

2018 in Brief

Ombudsman proceedings

As in the previous year, there were no particular events in 2018 that led to the Ombudsman being faced with a large volume of similar complaints. Once again, he handled a wide range of complaint cases concerning various products and services offered by banks without any specific discernible areas of focus. Selected case studies can be found on our website www.bankingombudsman.ch/en/ (see "Selected cases").

Of these, the following are particularly worth mentioning: the Ombudsman is increasingly faced with complaint cases involving the issue of the mental competence of banking customers. Of these, there is a fairly even mixture of cases in which the bank is accused of having breached its due diligence obligations because it failed to recognise the lack of mental competence in a customer, and cases where the bank is accused of having unnecessarily questioned a customer's mental competence. For more on this, see cases 2018/02 and 2018/21. Cases associated with disputed bank fees have also kept the Ombudsman busy in 2018. Both of the case studies 2018/18 and 2018/19 involve complaints regarding so-called fees for failing to provide notice which are charged by banks when withdrawal limits that exist for certain accounts are exceeded by a customer. Case 2018/20 involves disputed fee increases made by the bank during a period in which it had refused access to the account information for heirs who had not yet proved their authenticity to the bank's satisfaction. Cases 2018/10 and 2018/11 are based on alleged breaches of due diligence obligations by banks in connection with the maintenance of accounts for general contractors. Building owners who had transferred agreed payments to their general contractor's accounts in accordance with the general contractor agreement accused the bank maintaining the account of not having checked the use of these funds with the necessary due care. Recently, various banks have changed their business models in terms of investment advice and are now requiring the conclusion of a written and fee-based investment advice agreement as a requirement for the provision of investment advisory services. The case study 2018/12 provided covers the issue of whether a customer can insist upon the maintenance of the previous business model. Due to the so-called "Madoff Affair", and processes conducted by liquidators of the funds associated with Madoff and the bankruptcy trustee against certain banks, these institutes are freezing customers' assets which have resulted from the redemption of such funds. In the case study provided 2018/16, a customer asked the Ombudsman to release such assets within mediation proceedings. Errors when entering payment instructions can have unpleasant consequences for customers. This is the issue in cases 2018/06 and 2018/07. In case 2018/23, the issue is whether heirs are entitled to information from the bank about accounts in which the deceased was only a beneficial owner. Under "Miscellaneous", there is a case in which the bank's right to change the interest rates for a pension product was disputed 2018/28. Finally, in the same section, case 2018/30 looks at issues surrounding so-called "banking secrecy and data protection waivers", in other words declarations requested by the bank from customers in which the latter waive the protection of banking secrecy and the Swiss data protection provisions in connection with transactions they have commissioned the bank to perform.

In the year under review, the Banking Ombudsman closed 1,926 cases (1,129 verbal and 797 written). While the number of written cases from Switzerland rose by a good 4%, written cases submitted by bank customers residing abroad saw a marked decrease by over 20%. There was a clear decline in verbal cases both for inquiries from Switzerland (-7%) and those from abroad (-4%). All in all, this resulted in a decrease of approximately 5% compared with the previous year.

With a 60% share of the total volume, the dominance in the area of "Accounts, Payment Transactions, Cards" which has existed since 2011, has increased even further. Around two thirds of these cases concern the "Account/Savings Book" and "General Banking Relationship" sub-areas. At approximately one quarter, fee issues were the main area of focus here. Other key areas were identification and processing issues.

The previous year's downward trend in the area of "Loans and Mortgages" continued. With almost 40% of the cases, "Fixed-rate mortgages" was once again the largest sub-section, with disputes concerning early redemption penalties charged by the bank in the case of early repayment the main focus.

Another major source of problems in 122 concluded written cases (15%) was once again "fees". For this first time however, this area was overtaken by cases involving problems with "processing issues". Of these 161 cases, the majority (90 cases), as was also the case in "fee issues", related to the area of "Accounts, Payment Transactions, Cards".

