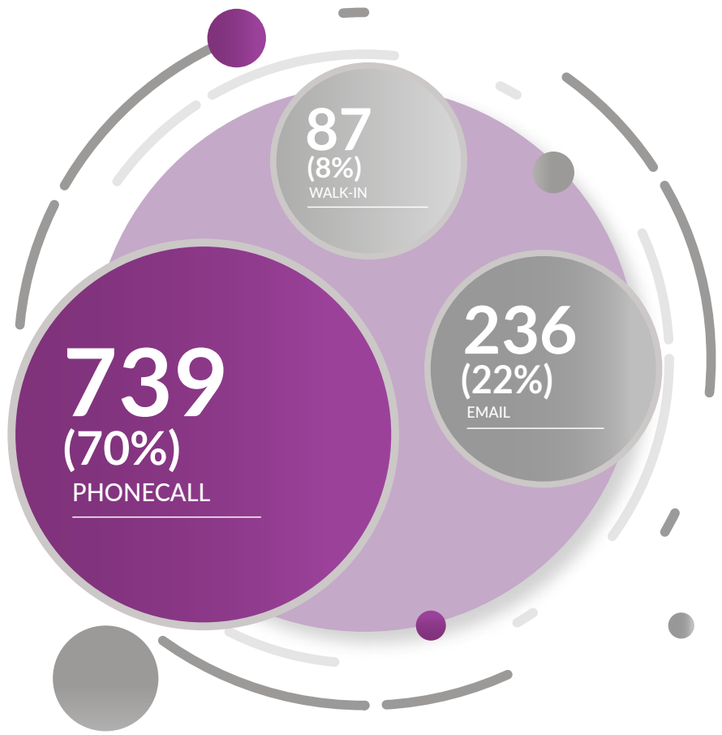
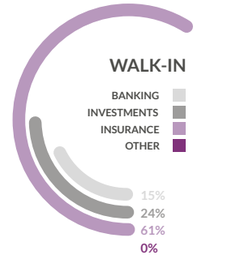
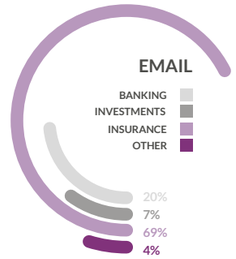


Figure 2 - Enquiries and minor cases in 2019 (by origination)







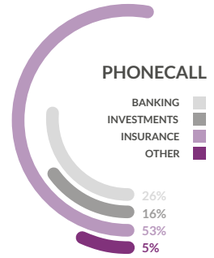
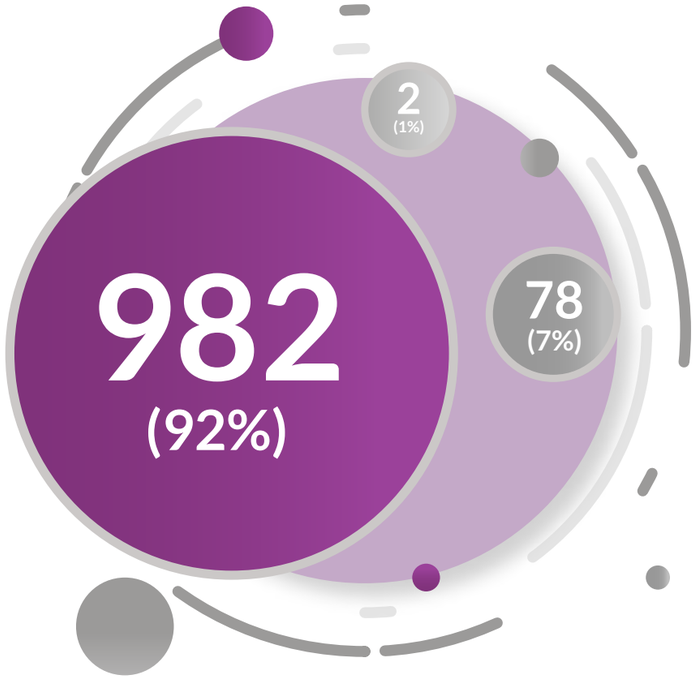


Figure 3 - Enquiries and minor cases in 2019 (by outcome)

