2019 in Brief

Ombudsman proceedings

As in previous years, the Ombudsman dealt with a wide variety of complaints about various products and services offered by banks during the year under review. Selected case studies can be found on pages 16 - 43.

Particularly noteworthy are cases involving early repayment penalties with negative reinvestment rates. The first court judgments on that subject were delivered in 2018. In the year under review, one of those judgements was upheld by the Zurich High Court (*Zürcher Obergericht*) in a fully reasoned decision. The Ombudsman published an Article on that subject on its website www.bankingombudsman.ch/en entitled “Negative Interest Rate in Connection with Early Repayment Penalties”.

Some banks have now amended their contract provisions for calculating early repayment penalties. In case 2019/04, the bank argued that it could already effectively apply such an adjustment to an ongoing fixed-rate mortgage. In the case of fee increases, too, the problem repeatedly arises that banks sometimes try to apply such adjustments during the locked-in period of fixed-term contracts. The Ombudsman has always taken the view that such adjustments can not take effect until the expiry of the corresponding locked-in period. For more on this, see cases 2019/15 und 2019/16.

In the custody business, questions regularly arise as to the extent of the banks’ obligation to perform ordinary administrative actions in custody relationships usually regulated by the banks' custodian regulations and particularly as to what information from the securities issuers must be passed on to the clients. Such issues formed the subject-matter of the cases 2019/12 und 2019/13. Finally, under the heading “Stock Exchange and Custody Accounts”, there is also an interesting case concerning the split of a cryptocurrency (2019/14).

The topic “Investment Advice and Asset Management” is discussed below in further detail. Cases 2019/06, 2019/07 and 2019/08 deal with complaints about the bank's responsibility in the event of unsatisfactory or negative investment performance. In cases 2019/11 and 2019/10, the question at issue was the extent to which a bank is required to take tax considerations into account when providing investment advice or asset management. Finally, in the latter case and in case 2019/09, the issue was whether a recommended product can be brought into line with the customer profile created.

Unfortunately, the Ombudsman is also confronted with the unpleasant subject of “Abuse and Fraud” every year. In case 2019/19, the bank invoked liability clauses in its e-banking provisions in a case of e-banking fraud without managing to produce convincing evidence that it had even entered into such a contract with the customer. The case 2019/18 describes a case in which a stolen credit card was misused by unknown perpetrators exclusively using the Contactless function without entering a PIN. In the sole case in the “Foreign Exchange Trading” category, the customer argued that the bank had closed its open foreign exchange positions at prices that were not in line with the market.

The Swiss Banking Ombudsman (see www.bankingombudsman.ch/en) has always striven that it can be contacted quickly and without any major formalities. Unlike many other ombudsman offices, it does not insist on a rigid data-entry structure requiring a certain form for written submissions. It does expect, however, that clients will make an effort to formulate their concerns clearly and substantiate them with any documents essential to understanding them. Its duties do not include organizing chaotic case files

received or structuring a complaint, as a lawyer or trustee might do for the client. Such activities would be incompatible with its status as an independent and neutral intermediary and place an excessive burden on its resources to the detriment of other clients. If clients wish to use the Ombudsman as an intermediary, it is indispensable that they first make a written complaint to the bank's management, describing their concerns in full and requesting a written opinion on those matters. Only then should the client submit its case file to the Ombudsman. The Ombudsman cannot act as an intermediary until he is familiar with the basic standpoint of both parties.

In today's world, telephone conversations can be conducted from anywhere, even when on the move, so that loud background noise in phone calls to the Ombudsman is becoming a source of ever greater communication problems. Sometimes a rational discussion is simply impossible. It is often impossible to respond to queries because the client does not have the necessary documentation on hand. The Ombudsman recommends that customers wait for a quiet moment before calling, take their time and have the necessary documents handy. That is part of dealing respectfully with your conversation partner's time and is conducive to higher quality advice to the satisfaction of both speakers.

Figures in brief

In the year under review, the Banking Ombudsman closed 2013 cases (1,298 oral and 715 written complaints). While the number of written cases from German-speaking Switzerland fell sharply by 27%, bank clients from the other regions showed a slight increase in the number of cases submitted in writing. There was an increase in oral cases for inquiries from Switzerland by 20%, while those from abroad fell by 6%. All in all, this resulted in an increase of approximately 5% compared with the previous year.

The main subject-area "Accounts, Payment Transactions, Cards” created in 2011 has further increased its share to 62% of the total number of cases. Around three quarters of such cases concern the "Account/Savings Book" and "General Banking Relationship" sub-areas. The main topics were authentication and settlement issues (30% and 27% respectively), while fee issues accounted for only 20%.

In the “Loans, Mortgages” subject-area, the downward trend of previous years has been halted and its share has increased slightly to 14%. Accounting for nearly 50% of such cases, “Fixed-rate Mortgage” were once again the largest sub-area, with the main focus on disputes during liquidation (early termination penalty, closing fee).