32% of the banking customers calling upon the Ombudsman came from abroad with most from immediately adjoining countries Germany and France, as was the case in the previous year. As is the case each year, 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 84% of the cases were concluded within the desired 3-month period. Extraordinarily long processing times of over 6 months occurred in only 5% of the cases.

In total, the Banking Ombudsman intervened at the bank in 233 cases (29% of the written cases or 36% 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 137 cases. The bank in question did not follow the Ombudsman's recommendation in just 5 cases (4%).

Detailed statistics regarding the complaints submitted verbally and in writing can be found on pages 52-61 (see Annual Report 2018 in German or French).

Negative reinvestment rates in the case of early repayment penalty charges

In his 2015 annual report, the Ombudsman commented on various problems submitted to him in complaint cases which were the consequence of the decisions made by the Swiss National Bank in January 2015. As is well known, at the time the latter had lifted the euro lower limit and introduced negative interest for Swiss francs. Since then, when calculating early repayment penalty charges for fixed-rate mortgages redeemed early, some banks have been taking negative interest into account which they then charge to the customer, for the remaining term of the fixed-rate mortgage, in addition

to the interest rates agreed upon with the customer. Until recently, the Ombudsman was unaware of any court rulings clarifying this practice which is the subject of much legal contention. A press release issued by the District Court of Zurich on 10 December 2018 revealed that the court reached the conclusion that taking negative interest into account is not permitted in a case presented to it. In this case the customer fundamentally disputed the bank's right to demand an early repayment penalty charge, and argued that the bank had not suffered any loss or damage as a result of his early redemption. The court found that an early repayment penalty charge had been contractually agreed upon and that this agreement was to be classified as a contractual penalty. Whether or not the bank actually incurred damage or loss as a result of the early repayment was therefore not a critical factor. There is also no obligation for the latter to minimise the damage or loss. Only the specific contractual agreement was significant. Based on the interpretation of this agreement pre-drafted by the defendant bank, the court found that no negative reinvestment rates could be taken into consideration in the case under review and that the bank's customer owed the bank the interest agreed upon for the remaining term of the fixed-rate mortgage at most by way of an early repayment penalty charge. The bank was ordered to pay back the sum over and above that amount. In March 2019, the consumer protection media reported a case in which the single judge sitting at the District Court of Zurich reached a similar conclusion. This decision is not yet final however. The Ombudsman is monitoring developments in this area and will apply the relevant judgements when dealing with similar complaint cases.

Financial Services Act (FinSA)

In the year under review, the Ombudsman continued to follow the legislative project for a federal law on financial services, the Financial Services Act (FinSA), and has also contributed to this project in certain areas. In particular, he took advantage of the opportunity to delegate his representative to one of the working groups for drafting the regulation for the Financial Services Act.

The new legal regulation of the ombudsmen's offices and the mediation proceedings is restricted to the area covered by the FinSA. For the Swiss Banking Ombudsman the new regulation therefore does not replace the existing one, which is based on self-regulation of the banking industry. Rather, it supplements and overlaps the latter in certain areas

One of the new features of the FinSA is that the ombudsmen's offices operating within the area covered by the FinSA will, in future, require accreditation from the Federal Department of Finance (FDF). Together with the Board of the Foundation, the Ombudsman has therefore begun analysing whether, and to what extent, changes will be needed to the existing rules for the Swiss Banking Ombudsman Foundation or the Banking Ombudsman in view of the accreditation requirements stipulated in Article 84 of the FinSA.

Parliament passed the FinSA, together with the Financial Institutions Act (FinIA), on 15 June 2018. Following the expiry of the referendum period, the Federal Council has set the date for both laws to enter into force, together with the three associated ordinances, on 1 January 2020. The Council also launched the consultation process for the ordinances on 24 October 2018.

The Ombudsman took part in the consultation process. As a representative of an independent and neutral institution however, he chose to focus on expressing his opinion regarding clauses of the

consultation drafts which concerned the Ombudsmen's offices directly only. In his response to the FDF dated 5 February 2019, he predominantly stated that he considered the implementation provisions appropriate and supported them. On the one hand, he welcomed in particular the decision not to include implementing provisions on the mediation proceedings already regulated in detail in the law and, on the other, the further clarification of the provisions on funding for the ombudsmen's offices, which, in his view, provide clarity, to include financial service providers and the accreditation requirements. The Ombudsman also made his response to the consultation available on the Ombudsman's office website (see www.bankingombudsman.ch/en/documents).

