# 2023 in brief

## OMBUDSMAN PROCEEDINGS

### Investment advice and asset management

As generally known, the previous year 2022 was a bad year for investors. Practically all asset classes suffered losses. As a result of the sharp rise in interest rates, the prices of bonds and bond-heavy investment products, which are often recommended to clients with low-risk appetite, also declined. This led to some complaints being submitted to the Ombudsman in the year under review. Overall, however, the number of such cases was manageable. The structured investment processes with the improved documentation that financial institutions had to implement due to the relevant obligations of the Financial Services Act (FinSA) may now have positive effects.

Clients who turn to the Ombudsman because they believe that their bank has caused them damage due to failures in investment advice or asset management cannot base their claims directly on the Swiss Financial Services Act. The rules of conduct contained in this Act are supervisory in nature. Their violation may result in a penalty being imposed by the supervisory authority. However, they do not directly render a financial services provider liable under civil law for damage suffered by the client. Such claims are assessed in accordance with the principles of civil law. The Ombudsman uses the opportunity below to recall in a simplified manner the rules of civil law relating to liability claims against a financial services provider arising from investment advice and asset management, as outlined in the 2019 annual report:

- 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 shall owe the client due care and not a particular investment performance, unless this has been agreed. A financial services provider usually does not enter into such an agreement with the client.

- If a client suffers a financial loss in connection with a financial service, they must generally bear the losses themselves.

- If applicable, the financial services provider is liable if it has breached the duty of care or loyalty owed to the client and the loss or damage has arisen as a result of this breach of duty.

- The level of care to be taken by the financial services provider is determined by the nature of the service owed. A distinction is drawn here between the following three type of agreements: the mere account/custody account relationship, the investment advice relationship and the asset management mandate. The decisive factor is not which designation the parties use for their relationship, but rather what the client requires within the agreed framework and the financial services provider actually provides.

- In the case of a purely **account/securities account relationship (execution-only relationship)**, the financial services provider is primarily obliged to execute the client's orders faithfully and diligently. It is not in principle required to advise the client in this regard. By way of exception, he may nevertheless be subject to duties to provide advice or warnings if, had he exercised due care, he would have been able to discover that the client had not recognized the risks associated with a particular investment. Corresponding duties of the financial services provider may also arise if a special relationship of trust has developed between the financial services provider and the client and

an unsolicited consultation and warning based on this appears to be required in good faith.

- When **providing investment advice**, the financial services provider must take the client's needs, knowledge and investment objectives into account. The information provided must satisfy the client's need for information. The investment advisor shall take into account the client's knowledge horizon, satisfy his need for information and assist him with his advice in selecting the appropriate measures. It is essential that the financial services provider can clearly explain the reasons that lead to a recommendation. In the event of a dispute, he must be able to prove that the client has issued the order to acquire a specific investment. Without a corresponding agreement, the financial services provider has no obligation to continuously monitor the client's investments when providing investment advice. Exceptionally, such an obligation may arise where a corresponding basis of trust has arisen between the financial services provider and the client.

- In the case **of asset management**, the client delegates the investment decisions to the financial services provider. The latter is obliged to safeguard the client's interests and to manage its assets diligently and faithfully. The asset manager's duty of care requires it to clarify the client's interest situation as well as his risk appetite and risk capacity. He must set out the results of these clarifications in a client profile and define a corresponding investment strategy with the client.

- Clients who assert that the financial services provider has breached its duty of care must describe these breaches in detail. A mere sweeping allegation of a breach of duty is not sufficient. In the Ombudsman's view, on the other hand, financial services providers must be able to explain contradictions and gaps in documentation.

Now to the individual cases in the section on investment advice and asset management: In case 2023/14, it was disputed whether the client had issued two specific orders to acquire fund units as part of an investment advisory relationship or whether the fund units were purchased by the bank without a corresponding client order. In case 2023/15, the client claimed that the bank failed to adequately monitor her securities portfolio in the course of an investment advisory relationship. Case 2023/16 deals with a claim for damages by a client who claimed that she had been wrongly advised in connection with the recommendation of a structured product. In case 2023/17, the client alleged that there was a de facto investment advisory relationship between him and the bank, whereas the bank assumed a pure execution-only relationship. In case 2023/18, the client complained about losses in connection with a managed portfolio with a high proportion of bonds.