As in the previous year, the main cause of the problem was “Settlement issues”, which triggered 254 submissions to the Banking Ombudsman. 142 of such cases fell under “Accounts, Payment transactions, Cards”. “Fee issues” gave rise to another 134 cases. As in the case of “Settlement Issues”, 77 cases involved the “Accounts, Payment Transactions, Cards” area.

37% of the bank clients calling upon the Ombudsman's services came from abroad, mainly from the neighbouring countries Germany and France, as in the previous year. Like every year, the places of origin of the Swiss customers approximately matches the actual population distribution of the individual language regions.

In 81% of the written complaints, the value in dispute did not exceed CHF 100,000 and 85% of such cases were closed within the 3-month target period. Only 5% of the cases required extraordinarily long resolution periods of over 6 months.

The Banking Ombudsman intervened at the bank in a total of 188 cases (26% of the written cases); after an in-depth analysis of the facts, the Ombudsman advised the bank to make concessions in 118 cases. In 7 cases (6%), the bank in question did not follow the Ombudsman's recommendation.

Detailed statistics on the oral and written complaints can be found in the annual report on the pages 44 – 53 (available in German and French only).

Financial Services Act (FinSA)

In previous years, the Swiss Banking Ombudsman was intensely involved with the legislative process for the Financial Services Act (FinSA). In the year under review, the Ombudsman worked in a number of ways on the consequences and implementation of the new statutory provisions governing its offices. The focus was on two aspects: firstly, the new statutory obligation for financial services providers and financial institutions to join an ombudsman office and, secondly, the new statutory requirement for such ombudsman offices to be accredited by the Federal Department of Finance (FDF).

Regarding the first aspect, one important factor was that the mission and area of responsibilities of the Swiss Banking Ombudsman are defined in the articles of association of its sponsoring foundation and in the rules of procedure issued by the Board of Foundation. Since the time when the Swiss Banking Ombudsman Foundation was created by the Swiss Bankers Association as part of the self-regulation of the banking industry, and the first Ombudsman went into operation in April 1993, these rules and regulations have stated that the Swiss Banking Ombudsman acts as an independent and neutral institution without jurisdictional power providing information and intermediation services to "bank clients" of the Swiss Bankers Association's member institutions. They also stipulate that it handles questions and complaints from bank clients regarding transactions conducted by "banks" domiciled in Switzerland.

The new financial market legislation makes membership in an ombudsman office mandatory not only for banks but, in principle, for all financial services providers within the meaning of the FinSA and financial institutions as defined by the Financial institutions Act (FinIA). The Swiss Bankers Association has therefore decided that the Swiss Banking Ombudsman should be the ombudsman office for all of its member institutions that are required by law to be subordinated to such an office, i.e. including member institutions holding a licence other than a banking license. Consequently, the General Meeting of Shareholders of the Swiss Bankers Association resolved on 12 September 2019 to amend the mission statement of the industry organisation accordingly, and its Board of Directors, as the governing body of the founder company of the Swiss Banking Ombudsman Foundation, has adopted a similar amendment to Article 3 of the Foundation Charter.

In order to deal with the extended mission under the amended Charter, the Board of Foundation of the Swiss Banking Ombudsman Foundation resolved at its meeting on 21 November 2019 to amend the terminology in the Banking Ombudsman's rules of procedure by replacing the term "bank client" with the more general term "client" and the term "bank" with the more general term "institution". In addition, the description of the Ombudsman's area of responsibilities under Article 2.1 of the rules of procedure has been extended to include questions and complaints about "banking and financial services transactions" instead of only "transactions" conducted by "banks", as had previously been the case.

Regarding the second aspect, the Ombudsman and other competent authorities in each case were supposed to bring about the necessary conditions (including formally) to obtain accreditation from the Federal Department of Finance (FDF) as set out in FinSA Article 84 (2).

After consulting with various stakeholders, the Ombudsman has therefore prepared new organisation regulations and membership dues and cost regulations, which were approved by the Board of Foundation on 21 November 2019 with effect from the entry into force of the Financial Services Act on 1 January 2020.

In September 2019, the Federal Department of Finance (FDF) issued a fact sheet setting out the requirements for applications for accreditation filed by Ombudsman offices, without prejudice to the upcoming Federal Council resolutions on the enactment of the new financial market laws and the enactment of implementing ordinances. The Federal Council adopted and published the necessary resolutions on 6 November 2019. In late November 2019 the Banking Ombudsman then filed a timely application to the Federal Department of Finance (FDF) formally requesting accreditation of the Swiss Banking Ombudsman as an ombudsman as defined by FinSA Article 84 (1).

