

## 2016 in Brief

### Financial Services Act

In last year's annual report (AR 2015, p. 13) the Ombudsman praised the dispatch on the Financial Services Act, adopted in November 2015 by the Federal Council, especially the proposals intended to improve the duties to provide information and keep documentation and those on mediation bodies. The Federal Council has also addressed a clear shortcoming in terms of customer protection, specifically the high and sometimes prohibitive costs of civil proceedings: a new provision in the Code of Civil Procedure will make it easier to obtain a court ruling by reducing the costs and expenses to be borne by customers. The Ombudsman is of the opinion that the Federal Council has found a simple and elegant way of dealing with a major difficulty, and one which will probably be much less expensive to implement than other more complex arrangements that offer no guarantee of achieving the desired objective. The Ombudsman regrets that the Council of States has not followed the Federal Council on this point and has indefinitely put off dealing with this issue, which is an urgent one for financial services in particular. Every citizen has one or more banking relationships. Consequently, there is much more potential for conflict than in other areas of consumer goods and services, so an appropriate system for dealing with disputes is required. Obtaining a legal ruling at a reasonable cost after a mediation procedure the customer finds unsatisfactory cannot be seen as a disproportionate procedural requirement in a modern constitutional state. The National Council has not yet taken a decision, but given what is already known about the views of the committee dealing with the project it is highly likely that it will follow the Council of States.

### Principles for assessing disputed bank charges

The Ombudsman regularly has to deal with cases involving bank customers and disputed charges. The year under review saw a particularly large number. The issue of bank charges was also discussed in the press, and the SECO intervened with banks whose charges had been analysed by the price monitor in 2015. The Ombudsman therefore decided to revise and update his principles put forward as long ago as the 2003 Annual Report for assessing disputed bank charges. These state that as a matter of principle, bank charges are only owed on the basis of an agreement between the bank and the customer. Unilateral increases in charges must be notified to the customer in the normal way. The Ombudsman does not generally express an opinion on the appropriateness of a charge, since under the Rules of Procedure questions about banks' general business and fee policy do not fall within his remit. He does, however, intervene where he feels the size of a charge is unlawful. The section also deals with issues relating to individual and flat-rate charges, maximum charges and ranges of charges and sets out the Ombudsman's requirements for transparency and the clarity of arrangements on charges. Finally, the Ombudsman talks about "lack of notice charges" when the notice period for withdrawing savings account balances is not observed. All these issues are discussed, along with case histories, in the "Selected cases" section (see pages 21-23).

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## **Swiss citizens resident abroad**

Swiss citizens resident abroad have a legitimate need for a bank account in Switzerland and the ability to access a broad range of financial services from Swiss institutions. In the year under review the Ombudsman received various enquiries and complaints from Swiss citizens resident abroad, as many banks have reviewed their cross-border activities on risk and profit grounds and adjusted their business models as a result. In most countries the laws on banking regulation, investor protection and tax offences look at the customer's place of residence rather than nationality. Therefore, as regards the legal and reputational risks that Swiss banks have to take into account, it makes no difference whether a customer resident in another country has a Swiss passport or not. As with other foreign customers, Swiss citizens resident abroad therefore faced various negative changes, specifically increases to charges or the introduction of new foreign customer charges, restrictions on the range of services available, and even termination of their relationship and demands to prove their tax compliance. Where Swiss citizens resident abroad complained to the Ombudsman in general terms about such strategic decisions by banks, he was normally obliged to restrict his response to explaining the background to these changes and advising the customer to seek a more favourable alternative, listing suitable information platforms. However, where a customer objected to specific misconduct by a bank, the Ombudsman assessed whether the bank had observed the principles set down in law and contract when amending/ending the relationship. He also reviewed such specific cases for fairness.

## **Selected cases**

### **Fixed-rate mortgages**

Once again during the year under review the Ombudsman was contacted by numerous customers who had fixed-term mortgages and were unable to understand all the potential consequences. We will not go into whether the bank advisors provided a sufficient explanation of this type of transaction or whether the customers were persuaded by historically low interest rates not to ask questions and paid insufficient attention to the risks. The reason a property is sold and a fixed-term mortgage repaid early is often loss of a job, divorce or something similar. Repaying a mortgage early in this way generally entails hefty early redemption costs. If the wording in the agreement is unambiguous, the Ombudsman cannot help. The situation is different if the bank's conduct can be queried for reasons of fairness. If, for example, a customer wishes to leave the bank early due to general dissatisfaction but the bank has contractually agreed that a fixed-rate mortgage can only be redeemed early if the property is sold, one may well ask if the bank really wants to tie in such a customer for years to come. If the customer is willing in such cases to indemnify the bank for early redemption, i.e. ensure it is no worse off than if the agreement had been kept, then some banks are prepared to allow customers to end their agreement early. The question occasionally arises as to whether the bank is obliged to contact the customer in good time before a fixed-rate mortgage matures about follow-up financing. Some agreements stipulate that unless the customer gives notice in good time, maturing fixed-rate mortgages are rolled over into a variable-rate mortgage. Since variable-rate mortgages generally have higher rates of interest at present, customers would be well advised to look at their agreements in good time and contact the bank themselves if it does not get in touch with them. The customer may expect this as a service from the bank, but generally the bank is under no contractual obligation to make contact. It may be different if the bank needs more documentation (tax