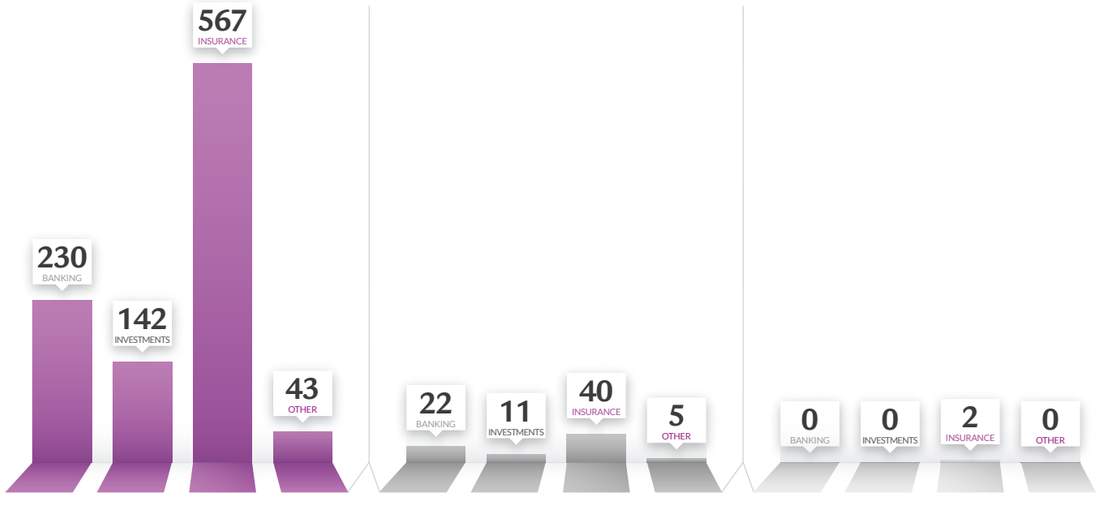


OAFS provided general information as to his/her query

Requested OAFS intervention - customer appears to be satisfied

Requested OAFS intervention - customer does not appear to be satisfied

Figure 4 - Enquiries and minor cases in 2019 (by sector and outcome)