When the FinSA enters into force, all banks, like all financial service providers, will be under a legal obligation to inform their customers, on various occasions, of the possibility of mediation proceedings by the Ombudsman. In particular, this also applies in each instance when rejecting a legal claim made by the customer. The Ombudsman has drawn attention to this new duty to provide information in numerous discussions with representatives from individual banks and industry representatives. In particular, he has indicated the need to avoid the wasted and frustrating effort for customers when a bank encourages them to refer a matter to the Ombudsman without first reviewing the customers' concern or claim, and the arguments raised by them in detail and with the required attention and thoroughness. With this in mind, the Ombudsman expects banks to have dealt with legal claims brought before them seriously and at the appropriate level, and to have given the customer a written response completed with a detailed and comprehensible explanation, before referring the customer to the Ombudsman.

Public relations

In addition to the press conference every June, the Ombudsman's office deals with other activities in the field of public relations all year round.

Thus, by invitation, the Ombudsman and his deputy spoke at numerous forums and conferences or lectured at training events (particularly at various universities). They 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 (the INFO Network) and took this opportunity to exchange ideas with prominent figures from other countries.

During the year under review, the Ombudsman also responded to media enquiries regarding specific banking topics and published an article in the "Schweizer Bank" industry magazine.

Various discussions with key figures from industry and consumer protection organisations were also on the agenda in the past year. Also particularly worth noting were the meetings with representatives from various financial institutions to discuss fundamental issues and banking-specific topics, which proved valuable for both parties.

Assets without contact and dormant assets

In addition to his role as an independent and neutral information point and mediator for banking customers, the Banking Ombudsman has also been the central claims office for searching for assets without contact and dormant assets since 1996. Within this activity, he received 408 new enquiries in the report year which related to the assets of one or more suspected bank customers. Of these and the search enquiries still pending from the previous year, 403 enquiries were considered sufficiently legitimate and, consequently, a total of 466 presumed bank customers were queried in the central database of assets without contact and dormant assets. After reaching its highest level in 2016, when 714 search enquiries were received, this decline in volume fell even further by around 23% compared with the previous year (530 search enquiries), to the level from 10 years ago. The main reason behind this change is probably a waning of public interest and significance for searchers, in the subject of dormant assets following the introduction of the obligation for banks to publish assets that have been dormant for a long time and the publication of names of the banking customers in question on the www.dormantaccount.ch website which began in late 2015. Having said this, it was still possible to make the assets of a total of 41 customer relationships without contact (account/deposit values of 11.7 million CHF and the contents of four safe deposit boxes) available to eligible beneficiaries during the year under review. 18 of these cases involved search enquiries submitted by the beneficiaries in one of the previous years and which had been held as pending by the claims office ever since, but the customer account was only reported as having no contact by the bank within the report year. Since the current search system was introduced in 2001, the claims office has identified a total of 530 dormant accounts or accounts without contact and made 107.7 million CHF, and the contents of 57 safe deposit boxes, accessible to eligible beneficiaries. Detailed statistics can be found on page 62-65 (see Annual Report 2018 in German or French).

As part of the publication of assets that have been dormant for a long time initiated in December 2015, the Banking Ombudsman acts as the claims office for enquiries and concerns relating to the publication platform at www.dormantaccounts.ch. As in the previous year, the amount of time and effort involved in this respect was low in the period under review and was predominantly limited to cases where the publishing bank had to be prompted because it had not (for too long) responded to applications it had received.

As in previous years, representatives from the Banking Ombudsman's Office have once again 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 numerous meetings and telephone conferences.

Further information about the relevant guidelines and options for searching for assets with banks in Switzerland can be found at: www.bankingombudsman.ch/en ("Search for assets" section).