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returns, property valuations, etc.) to decide whether it wishes to continue a fixed-rate deal. The Ombudsman is of the opinion that in such cases the bank can be expected to contact the customer in good time before any deadline passes and notify them of the need for more information. This is the only way the customer can make alternative financing arrangements in good time should it not be possible to reach agreement with the bank (see pages 24-25).

### **Investment advice and asset management**

In these cases, the Ombudsman generally has to look at whether the bank discharged its obligation to provide appropriate advice. In a nutshell, the issue is whether the customer was given information about the risks and characteristics of recommended investments in a way that was appropriate to their level of knowledge, whether the investments were in line with the customer's risk appetite and risk capacity, and whether the bank's recommendations resulted in a customer portfolio that was insufficiently diversified. The bank may be liable in cases where these duties were not discharged properly or at all. Of course, this only applies when the bank was genuinely acting in an advisory capacity, and not on an "execution only" basis, which means simply carrying out the customer's instructions. As such advisory sessions are normally verbal, Ombudsman proceedings of this kind often have to deal with the issue of evidence. As a mediator, the Ombudsman cannot carry out his own investigation and formally take evidence from the parties or witnesses; different recollections of what was discussed in conversations that are relevant to assessing the dispute often have to be left unresolved. The requirement for customers to be given information about risks and products in a way that is appropriate to their level of knowledge also often involves issues of circumstance and judgement. For customers who have already invested in equities and fixed income on numerous occasions, it may be sufficient to simply hand over a general risk brochure. However, if a customer is making another sort of investment for the first time the bank is well advised to provide in-depth information on how it works and the risks associated with that sort of transaction, and to document this appropriately (see page 28).

### **Misuse and fraud**

When it come to this category, sadly there seems to be no limit to the abilities and criminal energy shown by fraudsters. The Ombudsman continues to deal with major cases of loss that could put the bank customers in question in a very awkward position. Apart from the scams with bank and credit cards familiar from media reports, and the recurrent instances of criminals contacting elderly citizens pretending to be grandchildren, written payment instructions are also forged. The extent to which the customer is cautious or careless is key to the success of these frauds. The Ombudsman can only reiterate how important it is to keep bank and credit cards and their PINs, as well as statements and other bank documents, in a safe place. With forged payment instructions the fraudsters often have information like the account number and balance and a specimen of the customer's signature, which are used to give the bank the impression the instructions are genuine. The bank must exercise due care when accepting written payment instructions. The customer signature (which can change slightly over time) must be checked carefully, and as far as possible when written payment instructions are involved the bank should consider whether there are any other indications of forgery. However, the bank is not required to assume that every instance is an attempted fraud. Since payment instructions are normally time-critical, the bank has to weigh up whether it should refer back to the customer and risk delay or accept reasonable deviations

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from the normal specimen. The customers affected tend to find it hard to accept losses due to forged written payment instructions. In such instances the Ombudsman has to form a view as to whether the bank carried out its duties of care appropriately in the circumstances when accepting the instructions (see pages 29-30).

### **Payments and cheques**

Increasingly, customers are issuing payment instructions electronically. The instructions are entered directly from the web browser into the bank's payment system. Banks also frequently offer discounted third-party software solutions allowing customers to enter payments at their convenience on their own computer and send them to the bank in a single batch. Electronic aids such as scanning pens help avoid manual inputting errors, e.g. with reference numbers on credit slips. With payment instructions the bank's responsibility is to execute the instructions as entered by the customer promptly and with due care. If no entry errors are immediately apparent, banks usually process the payment fully automatically without any manual intervention. The Ombudsman often has to deal with cases where the customer has entered details incorrectly, resulting in problems and losses. For example, if the customer gives the wrong beneficiary account number (IBAN) for a foreign transfer the money may be credited to another customer at the same foreign bank. Nowadays the name of the beneficiary is no longer always checked against the account number abroad (or even in Switzerland, depending on the General Terms and Conditions) and the credit is based solely on the IBAN. There is no dispute that the customer is responsible for entering electronic or written instructions correctly. The Ombudsman's opinion is that where an entry error results in an incorrect payment, as soon as the bank is informed it should take reasonable steps to reverse the payment or request a return as its contribution to preventing a loss. If the money has already been credited to the wrong beneficiary a return is generally only possible if they consent, which is something the customer's bank has no direct influence over. If the bank executes payment instructions late for no good reason, which occurs occasionally, significant consequential losses can arise. This raises the question of the bank's liability; depending on the contractual provisions and circumstances in the case, liability may extend to the interest missed as a result of the delay or even, in some instances, the full consequential loss (see pages 35-38).