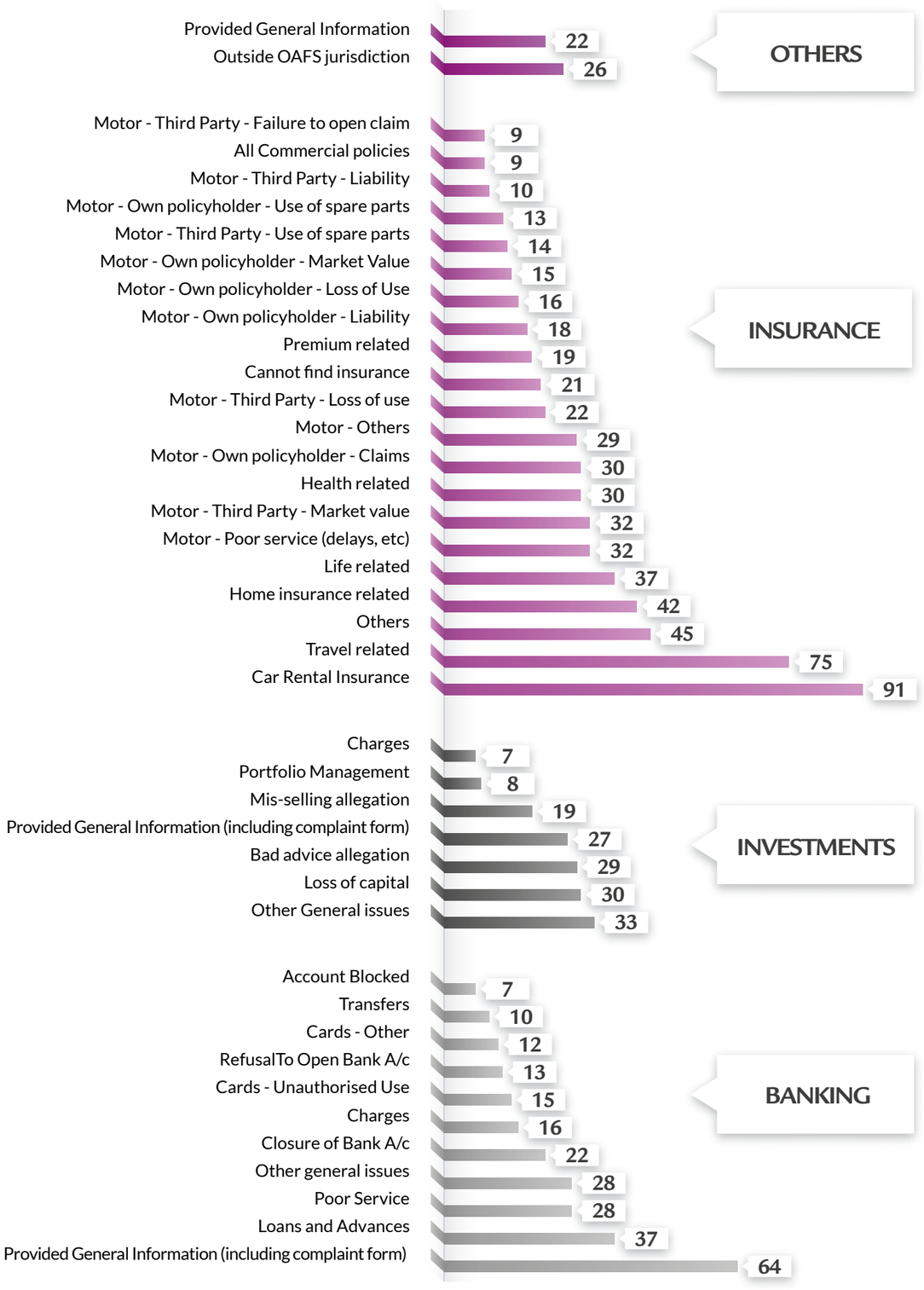


OAFS provided general information as to his/her query

Required OAFS intervention - customer appears to be satisfied

Required OAFS intervention - customer does not appear to be satisfied

Figure 5 - Enquiries and minor cases in 2019 (by type)



Annex 2 - Formal complaints' statistics

Table 1 - Formal complaints (by sector)

	2019	2018	2017	2016[1]
Banking and financial institutions	32	39	40	13
Investments	30[3]	134	112	138[2]
Insurance	48	19	23	21
Others	/	/	/	1
Total	**110**	**192**	**175**	**173**

[1] The number of complaints for 2016 (June to December) has been adjusted to reflect the actual number of cases received, rather than the number of complainants collectively making up such cases.

[2] This includes nine cases (comprising 400 complainants) which were treated as one collective complaint (Case reference 28/2016) given that their merits are intrinsically similar in nature, and a further 38 complaints filed separately by different complainants. In the latter cases, each case was treated on its merits. All these cases concern a collective investment scheme. Refer to page 47 of this report for further information about the Arbiter's decisions regarding this investment.

[3] One complaint is made up of 56 individual complainants as their merits are intrinsically similar in nature.

Table 2 - Formal Complaints in 2019 (by sector and type)

BANKING	
Cards - Other	3
Cards - Unauthorised use	7
Charges	1
Deposit accounts	8
Home loans	2
Poor service	2
Transfers	2
Refusal to open bank account	5
Closure of account	2
Total	**32**

INVESTMENTS	
Bad advice/mis-selling	3
Calculation of interest/yield	1
Charges	1
Delay (payment)	1
Failure to provide information	2
Pensions-related	22
SUB-TOTAL	**30**

INSURANCE	
Health insurance	6
Home insurance	1
Life insurance	10
Marine cargo insurance	1
Motor - Own policy - claims	3
Motor - Own policy - loss of use	1
Travel insurance	7
Pet insurance	16
Car rental insurance	3
SUB-TOTAL	**48**

Table 3 - Formal complaints in 2019 (by provider)

Alphabetical list of financial services providers against whom complaints were lodged with the OAFS during 2019.