In the area of investment advisory services and asset management, amicable settlements are very difficult to achieve. Many mediation requests are motivated not directly by a possible misconduct on the part of the bank, but rather by a loss of assets in connection with adverse market developments. Moreover, cases that were more negotiable in the past due to difficulties of banks in providing evidence, have in the meantime, since the introduction of the Financial Services Act, been better documented and are therefore almost impossible to be solved by mediation. In addition, the requirements placed on plaintiffs in such cases by the courts are relatively high.

## Fraud

Unfortunately, there has again been a sharp increase in fraud, especially regarding credit and debit cards. Fraud cases increased by 85% compared to the previous year. Unfortunately, this trend has continued in the current year 2024 and is in line with the general developments reported by law enforcement authorities. In this context, the Ombudsman draws attention to the annual reports 2020 and 2022, in which this topic was widely discussed. The statements pointed out there are still up-to-date. It is becoming increasingly clear that it is not the technical systems, but rather the human factors – specifically the bank clients – that are the entry points for fraudulent activities. Fraudsters use increasingly sophisticated methods, simulating false facts, to induce clients to make payments or charge credit and debit cards in order to benefit the fraudsters or their intermediaries. In some cases

the fraudsters elicit access data from clients for their cards and accounts in order to debit them for their own benefit.

Clients usually have to bear the losses arising from these incidents themselves. The bank is rarely liable. In individual cases, gestures of goodwill can be reached. Prevention is key in these areas. The Ombudsman therefore repeats his recommendation to clients to take note of the relevant information and follow the warnings from the authorities, financial institutions and consumer protection organizations, and refers once again to his own advice, which is published as follows: Beware of fraudsters. The detailed information provided on the following websites is also very helpful: Card security and National Cyber Security Center.

In the reporting year, the Ombudsman was once again faced with a phenomenon that he had highlighted for the first time in the annual report 2020 (case 2020/07). Clients who have been victims of investment fraud use external service providers who prepare submissions for them to the bank and subsequently to the Ombudsman. As a general rule, the authors do not submit the cases as representatives of the clients but remain unidentified. Only a handful of submissions were made by a law firm established in an Eastern European country that legitimized itself with a power of attorney from the clients. These service providers seem to be full of promises to clients to recover the money that was taken from them by the fraudsters. They advertise on their websites with high success rates. Their submissions are usually extensive but hardly adapted to the specific facts of the case and the legal situation in Switzerland. They are often virtually identical in terms of content. The claims against the banks are based on general legal principles that are not presented systematically and that origin in foreign and not applicable legal systems. As these submissions generally do not make it possible to determine exactly what happened to the clients concerned or to establish a basis for their claims against a bank, the Ombudsman has never had any successful mediation so far in such cases. He is therefore now closing such cases without any elaborate investigation. He recommends the clients to carefully check the representatives they want to instruct to reclaim the money lost to fraudsters. Otherwise, they risk losing even more money with dubious internet offerings after the loss suffered as a result of the fraud.

Referring now to the individual cases concerning fraud: In case 2023/07, one of the many phishing cases is described. While it was undisputed that the client in question had entered his card data and the confirmation code for the transaction on a phishing website, the question arose as to why the bank's fraud prevention system could not identify the conspicuous transactions. In cases 2023/08, 2023/10 and 2023/11, the question arose whether a charge-back procedure for fraudulent card transactions was possible and whether the deadline had not yet expired. The client in case 2023/09 did not understand why the bank, after reporting the fraud, executed a transaction that was only described as “reserved” on his card account at the time of the fraud report.

Besides the chapters of fraud as well as investment advice and asset management, the Ombudsman dealt with numerous cases from other areas of activity of financial institutions during the reporting year. In the section entitled account/savings book, reference is made to cases 2023/02 and 2023/04, in which the bank refused to enter into a specific business relationship. Case 2023/05 in the chapter on payment transactions deals with a claim for damages for a non-execution of a payment order. In the area of loans, with the rise in interest rates, there were some few cases in which banks refused to comply with promised conditions for fixed-rate mortgages. One example is case 2023/12. After many years, it was once again disputed for the first time whether the international day-count convention could be applied to a particular mortgage (see case 2023/13). And, of course, the Ombudsman also dealt with disputes relating to fees in the reporting year. In case 2023/19, it was disputed whether the calculation basis for a non-termination fee after a failed money transfer was given. Case 2023/21 dealt with the problem of a fee for closing a vested benefits account, which seemed particularly high due to the special circumstances.