Financial services: Asset Management, Investment Advisory Services and Financial Instrument Transactions

For the Ombudsman's activities, it goes without saying that not only the provisions of the FinSA concerning the Ombudsman offices are important, but also the rules of conduct that are or will be applicable to all financial services providers according to the provisions of the second chapter of the new Act.

Certain of these rules of conduct, namely the fundamental duties to provide information, documentation and render accounts will apply to all types of financial services, i.e. both investment advisory services and asset management, as well as merely receiving and executing or transmitting customer orders related to financial instruments.

In addition, financial services providers offering investment advisory or asset management services will be required to conduct suitability or appropriateness tests. Financial services providers that offer investment advice for individual transactions without taking the entire portfolio into account are required to ask about the investor's knowledge and experience and, before recommending any financial instruments to check whether those instruments are appropriate for the client. In addition, when providing investment advice tailored to the client's portfolio or asset management services, the financial services provider must enquire into the client's financial situation and investment objectives.

The requirements for providing financial services and offering financial instruments have been specified by the Federal Council in the Financial Services Ordinance (FinSO). Regarding the suitability test, it specifically stipulates that when inquiring into the client's financial situation, the financial services provider must take into account the nature and amount of the client's regular income and net worth, along with present and future financial liabilities. In addition, when inquiring into the client's investment objectives, the financial services provider must especially take into account the client's statements regarding the time horizon and the purpose of the investment, risk tolerance and any investment restrictions. Based on the information obtained, the financial services provider must then draw up a risk profile for each client and agree on an investment strategy for asset management mandates and ongoing advisory relationships with the client.

The Federal Council has decided to enact both the new financial market laws and the associated ordinances on 1 January 2020. In accordance with the Federal Council's transitional provisions, financial services providers have a time limit of two years, i.e. by the end of 2021, in which to meet their duties to inform and to render accounts, as well their duties of verification, documentation, transparency and due

diligence with customer mandates. Until then (or a specified earlier date by which a financial services provider intends to comply with the new duties of conduct), the individual financial services providers will remain subject to the rules of conduct under the financial market laws that have hitherto been applicable to their business activities.

Although the new duties of conduct were not yet in force, they already affected the Ombudsman's activities in the year under review. For example, the Ombudsman noted that various banks had apparently already begun to bring their processes and documentation into line with the new requirements, and they are asking their financial services customers for additional information or documents in that context. Since it may be necessary, depending on the nature of the relevant financial services relationship, to collect and document information that penetrates deeply into the private sphere of the clients' finances, a number of disconcerted clients have approached the Ombudsman with questions and complaints because they considered their bank's requests for information and documentation to be unnecessary or even invasive. Conversely, in 2019, a number of cases were submitted to the Ombudsman where the bank's documentation was deficient or contradictory, for example, because the financial instruments acquired under an advisory mandate did not correspond to the result of the suitability test. It was also striking that the banks were unable to substantiate their opinions (e.g., to the effect that the investments were made according to the customer's wishes, or the risk profile had changed).

The new conduct rules under the Financial Services Act are supervisory in nature, so that their violation can primarily lead to a penalty by the supervisory authority but cannot lead directly to the financial services provider being held liable for civil damages incurred by the client. In other words, the client cannot claim direct damages for an alleged breach of such duties. In the prevailing opinion, however, the duties of conduct under supervisory law should have a "ripple effect" on the relationship under civil law between a financial services provider and its clients. The extent to which the ripple effect will affect the conditions for civil liability for investment losses suffered by clients will ultimately be determined by the practice of the civil courts.

Although the Ombudsman's activities are still mainly guided by private-law principles and criteria, the Ombudsman will not be able to ignore the new provisions of public law completely in his search for fair and negotiated solutions in the meantime, especially since large segments of the applicable civil-law provisions are in line with the new provisions of public supervisory law. The civil-law rules are based on the statutory provisions on mandate agreements and have been specified and further developed by the Federal Supreme Court. They are recalled here in a very simplified form:

- The opportunities and risks arising from financial services transactions are generally assumed by the client. Unless agreed otherwise, the client must neither share any profits with financial services providers nor can the client pass on any losses to them.
- The financial services provider owes the client a duty of best efforts rather than a duty to achieve a specific result.
- As a result, a loss of assets suffered in connection with a financial service must generally be assumed by the services provider's client.
- The financial services provider may be held liable, however, for breaching a duty of care or loyalty owed to a customer who suffers a loss as a result of that breach of duty.
- The due diligence to be exercised by the financial services provider is determined by the nature of the service owed, or in the words of the Swiss Federal Supreme Court: "in principle, three types of contracts are available to clients for stock-exchange investments: 1) an ordinary current account/securities account relationship, 2) investment advisory services and 3) actual asset management services. […] The decisive factor in classifying the contract is not what the parties call it

but the type of service that is requested by the client and actually provided by the bank within the agreed framework." (Federal Supreme Court decision 4A_449/2018 consid. 3).