	SECTOR	TOTAL
Argus Insurance Agencies Limited	Insurance	1
Atlas Insurance PCC Limited	Insurance	1
Axeria Insurance Limited	Insurance	5
Bank of Valletta plc	Investments	1
Bank of Valletta plc	Banking	11
BNF Bank plc	Banking	3
Building Block Insurance PCC Limited	Insurance	15
Crystal Finance Investments Limited	Investments	2
EFT Global Limited	Banking	1
GasanMamo Insurance Limited	Insurance	6
GlobalCapital Life Insurance Limited	Insurance	2
Hollingsworth International Financial Services Limited	Investments	1
HSBC Bank (Malta) plc	Banking	7
HSBC Bank Malta plc and Atlas Healthcare Insurance Agency Limited	Insurance	1
Insignia Cards Limited	Banking	1
Integrated-Capabilities (Malta) Limited	Investments	2
Island Insurance Brokers Limited and Mapfre Middlesea plc	Insurance	1
Lombard Bank Malta plc	Banking	1
Mainstream Fund Services Limited	Investments	1
Mainstream Fund Services Ltd and Timeless Uranium Fund SICAV plc	Investments	1
Mapfre Middlesea plc	Insurance	1
Mapfre MSV Life plc	Insurance	10
MeDirect Bank (Malta) plc	Banking	1
Momentum Pensions Malta Limited	Investments	14
Rizzo, Farrugia & Co (Stockbrockers) Limited	Investments	1
SataBank plc	Banking	6
Sovereign Pensions Services Limited	Investments	1
STM Malta Trust and Company Management Limited	Investments	6
Syspay Limited	Banking	1
TravelJigsaw Insurance Limited	Insurance	4
Untours Insurance Agents Limited	Insurance	1
		110

Table 4 - Complaint outcomes in 2019

Agreement was reached at mediation	6
Withdrawn prior to mediation	12
Parties agreed to settle prior to commencement of mediation	5
Complaints withdrawn following mediation	6
Complaint returned to customer / not in conformity	3
Complaint withdrawn following case hearing	4
Complaint withdrawn prior to case hearing	1
Agreement reached by the parties during hearing before the Arbiter	5
Decisions delivered by the Arbiter (see Table 5)	112

Table 5 - Decisions of the Arbiter (by sector)

		Banking	Investment Services	Insurance
Preliminary and follow-up decisions	18	1	13	4
Cases upheld in full	63	2	53	8
Cases partially upheld	8	2	3	3
Rejected cases	23	3	16	4
	112	8	85	19
Final Decisions				
Res judicata	63	4	45	14
Appealed	31	3	27	1

Table 6 - Decisions delivered by the Arbiter in 2019 (breakdown by financial services provider)

The table below provides a breakdown of the type and nature of decisions by financial services provider during 2019, and whether the final decision has been appealed.

Name of financial services provider	Type of Complaint	Final Decisions	Preliminary & Follow Up		Complaint Upheld	Partially Upheld	Complaint Rejected		Appealed	Not Appealed	
AIG Montaldo Insurance Agency Limited	Insurance	1		1		1		1		1	1
All Invest Company Limited	Investments	19		19	19			19		19	19
Bank of Valletta plc	Banking	3		3	1	1	1	3	2	1	3
Bank of Valletta plc	Investments	12		12	10		2	12	10	2	12
Bank of Valletta plc et	Investments	1		1	1			1	1		1
Binary Investments (Europe) Ltd	Investments	1		1		1		1		1	1
BNF Bank plc	Banking	1		1		1		1	1		1
Bonnici Insurance Agency Ltd	Insurance	1		1			1	1	1		1
BOV plc & Mapfre Middlesea plc	Insurance	1		1		1		1		1	1
Building Block Insurance PCC Ltd	Insurance	8		8	7		1	8		8	8
Calamatta Cuschieri Inv Serv Ltd	Investments	2		2	1		1	2		2	2
Crystal Finance Investments Limited	Investments	24	7	31	12	1	11	24	9	15	24
Curmi & Partners Ltd	Investments	1		1		1		1		1	1
FXDD Malta Ltd	Investments	1	1	2			1	1		1	1
GlobalCapital Financial Management Limited	Investments	8	3	11	8			8	7	1	8
Hollingsworth Int Fin Serv Ltd	Investments	1	1	2	1			1		1	1
HSBC Bank Malta plc	Banking	1	1	2			1	1		1	1
Global Insurance Brokers Limited	Insurance		2	2							
Jesmond Mizzi Financial Advisors Limited	Investments		1	1							
Laferla Insurance Agency Ltd	Insurance	1		1			1	1		1	1
Lombard Bank Malta plc	Banking	1		1			1	1		1	1
Mapfre MSV Life plc	Insurance	3	1	4	1	1	1	3		3	3
MCM Global Opportunities Fund Sicav plc	Investments	1		1	1			1		1	1
MeDirect Bank (Malta) plc	Banking	1		1	1			1		1	1
MIB Insurance Agency Limited	Insurance		1	1							
Michael Grech Financial Services Limited	Investments	1		1			1	1		1	1
		94	**18**	**112**	**63**	**8**	**23**	**94**	**31**	**63**	**94**

