

Annual Report 2014

Swiss Banking Ombudsman

2014 In Brief

In addition to statistics on cases of mediation and dormant accounts, an analysis of two major issues and 20 or so selected examples, the summary below also provides an overview of the questions the Ombudsman dealt with over the year under review.

Financial Services Act

The Ombudsman has issued a detailed position on the draft Financial Services Act. While he approves of the powers granted to mediators, he regards it as particularly important that they are not be burdened with procedural rules of no benefit to the consumer. If the mediator has no power to reach a decision, he must be allowed the greatest freedom of action to seek a solution without having to follow specific rules that could be counterproductive in mediation and conciliation proceedings.

Powers of attorney

The Ombudsman regularly deals with requests relating to powers of attorney, for example from persons holding a power of attorney who complain that the bank has wrongfully failed to carry out their instructions. It is true that banks in case of doubt often carry out checks whether the requested transaction is in line with the interests of the person having granted the power of attorney. This is a precaution which prevents abuse and transactions that are not in the interests of account holders or their heirs. It is also normal bank practice to only accept powers of attorney on standard forms; this is often criticised by customers, but has the advantage of reducing the risk of clauses that are vague or incomplete and ultimately cause disputes.

Market manipulation

In 2014, Swiss and foreign banking regulators reported several cases of market manipulation by some financial institutions involving various equities, exchange rates, precious metal prices and benchmark interest rates. Although these incidents were given considerable attention in the media, the Ombudsman only dealt with a few requests and complaints in this regard. Upon analysing the facts, the Ombudsman noted that it was often difficult in these cases to tell if the customer had genuinely been a victim of manipulation, and if this had truly resulted in prejudicial consequences. Since the authorities had declared that there was no obvious chain of specific causality between such activity being committed and prejudice being suffered, and a detailed investigation would have been required to identify one, most of the few cases submitted did not qualify for mediation. Nevertheless, in some particular

cases the Ombudsman did arrange for the bank to make a commercial gesture where the institution in question had manipulated the price of its shares and actively recommended that the customer invest in them during a critical period and in particular conditions.

Banking institution in liquidation

Difficulties experienced by a foreign financial group resulting in the liquidation of its Swiss banking subsidiary led to several dozen complaints from customers about investments the Swiss bank had made within the group. However, as the liquidation of a bank follows strict rules to ensure that all creditors are treated equally, it was not possible for the Ombudsman to mediate. Liquidators are not allowed to negotiate specific reparations with the Ombudsman, which would favour some creditors at the expense of others. However, in line with his role as an information provider, the Ombudsman approached the bank and the Swiss Financial Market Supervisory Authority FINMA. He was therefore able to provide all customers who had made enquiries with detailed information on the liquidation procedure and how to contact the relevant bodies.

“Exit strategies”

In recent years, changes in the business climate have driven many banks to adapt their offerings so as to cease servicing some customer segments or abandon entire markets. For many customers, the resultant termination of the business relationship is difficult. Sadly, the processes the various banks put in place to close customer relationships did not always allow for customers' heightened sensitivities, so once again a large number of complaints were made to the Ombudsman. These mainly related to the lack of professionalism and limited availability of their new bank contact people. The Ombudsman intervened in cases where the bank was accused of specific culpable treatment of the customer. He takes the view that customers are entitled to expect an appropriate quality of service, even during an “exit process”. Any failure to provide this harms not only the reputation of the bank in question but potentially also that of the entire Swiss financial centre (for more details on this issue, please refer to sections 3.2 and 4.2 in the 2013 annual report).

Tax compliance

The Swiss Financial Market Supervisory Authority FINMA has asked banks to analyse the legal and reputational risks they face in their cross-border activities and take suitable action to mitigate these. The banks are therefore seeking to enquire into the fiscal honesty of their customers, using different methods, and to close business relationships where no satisfactory answers have been provided to the relevant questions. Measures of this sort taken by the banks, and particularly the deadlines given to customers, again resulted in various complaints, notably about the restrictions on closure options such as a refusal to settle in cash. The Ombudsman cannot get involved in issues of banks' commercial policy. However, while he respects freedom of contract as a fundamental principle of Swiss law, he nevertheless puts in a plea for a little more discernment in some cases. The Ombudsman has had to acknowledge that the banks apparently prefer to take the risk of being sued under civil law in Switzerland rather than open themselves up to regulatory action or criminal prosecution in Switzerland or abroad (for more details on this issue, please refer to sections 3.2 and 4.2 in the 2013 annual report).

Selected cases

Asset management/investment advisory

Where a bank manages a customer's assets or offers advice on possible investments, it is essential that it has a good knowledge of the customer, the personal and financial circumstances and investment objectives, and explains carefully the investment strategy and the individual products as well as the associated risks. These explanations must be suited to the customer's financial knowledge and experience. If the bank is negligent in this regard or fails to properly document the checks and agreements, it may be prompted, on intervention by the Ombudsman, to compensate the customer if the value of the assets declines. For their part, customers have a duty to check the statements and notifications they receive from the bank carefully. Failure to do so in good time will generally mean they cannot subsequently claim ignorance about the investments made or how they performed.

Fixed-rate mortgages

Many of the requests and complaints made to the Ombudsman concerned the "early repayment penalties" often applied by banks when a customer wishes to repay a fixed-rate mortgage before the end of the contractual term. In most cases the bank's position is contractually secured and institutions are not inclined to waive the penalty if the customer wishes to exit the contract early.