- In the case of an ordinary current account/securities account relationship, the financial services provider's main duty is to execute the client's orders loyally and diligently. It is true that, in principle, the financial services provider has no duty to advise the client but it may nevertheless have such a duty to advise or warn if it should have noticed (had it been sufficiently conscientious) that the client was not aware of the risks associated with a particular investment, or if a special relationship of trust between the provider and client has developed and spontaneous advice and warning should have seemed appropriate according to the principle of good faith.
- During investment advising, it is the duty of the financial services provider to give advice tailored to the client's needs, knowledge and investment objectives. The data provided is supposed to meet the client's need for information, which is why the investment adviser should always adopt the vantage point of the client and give him advice that will help him choose the most suitable course of action in each case. It is essential for the financial services provider to be able to clearly explain the reasons underlying a recommendation and, in case of a dispute, to also be able to prove that the client did indeed issue the order to acquire a particular investment.
- Unless specifically agreed to, the financial services provider has no duty of ongoing monitoring of the customer's investments in investment advisory services. The situation may exceptionally be different if a corresponding basis of trust has been built up in the investment advisory relationship between the bank and the client.
- In an asset management arrangement, the client delegates investment decisions to the financial services provider, who is responsible for safeguarding the clients' interests and managing their assets carefully and honestly. Accordingly, it is part of the asset manager's duty of care to inquire into the client's interests, risk tolerance and risk capacity. The results of such inquiries must be recorded in a client profile and a corresponding investment strategy must be defined with the client.
- In principle, any client who asserts a breach of the financial service provider's duty of care bears the burden of alleging and proving such a breach. A mere sweeping allegation of a breach of duty is not sufficient. From the Ombudsman's point of view, however, the financial services provider is responsible for justifying any contradictions or omissions in the documentation.
- A breach of duties of care on the part of a financial services provider cannot be concluded solely from a level of Return on Investment that is considered unsatisfactory by the client. Insufficient documentation may be taken into account when assessing the evidence, however: "[f]or example, if the service provider is accused of insufficient clarification and advising, the agent faced with that accusation bears the burden of alleging and proving positive facts that refute the accusation of omission" (Fed. Sup. Ct. Dec. 4A_364/2013 consid. 6.6.4).

Public relations

In addition to the media conference to be held in mid-year each year, the Swiss Banking Ombudsman also handles various public relations activities during the rest of the year.

For example, the Ombudsman and his Deputy took up invitations to speak at numerous forums or conferences and lectured at continuing education events (particularly at various universities). At annual meetings of the network of European financial services ombudsmen (FIN-NET) and the annual world conference of financial services ombudsmen (INFO Network), they seized the opportunity to exchange ideas with prominent figures from other countries.

In this past year, too, many questions were received from the media on specific banking topics. The opportunities for meeting with spokesmen of the bank industry, on the one hand, and of consumer

protection associations, on the other, were put to good by discussing fundamental issues and special banking topics. Finally, it is worth mentioning the regular meetings with representatives of various financial institutions, which are worthwhile for both sides.

Assets without contact and dormant assets

Since 1996, the Banking Ombudsman has also served as Central Claims Office for searches for assets without contact and dormant assets. In so doing, the Ombudsman received 468 new search queries related to the assets of one or more presumed bank customers in the year under review. Of these and the search enquiries still pending from the previous year, 424 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. The volume of search queries increased by around 15% compared to the 10-year low of the previous year, most likely because of the foreign media reports towards the end of the year, which reminded the general public of the possibility of such searches. In the year under review, the assets of a total of 41 customer relationships without contact (current account/securities account assets of CHF 7.5 million and the contents of five safe deposit boxes) were made available to eligible beneficiaries. Twelve such cases involved search queries submitted by the beneficiaries in one of the previous years and held as pending by the claims office ever since, but the bank did not report the customer relationship as having no contact until the year under review. Since the introduction of the current search system in 2001, the claims office has identified a total of 571 dormant accounts or accounts without contact and has made available to eligible beneficiaries CHF115.2 million in assets and the contents of 62 safe deposit boxes. Detailed statistics can be found in the annual report on the pages 54 – 57 (available in German and French only).

In the context of the publication of long-term dormant assets, an activity 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/en. In the year under review, as in the year before that, the workload involved was low and limited to cases in which it was necessary to issue a notice to the publishing bank because it failed to give a timely response to the queries received or cases in which presumed beneficiaries were unable to submit their query to the publication platform as planned due to technical problems.

As in previous years, representatives from the Banking Ombudsman's Office have actively served on the Swiss Bankers Association Narilo working group. This group is committed to coordination, solving any problems which may arise and improving procedures related to the subject of assets without contact and dormant assets and, in the year under review, held several 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).