Data featured under "Preliminary & Follow-up" includes decisions on initial legal pleas (such as if the service provider is contumacious), any clarification requests that the parties to a complaint might have requested the Arbiter to issue following delivery of a decision, as well as decisions referred back by the Court of Appeal (Inferior Jurisdiction) following delivery of an appeal judgement. When this happens, the Court of Appeal would request the Arbiter to revalue the compensation award to the complainant regarding a financial instrument or instruments that would be subject to the dispute.

Data featured under the "Appealed" column has been obtained from the eCourts website and is subject to change as cases might have been decided or ceded following publication of this report.

Office of the Arbiter for Financial Services

Audited Financial Statements as at
31 December 2019

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Report of the Auditor General

To the Office of the Arbiter for Financial Services

Report on the financial statements

We have audited the accompanying financial statements of the Office of the Arbiter for Financial Services set out on pages 1 to 9, which comprise the statement of financial position as at 31 December 2019, the statement of comprehensive income, statement of changes in equity and statement of cash flows for the year then ended, and a summary of significant accounting policies and other explanatory information.

The Office of the Arbiter for Financial Services' responsibility for the financial statements

The Office of the Arbiter for Financial Services is responsible for the preparation of financial statements that give a true and fair view in accordance with International Financial Reporting Standards as adopted by the European Union, and for such internal control deemed necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with International Standards on Auditing. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on our judgement, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, we consider internal controls relevant to the preparation of financial statements of the Office, in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the internal controls. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the Office of the Arbiter for Financial Services, as well as evaluating the overall presentation of the financial statements. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements give a true and fair view of the financial position of the Office of the Arbiter for Financial Services as at 31 December 2019, of its financial performance, changes in equity and cash flows for the year then ended in accordance with International Financial Reporting Standards as adopted by the European Union, and comply with Act XVI of 2016 and 2017 of the Laws of Malta.

Auditor General
5 June 2020

BOARD OF MANAGEMENT AND ADMINISTRATION REPORT

Board of Management and Administration submit their annual report and the financial statements for the period ended 31st December 2019.

Objects

The Office of the Arbiter for Financial Services is an autonomous and independent body setup in terms of Act XVI of 2016 of the Laws of Malta. It has the power to mediate, investigate and adjudicate complaints filed by customers against financial services providers.

Results

The statement of comprehensive income is set out on page 3.

Review of the period

The Board reports a surplus of €27,401 during the period under review.

Post Statement of Financial Position Events

There were no particular important events affecting the entity which occurred since the end of the accounting year.

Statement of the Board of Management and Administration responsibilities

In terms of the licensing regulations applicable to Goverment entities, the entity is to prepare financial statements for each financial period which give a true and fair view of the financial position of the Entity as at the end of the financial period and of the surplus or deficit for that period.

In preparing the financial statements, the entity is required to: -

- adopt the going concern basis unless it is inappropriate to presume that the Entity will continue to function;
- select suitable accounting policies and apply them consistently;
- make judgements and estimates that are reasonable and prudent;
- account for income and charges relating to the accounting period on the accrual basis; and
- prepare the financial statements in accordance with International Financial Reporting Standards as adopted by the European Union.

Statement of financial position

	Notes	2019 €	2018 €
ASSETS			
Non-current assets	7	**25,102**	**21,519**
Current assets			
Trade and other receivables	8	**2,582**	**2,033**
Cash and cash equivalents	9	**73,551**	**49,240**
		76,133	**51,273**
Total assets		**101,235**	**72,792**
EQUITY AND LIABILITIES			
Equity			
Accumulated Funds		**90,877**	**63,476**
		90,877	**63,476**
Current liabilities			
Trade and other payables	10	**10,358**	**9,316**
		10,358	**9,316**
Total liabilities		**10,358**	**9,316**
TOTAL EQUITY AND LIABILITIES		**101,235**	**72,792**

The accounting policies and explanatory notes on pages 6 to 9 are an integral part of these financial statements.