Order execution

Cases where customers claim that an order has not been properly executed are among the most varied, reflecting the wide scope of the law governing mandates. They range from the question whether the bank should have noticed that a word which the customer had written in the message section of a payment instruction would result in the instruction being blocked by its correspondent bank in the United States, to the bank's liability for executing an order to close a Pillar 3a retirement savings account only in the following year even though the customer had specified that for tax reasons it had to be closed in the same year the order was placed. Another example is a case where a bank executed a stock exchange order submitted via e-banking and the customer then complained that the bank should have noticed the price had developed to his disadvantage after the order had been placed.

Misuse and Fraud

In cases of fraudulent use of credit or debit cards, the key issue is generally whether the customer has shown due care in using the card. If a customer can convincingly show that he or she has met all the duties of care specified in the relevant agreements, card organisations are normally prepared to compensate the client. On the other hand, if a payment or cash withdrawal has been made with the original card and PIN, the customer usually appears to be at fault. In these cases, banks are normally less willing to cover the loss.

Conversely, in cases where a bank has received fraudulent payment instructions from an unauthorised third party, it is the bank that must show that it had acted with due care or should have realised that the order was not given by the customer.

Fees and commissions

As in previous years, the Ombudsman received many complaints about bank charges. In reviewing these complaints the Ombudsman starts from the principle that most banking services are subject to the law governing mandates and, given the relevant provisions of the Code of Obligations, fees are due where they have been agreed or are standard practice. A detailed description of the approach taken, with illustrative examples, can be found in the 2003 annual report (www.bankingombudsman.ch/Documents, under Annual Reports). The Ombudsman expects banks to respect these simple principles.

Facts and figures

During the year under review the total number of cases dealt with (verbally and by correspondence) decreased by 8% from 2,178 to 2,002, after an 18% rise the previous year. This is mainly because cases concerning retrocessions, which had seen a boom in 2013, fell sharply again in 2014. The figures are still above the long-term average (excluding 2008 and 2009, which saw record numbers due to the financial crisis).

Assets without contact and dormant assets

This year the figures once again show the importance of the central office set up in 1996; the number of questionnaires (831) sent out to persons making enquiries (generally the heirs of bank customers who have passed away) and the number of questionnaires actually processed (491) reached a record level. Beneficial owners gained access to 27 business relationships with total assets of some CHF 4.6 million and to six safety deposit boxes. Since 2001, when the current enquiry system was set up, 357 dormant customer relationships have been identified in total. CHF 52.5 million and 42 safety deposit boxes have been returned to their beneficial owners.

Public relations

In addition to the annual report, with comments provided at the press conference on 3 July 2014, the Ombudsman presented his activities to two university-level events and one professional association. One of these conferences was followed by a publication by the Ombudsman (www.bankingombudsman.ch/documents: *Arbitration between banks and clients: Could FINRA be a model?* Marco Franchetti and Philipp von Ins).

Over the year the Ombudsman met representatives of various banks, and members of his office took part in two working parties of the Swiss Bankers Association: one on the topic of dormant assets and one on setting up an arbitral tribunal. Along with bank and consumer representatives the Ombudsman also participated in a round table in the presence of members of the Federal parliament on the draft Financial Services Act. Finally, a meeting took place between the foundation board *in corpore* and the Chairman and CEO of the Swiss Bankers Association to share views on current issues. This meeting will be repeated annually from now on.

Internationally, having submitted a detailed application, the Ombudsman was admitted as an observer member of FIN-NET, the European network of financial mediators in the countries of the EU and the

European Economic Area. Two meetings were held in 2014; at one of these the Ombudsman presented his organisation, powers and procedures. It should be noted in this context that the organisation and funding of the Swiss Banking Ombudsman comply with the fundamental criterion of independence as defined in Directive 2013/11/EU on alternative dispute resolution for consumer disputes. In September 2014 the Ombudsman also took part in the annual conference of INFOnet, the International Network of Financial Ombudsman Schemes. This conference brings together financial mediators from all over the world (banks, insurance companies, wealth managers, etc.). It is an excellent opportunity to share information about different practices around the globe. On this occasion the Ombudsman chaired a working party on the financing of mediation bodies.

The mediation body

On the operational level, an IT project was launched during the year under review. In addition to offering customers the opportunity to submit their requests on line as well as in hard copy, a decision has been taken to update systems and the use of information technology. Given the complexity of processes and high security requirements of the mediation body, the project has been designed and implemented in stages after careful examination of tenders from external partners. The project will be completed during 2015.

While the landlord of the Ombudsman's offices was carrying out normal building work, two leaks of water made the offices unusable for several weeks. The unwavering commitment and great flexibility of all staff made it possible to keep the impact of these incidents on the daily work of the mediation body within reasonable limits.

As a result of several retirements since 2013, various positions fell vacant. These were all filled with new hires. At present the team at the mediation body consists of eight qualified and seasoned specialists.

The foundation

Mr Paul Hasenfratz retired from the foundation board after having served many years as vice-president. He has been succeeded by Mr Markus Grünenfelder, who has been elected as member and vice-president. Mr Christian Bovet also stepped down at the end of 2014.

02.07.2015