### **Stock exchange and custody accounts**

In these cases, the Ombudsman faced a whole series of reasons for customers having disputes with their bank. Complaints ranged from orders being executed late or not at all and dissatisfaction with execution prices to losses incurred as a result of stop-loss limits that were ignored or could not be achieved. Investigations by the Ombudsman in such cases take a great deal of time and effort, and it is always essential that the customer provide full and substantive documentation to back up claims. The Ombudsman has to occasionally point out that he cannot look into events and search for potential breaches of duty by a bank on the basis of accusations made purely in general terms. Where a stock exchange order has been executed late or not at all (and delays in execution for which the bank is responsible can give rise to substantial claims for damages), customers should always inform the bank immediately and, if agreement cannot be reached, place the order again in order to avoid or minimise any loss. If a customer simply waits, even though they are well aware that a transaction has not been executed as requested, it can be argued that they accepted it from

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then on and should be liable for any price losses after that point as well as any gains. The Ombudsman is also repeatedly obliged to point out to complainants that they have a duty to check and give notice of any errors. If customers cast doubt on the price provided by a market-maker, with call options for example, or even suspect price manipulation, extensive investigations may be necessary. With allegations of price manipulation in particular, it is often necessary to remind people of the limits to the Ombudsman proceedings (see pages 31-34).

## **Facts and figures**

The number of cases dealt with (verbally and by correspondence) rose 2% year-on-year from 2,103 to 2,068. Excluding 2008 and 2009 (the financial crisis) and 2013, this is the second-highest figure after the previous year's. The largest number of cases involved bank accounts, payments, cards (especially charges, foreign status, fraud and identity issues), loans, and mortgages, where negative interest rates (and in particular the impact these have on calculating early redemption penalties) continued to dominate, as they did in the previous year (see pages 49-57).

## **Public relations**

At the annual press conference, the Ombudsman presents the annual report for the previous year along with current topics. In addition to the press conference, information can also be found on the website, where earlier press releases, annual reports and many case studies are available. The website also provides important information such as the rules of the Ombudsman's Office, a description of procedures to be followed, explanations about dormant assets, and public statements on various issues. At the public presentation on 30 June 2016, the Ombudsman considered the draft Financial Services Act and the question of negative interest rates in connection with fixed-rate mortgages. He also shared his initial thoughts following the first publication of long-term dormant assets.

In 2016 the Ombudsman held exchanges of views with representatives of the Swiss Financial Market Supervisory Authority FINMA, judges and other players in the private and public sector. He met representatives of various financial institutions, and members of the Office took an active part in the Swiss Bankers Association working group on dormant assets. In addition, the President and Vice-President of the Board of the Foundation met the Chairman and the CEO of the Swiss Bankers Association.

Throughout the year the Ombudsman replied to enquiries from the press and various professional and consumer protection associations. In addition, he and/or his deputy spoke at a dozen or so events and conferences, and took an active part in the meetings of the European financial dispute resolution network (FIN-NET) and the annual world conference of the International Network of Financial Services Ombudsman Schemes (the INFO Network). At the latter the Ombudsman presented the Swiss system for dealing with dormant assets and the impact of international tax developments on the customers of Swiss banks.

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## **Assets without contact and dormant assets**

As well as performing its traditional role as the central point of contact for people looking for assets, since December 2015 the Banking Ombudsman has also dealt with numerous issues relating to publication of long-term dormant assets ([www.dormantaccounts.ch](http://www.dormantaccounts.ch)). One side-effect of the media interest in publication is that the general public has become more aware of the ability to carry out a search through the Banking Ombudsman, something which has in fact been possible for over 20 years. The year under review saw the number of questionnaires returned rise by 34% to 714. In total, 62 relationships (CHF 12.7 million and seven safe deposit boxes) were made accessible to beneficiaries during the year. Since 2001, when the current search system was introduced, the Ombudsman's Central Claims Office has identified a total of 449 dormant accounts or accounts without contact and made CHF 85.1 million and the contents of 51 safe deposit boxes accessible (see pages 59-65).

## **The Office**

The entire IT system in the Office of the Ombudsman was upgraded in 2016. The computer hardware was replaced and at the end of the year a case management system developed by a Swiss software provider was installed. As a result the IT support for processes in both areas of the Ombudsman's activities – namely Ombudsman proceedings and dormant asset searches – has now been consolidated on a single platform. This makes for a more streamlined support service. The project was completed on time and on budget. Both the new software and the computers are state-of-the-art in terms of security, functionality and efficiency.

There were no changes in the staff of the Office. The team consists of eight proven specialists and experts (see page 67). Reflecting additional duties to do with the publication of long-term dormant assets and the inclusion of PostFinance with effect from 1 June 2016, when it joined the Swiss Bankers Association, the Board of the Foundation approved an increase in the workforce of one full-time position for 2017.