

2017 in Brief

Ombudsman proceedings

There are some years when the Ombudsman is faced with a large number of similar complaints. These complaints are triggered by extraordinary large-scale events affecting a multitude of bank customers (for example in the case of the 2007-2009 financial crisis, the landmark ruling by the Swiss Federal Supreme Court on retrocessions, the decision to abolish the euro minimum exchange rate and the introduction of negative interest by the Swiss National Bank). This was not the case for the year under review. The Ombudsman saw a broad range of complaints regarding various products and services without the accumulation of any particular set of circumstances. The causes giving rise to the complaints were equally varied. Selected case studies in English can be found on the www.bankingombudsman.ch website.

Of these case studies, the following are particularly noteworthy: the Ombudsman is still regularly being faced with complaints regarding early redemption penalties when customers are repaying fixed-rate mortgages early. Because of the low interest rates, these are fairly expensive for customers. One perennial issue among the complaints in other cases is bank charges. Whether or not charges have been newly introduced or adjusted in a valid form is frequently disputed here, particularly where the customer has not actually taken notice of the corresponding messages and raises the question of whether or not an implied approval of such charges can be assumed. Cases of misuse and fraud, often occurring in connection with the bank's electronic services, are regularly painful for customers. Such cases raise liability issues, the solution to which depends primarily on whether the bank and the customers fulfilled the contractual due diligence requirements incumbent upon them. More details on this can be found on the website. The suspected lack of mental competency on the part of a customer and the reporting obligations introduced for authorised representatives or agents by the revision of the adult protection law raise some difficult issues for the banks concerned. According to press reports, individual consumer credit banks are accused by debt counsellors of not performing credit assessment checks with due care, which regularly leads to overindebtedness for borrowers. The Ombudsman has also been faced with such cases. One of these can be seen on the www.bankingombudsman.ch website.

In the year under review, the Banking Ombudsman closed 2027 cases (1202 verbal and 825 written). While written cases were up by 3%, verbal cases saw a significant decrease by 16% compared with the previous year. This comes after the previous year saw the number of verbal cases reach its highest level since the financial crisis from 2007 to 2009.

More than half of all cases concerned the "Account, Payment Transactions, Cards" area. The "Loans, Mortgages" area, in which the previous two years saw above average case numbers recorded, continued to see high volumes of verbal enquiries. This was still primarily due to issues in connection with negative interest and its impact on the calculation of customer interest rates in LIBOR mortgages and early redemption penalties. There was however a reduction to long-term normal values in written

cases. Enquiries about charges were at the heart of around 20% of all written cases. These cases were distributed across all areas with the largest proportion falling in the “Accounts, Payment Transactions, Cards” area.

38% of the banking customers calling upon the Ombudsman came from abroad with most from immediately adjoining countries Germany and France. The origin of the Swiss customers more or less corresponds to the actual population distribution of the individual language regions.

In 85% of the written cases, the dispute value was no more than 100,000 CHF and 77% of cases were concluded within the desired 3-month period. Extraordinarily long processing times of over 6 months occurred in 7% of the cases.

In total, the Banking Ombudsman intervened at the bank in 264 cases (32% of the written cases or 39% of the requests for mediation). After an in-depth analysis of the facts, the Banking Ombudsman recommended a concession on the part of the Bank in 158 cases. The bank in question did not follow the Ombudsman’s recommendation in just 7 cases (4%).

Detailed statistics regarding the complaints submitted verbally and in writing can be found in the annual report, available in German and French on the www.bankingombudsman.ch website.

Financial Services Act (FinSA)

In the year under review, parliament continued to work on the Financial Services Act (FinSA). To the Ombudsman’s regret, after the Council of States, the National Council also rejected the Federal Council’s proposal to grant the mitigation of procedural costs to private clients in disputes concerning financial services or claims relating to investment, lending or insurance products or services. The proposal stipulated that private clients without exceptionally good financial circumstances would be released from the obligation to pay an advance on costs and provide collateral security for party costs, and would be granted mitigation for procedural cost risks if the customer was prompted to initiate civil proceedings in good faith after undergoing mediation before a recognized Ombudsman’s office. The problem of prohibitively high costs or cost risks in civil proceedings in some cases therefore remains unresolved for the time being.

In addition to following the legislative procedure, the Ombudsman supported the federal administration’s work started in the year under review on the implementing regulations for the FinSA having his deputy sit on a Federal Department of Finance (FDF) working group and being able to submit proposals for the provisions of the Ordinance on the FinSA pertaining to the Ombudsman.