So much for the cases that are particularly worth mentioning. Other interesting cases from the Ombudsman’s activities are published here: Case studies - Bankingombudsman

## FACTS AND FIGURES

In the reporting year, the Ombudsman dealt with and closed a total of 2360 cases, of which 1489 were oral and 871 written. This corresponds to an 18% increase compared to the previous year (2006 cases), or 14% more in oral cases and 24% more in written cases.

In 303 cases (previous year 257), the Ombudsman contacted the financial institution, which corresponds to 35% of the total number of cases. After an in-depth analysis of the facts, the Ombudsman considered a compensation by the financial institution to be appropriate in 207 cases or two thirds of those interventions. In 95% of these cases, the financial institution agreed with the Ombudsman's opinion and accommodated the client.

50% of the clients come from German-speaking Switzerland, followed by 27% from abroad. The percentage from French-speaking Switzerland has increased from 16% to 20%. The percentage from Italian-speaking Switzerland remained unchanged at 3%.

In a total of 85% of the cases, the amount in dispute remained below 100 000 CHF.

The average time taken to process cases was fortunately stabilized in the year under review, despite an increase of 14% in oral cases and 24% in written cases. As in the previous year, two thirds of complainants received a final response within one month.

### Overview by subject area

Broken down by subject area, 69% of the 871 written cases concerned the area of **"Accounts, Payment Transactions, Cards"**. Fraud was the most common cause of problems in this area with 226 cases (+82%), after around 120 cases in each of the two previous years. Settlement issues were the cause in 132 cases and a restriction by the financial institution in 93 cases. Fee issues were involved in 57 disputes.

107 or 12% of all written cases were allocated to the subject area "**Stock Exchange, custody account".** In 62% of cases, the main cause of problems is the incorrect or incomplete processing of orders.

10% or 85 of all written cases related to the subject of **"Investment advice, assets management"**. These cases increased by 52% compared to the previous year. 54% of these cases focused on clients complaining about errors in advisory, followed by 32% of complaints regarding settlement problems.

In 7% or 61 of the written cases respectively, the Ombudsman dealt with complaints relating to **"Mortgages and loans".** The largest sub-area, with 50% of the cases, was again fixed-rate mortgages, where the focus was on disputes in connection with fees, primarily early repayment penalties.

### Overview of all causes of problems

Problems with settlement issues have been the most frequent cause in years, followed by problems of fraud, which again increased significantly in the reporting year.

## PUBLIC RELATIONS

The media conference took place as webcast on 23 May 2023. Feedback was very good, and the topic of credit card fraud was prominently addressed in the interests of prevention. Even in the aftermath, the number of media queries remained relatively high, and the Ombudsman's office was given the opportunity to present its position through various articles and interviews.

Most of the regular meetings, such as those held by the Financial Dispute Resolution Network (FIN-NET) or the International Network of Financial Services Ombudsman Schemes (INFO Network), were held online. Only the Annual Conference of the INFO Network was held physically and provided a valuable opportunity for the Ombudsman to exchange views and network internationally.

Also in 2023, representatives of the Ombudsman's office were again involved in public panel discussions and teaching events at universities.

## ASSETS WITHOUT CONTACT AND DORMANT ASSETS

Since 1996, besides acting as an information and mediation office, the Banking Ombudsman has also been responsible for the single point of contact for the search for assets without contact and dormant assets. In this function, the Ombudsman received 495 new search enquiries (448 in the previous year) related to the assets of one or more presumed bank clients. Of these, 477 (plus 10%) were considered sufficiently legitimate. 544 presumed bank clients (+8%) were compared with the central database of assets without contact and dormant assets. This resulted in assets of a total of 18 client relationships without contact, which could be made accessible to authorized persons. These 18 relationships corresponded to account/deposit values of CHF 1.1 million and the contents of 1 safe deposit box. 4 of these relationships involved search enquiries submitted by the beneficiaries in one of the previous years and which had been held as pending by the central claims office ever since, but where the account was only reported as having no contact by the bank within the year under review.

Since the current search system was introduced in 2001, the claims office has identified a total of 710 dormant accounts or accounts without contact and made CHF 139,4 million, and the contents of 73 safe deposit boxes accessible to eligible beneficiaries.

Representatives of the Banking Ombudsman’s Office are part of the “Narilo”-working group of the Swiss Bankers Association. This group is dedicated to coordinating, solving problems and improving processes around the issue of dormant assets and assets without contact. The working group met several times by telephone and personally in the reporting year.

Further information about the relevant guidelines and options for searching for assets with banks in Switzerland can be found here.