The financial statements have been authorised for issue by the Board of Management and Administration and signed on its behalf by:

Mr Geoffrey Bezzina
Chairperson

Date: 4 June 2020

Statement of comprehensive income

	Notes	2019 €	2018 €
Income	3	**597,587**	**503,065**
Administrative expenses	4	**(569,972)**	**(511,725)**
Financial costs	5	**(214)**	**(87)**
Surplus/(Deficit) for the year		**27,401**	**(8,747)**

The accounting policies and explanatory notes on pages 6 to 9 are an integral part of these financial statements.

Statement of changes in equity

	Accumulated fund	Total
	€	€
Balance at 1 May 2016	-	-
Surplus for the period	72,223	72,223
Balance at 31 December 2017	**72,223**	**72,223**
(Loss) for the year	(8,747)	(8,747)
Balance at 31 December 2018	63,476	63,476
Surplus for the year	27,401	27,401
Balance at 31 December 2019	90,877	90,877

The accounting policies and explanatory notes on pages 6 to 9 are an integral part of these financial statements.

Statement of cash flows

	Note	2019	2018
		€	€
Operating activities			
Surplus/(Deficit) for the year/period		**27,401**	**(8,747)**
Adjustments to reconcile profit/(loss) before tax to net cash flows:			
Non-cash movements			
Depreciation of fixed assets		**8,329**	**6,610**
Working capital adjustments			
Increase in trade and other receivables		**(549)**	**(322)**
Increase in trade and other payables		**1,042**	**(326)**
Net cash generated from operating activities		**36,222**	**(2,785)**
Investing activities			
Purchase of property, plant and equipment		**(11,912)**	**(1,672)**
Net cash used in investing activities		**(11,912)**	**(1,672)**
Cash and cash equivalents at 1 January		**49,240**	**53,697**
Net increase/(decrease) in cash and cash equivalents		**24,310**	**(4,457)**
Cash and cash equivalents at 31 December	9	**73,551**	**49,240**

The accounting policies and explanatory notes on pages 6 to 9 are an integral part of these financial statements.

Notes to the financial statements

1. Corporate information

The financial statements of the Office for the Arbiter for Financial Services for the year ended 31 December 2019 were authorised for issue in accordance with a resolution of the members. Office of the Arbiter for Financial Services is a Goverment entity.

2.1 Basis of preparation

The financial statements have been prepared on a historical cost basis. The financial statements are presented in euro (€).

Statement of compliance

The financial statements of Office for the Arbiter for Financial Services have been prepared in accordance with International Financial Reporting Standards as adopted by the European Union.

2.2 Summary of significant accounting policies

The accounting policies set out below have been applied consistently to all periods presented in these financial statements.

Property, plant and equipment

Property, plant and equipment is stated at cost less accumulated depreciation and accumulated impairment losses. Such cost includes the cost of replacing part of the plant and equipment when that cost is incurred if the recognition criteria are met. Likewise, when a major inspection is performed, its cost is recognised in the carrying amount of the plant and equipment as a replacement if the recognition criteria are satisfied. All other repair and maintenance costs are recognised in profit or loss as incurred.

Depreciation is calculated on a straight line basis over the useful life of the asset as follows:

Fixtures, furniture & fittings	10 years
Computer equipment	4 years
Office equipment	4 years

Depreciation is to be taken in the year of purchase whereas no depreciation will be charged in the year of disposal of the asset.

Notes to the financial statements (continued)

Summary of significant accounting policies (continued)

An item of property, plant and equipment is derecognised upon disposal or when no future economic benefits are expected from its use or disposal. Any gain or loss arising on derecognition of the asset (calculated as the difference between the net disposal proceeds and the carrying amount of the asset) is included in profit or loss in the year the asset is derecognised. The asset's residual values, useful lives and methods of depreciation are reviewed and adjusted if appropriate at each financial year end.