Retrocessions

In a noteworthy, precedent-setting decision of 30 October 2012, the Swiss Federal Supreme Court clarified that trailer fees received by banks, like conventional retrocessions, may be subject to an entitlement on the part of the customer to restitution. Trailer fees are sales commissions paid to banks by product providers. Their amount is not calculated based on the expense incurred by the bank, but on the volume of the products sold. The content and significance of this ruling has consequently been

the subject of controversial public debate by stakeholders and legal experts. Within that discussion, the following issues remained disputed in particular:

- Whether or not an obligation to return trailer fees also applies outside comprehensive asset management agreements, in particular in advisory relationships or simple account/securities account relationships without advice;
- What are the requirements for a valid advance waiver on the part of the customer of the right to the restitution of such remuneration;
- What is the limitation period for the entitlement to restitution and when does this period start to run?

The Federal Supreme Court has now clarified the limitation period issue in a new landmark decision of 16 June 2017: the court decided that the customer's entitlement to the restitution of retrocessions is subject to a limitation period of ten years with said period commencing for each individual remuneration element on the date it is received by the bank or asset manager.

To notify interested bank customers about this new aspect, the Ombudsman made an updated "Retrocessions: When should I contact the Banking Ombudsman?" leaflet available on the Ombudsman's office website. He also published an article in the magazine *Schweizer Bank* in September 2017 outlining his practice on claims for reimbursement of retrocessions following delivery of the new Federal Supreme Court landmark decision.

The Federal Supreme Court's decision regarding the limitation period for claims for the restitution of trailer fees only led to a few enquiries with the Ombudsman. One such example can be found on the website (see "Selected cases").

Public relations

In the year under review, public relations work by the Ombudsman's office was not only limited to the annual media conference in June, but also included various public appearances.

Thus, by invitation, the Ombudsman and his deputy spoke at numerous forums and conferences (particularly at various universities) and were once again actively involved in meetings of the European financial services ombudsmen association (FIN-NET) and in the annual global conference of financial services ombudsmen (INFO Network).

Various discussions were also held throughout the year with journalists, lawyers and representatives from key institutions. The Ombudsman once again met with representatives of various financial institutions to discuss bank-specific issues. On the subject of the FinSA, the Ombudsman took part in a National Council commission for economic affairs and taxation hearing. Finally, the Board of the Foundation met with the president and director of the Swiss Bankers Association to exchange views.

Assets without contact and dormant assets

As part of its traditional activity as a central claims office for searches for assets, in the year under review, the Banking Ombudsman received 530 new search requests. The Ombudsman considered 526 search enquiries sufficiently legitimate and queried a total of 588 presumed bank customers in the central database of assets without contact and dormant assets. Compared with the previous year, this represents a drop of one quarter, a fact that is attributable to the unusually high volume of cases in the previous year. At the time, the first publication of long-term dormant assets led to greater publicity of the possibility to perform searches (which had been in existence for a long time) and to a sharp increase in numbers at the claims office whereas there has been a return to normal levels in the year under review. In total, 40 banking relationships (10.9 million CHF and two safe deposit boxes) were made accessible to their beneficiaries in 2017. Two such cases involved customer relationships that had only been reported as without contact by the bank within the year under review, after a search had already been requested by beneficiaries and thus, performed through the claims office in previous years. Since the current search system was introduced in 2001, the claims office has identified a total of 489 dormant accounts or accounts without contact and made 96 million CHF, and the contents of 53 safe deposit boxes, accessible to beneficiaries. Detailed statistics can be found in the annual report, available in German and French on the website.

Since first publishing the long-term dormant assets in December 2015, the Banking Ombudsman has also acted as an information centre for questions and concerns relating to the publication platform www.dormantaccounts.ch. The amount of work required by this role was lower in the year under review than in the previous year and primarily consisted of information and occasional contact with banks that have taken a long time to respond to applications received.

For some years now, representatives of the Banking Ombudsman's Office have actively served on the Swiss Bankers Association Narilo working group. This group is committed to coordinating, solving any problems which may arise and improving procedures related to the issue of assets without contact and dormant assets and, in the year under review, held several meetings and telephone conferences.

Further information about the applicable guidelines and options for searching for assets in Switzerland can be found on the website www.bankingombudsman.ch (see "Search for assets").

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The Banking Ombudsman

The Swiss Banking Ombudsman is a neutral and free of charge information centre and mediator. It deals with specific complaints from customers against a bank with its registered office in Switzerland. The institution began operating in April 1993. The Office of the Swiss Banking Ombudsman is sponsored by the "Swiss Banking Ombudsman Foundation" which was founded by the Swiss Bankers Association.

Details of how to submit a problem to the Banking Ombudsman can be found on the Banking Ombudsman's website at bankingombudsman.ch.