Cash and cash equivalents

Cash and cash equivalents in the balance sheet comprise cash at bank and in hand and short term deposits with an original maturity of three months or less. For the purposes of the cash flow statements, cash and cash equivalents consist of cash and cash equivalents as defined, net of outstanding bank overdrafts.

Trade and other payables

Trade and other payables are shown in these financial statements at cost less any impairment values. Amounts payable in excess of twelve months are disclosed as non current liabilities.

3. Income

Income represents Goverment funding, complaint fees and EU funding.

	2019	2018
	€	€
Government Funding	**585,000**	**500,000**
Complaint Fee's	**3,225**	**3,065**
EU Funding	**9,362**	-
Total Income	**597,587**	**503,065**

4. Expenses by nature

	2019	2018
	€	€
Staff Salaries	**468,814**	**430,023**
Office maintenance & Cleaning	**20,974**	**14,005**
Car & Fuel Expenses	**18,110**	**19,911**
Advertising (Recruitment costs)	**2,941**	**734**
Telecommunications	**6,998**	**5,124**
Professional Fees	**4,548**	**2,699**
Depreciation charge for the year	**8,329**	**6,610**
Other expenses	**39,258**	**32,619**
Total administrative costs	**569,972**	**511,725**

Notes to the financial statements (continued)

4. Expenses by nature (continued)

Average number of persons employed by the office during the year:	2019	2018
Total average number of employees	**14**	**14**

5. Financial costs

	2019 €	2018 €
Bank and similar charges	**214**	**87**

6. Taxation

Being a Government entity, no tax is liable on the surplus earned during the year as per the Income Tax Act.

7. Property, plant and equipment

	Furniture, Fixtures & Fittings	Office Equipment	Computer Equipment	Total
	€	€	€	€
Net book amount at 1 January 2018	15,802	3,235	7,420	26,457
Additions	590	230	852	1,672
Depreciation charge for the period	(1,980)	(1,136)	(3,494)	(6,610)
Net book amount at 31 December 2018	**14,412**	2,329	**4,778**	**21,519**
Additions	8,391	590	2,931	11,912
Depreciation charge for the year	(2,819)	(1,283)	(4,227)	(8,329)
Net book amount at 31 December 2019	**19,984**	1,636	**3,482**	**25,102**
As at 31 December 2018				
Total cost	28,194	5,134	16,909	50,237
Accumulated depreciation	(8,210)	(3,498)	(13,427)	(25,135)
Net book amount at 31 December 2019	**19,984**	1,636	**3,482**	**25,102**

Notes to the financial statements (continued)

8. Trade and other receivables

	2019 €	2018 €
Prepayments	**2,182**	**2,033**
Other receivables	**400**	**-**
	2,582	**2,033**

9. Cash and cash equivalents

For the purpose of the cash flow statement, cash and cash equivalents comprise the following:

	2019 €	2018 €
Cash at bank and in hand	**73,551**	**49,240**

10. Trade and other payables

	2019 €	2018 €
Other payables	**6,620**	**159**
Accruals	**3,738**	**9,157**
	10,358	**9,316**

Administrative expenses

	2019 €	2018 €
Staff Salaries	**468,814**	**430,023**
Training	**3,615**	**-**
Office Consumables	**982**	**1,178**
Cleaning	**8,772**	**8,044**
Office Maintenance	**12,202**	**5,961**
Printing and Stationery	**3,459**	**2,468**
PC/Printer Consumables	**662**	**1,836**
Other Office Costs	**1,575**	**4,787**
Other Office Equipment	**110**	**120**
Telecommunications	**6,998**	**5,124**
Website Expenses	**671**	**276**
Postage, Delivery & Courier	**4,040**	**3,326**
Insurance - Health	**8,478**	**8,780**
Insurance - Travel	**280**	**244**
Insurance - Business	**1,197**	**188**
Memberships & Subscriptions	**1,025**	**756**
General Expenses	**672**	**171**
Vehicle, leasing and fuel expenses	**18,110**	**19,911**
Travelling Expenses	**7,651**	**4,639**
Advertising (Recruitment)	**2,941**	**734**
Legal Fees	**206**	**-**
Professional Fees	**4,548**	**2,699**
Payroll Fees	**118**	**483**
Accounting Fees	**4,518**	**3,367**
Depreciation Charge	**8,329**	**6,610**
	569,972	**511,725**

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