

Brief summary of the report on the Swiss Banking Ombudsman

The role of the banking ombudsman: non-binding arbitrator or judge?

- **90-page impact analysis on the Swiss Banking Ombudsman**
- **Swiss Banking Ombudsman scheme has proved its worth**
- **Ten recommendations for greater independence and improved governance**
- **Recommendations can be implemented within the existing concept**

To mark this year's 20th anniversary of the creation of the Swiss Banking Ombudsman Foundation, the Foundation Board commissioned a study designed to analyse the current concept and compare it with schemes in other countries, to examine the way in which the Banking Ombudsman has operated and fulfilled his mandate since creation of the scheme and to produce an outlook to include potential courses of action and recommendations.

This "anniversary task" has become all the more important because of the severe financial crisis, which saw the Banking Ombudsman receive a record number of complaints in 2009 and led FINMA to launch a debate on improving customer protection (FINMA Distribution Report 2010). In parallel with this, the level of acceptance among banks fell. Whereas between 86% and 95% of the Banking Ombudsman's recommendations were accepted by the banks in question in the period 2006 to 2008, that figure dropped to 73% in the crisis-hit year 2009.

All this raises the question of whether changes to the Banking Ombudsman concept are needed in order to be able to tackle the new challenges, while the unprecedented number of similar cases (e.g. complaints about Lehman Brothers and absolute return products) illustrates that there are limits to case-by-case treatment.

Dr Urs Philipp Roth-Cuony, former CEO and delegate of the Swiss Bankers Association, was commissioned to conduct the study in December 2010. His report, which runs to some 90 pages, considers the key issues and makes ten specific recommendations for the future definition of the Banking Ombudsman scheme.

In his study, Dr. Roth investigated the Ombudsman scheme in light of its regulatory basis and the actual procedures followed. He then compared this with the structure and developments in financial ombudsman schemes in the EU and various other countries around the world.

The results were discussed in structured interviews with representatives of banks, FINMA, the Ombudsman of Private Insurance and of SUVA, consumer organisations and various ombudsman's offices in other countries.

Banking Ombudsman meets EU standards

With regard to its regulatory basis and the informal way in which it conducts its business, the concept followed by the Swiss Banking Ombudsman is in line with the recommendations of the European Commission on:

- Independence and neutrality
- Transparency and efficiency
- Comprehensive powers of investigation (a duty on banks to provide information and allow access to files)
- Fair, adversarial proceedings, with the right to be heard
- Customer complaints are evaluated on the basis of what is right and fair
- Free service and a low threshold for complaining to the Banking Ombudsman
- Freedom of action and the right to be represented

The study concludes that the Swiss Banking Ombudsman is of an equivalent standard to foreign financial services ombudsman schemes.

“Some schemes go further than the Swiss system, in that the ombudsman has the power to make rulings, and not just recommendations,” notes Dr Roth. However, in his view, this is not critical for the ombudsman process and has not at present established itself as the standard in financial ombudsman systems. *“In fact, this is largely alien to the traditional ombudsman concept.”*

Liberal rules of procedure

Conversely, the report also finds that the Swiss Banking Ombudsman takes a very active approach to his non-binding arbitration role *“thanks to the liberal rules of procedure”*:

“He insists on establishing the facts in full, undertakes a detailed and professional assessment of the legal situation taking account of fairness considerations which he then communicates to the parties, and makes great efforts to convince the parties to accept his recommendations to achieve an amicable settlement to the dispute.”

The report finds that in this regard, he performs better than some foreign ombudsman schemes that do not provide for an active intermediation role for the ombudsman.

“The banks surveyed and FINMA have a largely positive opinion of both the institution of the Swiss Banking Ombudsman and its rules of procedure and practices.”

Only one consumer organisation expressed reservations about the independence and powers of the Banking Ombudsman.

Problem of collective dispute resolution

There were differences of opinion in particular over the question whether the Ombudsman should be entitled to issue general statements of a legal nature that go beyond individual cases.

“There have been particular controversies in relation to collective dispute resolution, which reflect the dilemma between doing justice to each individual case and efficiency in ombudsman proceedings. This is where the limitations of the traditional case-by-case approach emerge; the prospect of categories being created for the handling of similar cases suggests itself.”

Dr Roth recommends that the Foundation Board investigate whether the ombudsman or potentially an independent third party should be given the power to determine criteria and categories for collective dispute resolution.

The study resulted in a series of recommendations that can all be implemented within the current concept. Recommendations 1 to 4 focus on strengthening the ombudsman’s independence and transparency. Recommendations 5, 6 and 9 are aimed at improving governance.

The full reasoning behind the recommendations listed below is given in the study. As Dr Roth states:

“Even a good ombudsman scheme has scope for improvement and optimisation.”

Authority to issue decisions binding on banks

One consumer organisation said that it could imagine the Banking Ombudsman being given authority to issue decisions binding on banks in material disputes. However, bank representatives and FINMA reject this idea and could potentially envisage a *“court of arbitration for the industry, with separate personnel and functional separation from the ombudsman”*, which would then have the authority to issue decisions binding on banks.

In this context Dr Roth asks what the purpose of the ombudsman system really is:

“Should the ombudsman act as a non-binding arbitrator or should he be able to rule authoritatively on disputes, at no cost to the customer? Is a hybrid dispute settlement process of this kind, combining elements of non-binding arbitration with those of judicial-style rulings, really necessary

or are the customary instruments for definitive dispute settlement under Swiss law – namely courts and arbitration courts – sufficient?

Dr Roth takes the view that a court of arbitration for the financial sector is not on the agenda given the potentially low number of cases. Between 2006 and 2008, 86% to 95% of recommendations by the Banking Ombudsman were accepted by the parties. Acceptance fell to 73% in the crisis-hit year 2009, but climbed back to 80% in 2010.

The ordinary courts and Switzerland's well-developed system of courts of arbitration are sufficient to handle cases not resolved by non-binding arbitration.

A single ombudsman's office for all financial services providers:

"A single ombudsman's office for all financial services providers would have a degree of logic within a single financial market regulation system like that which we have in Switzerland," asserts the report. However, it says there are doubts over whether a single ombudsman's office of this kind would deliver real benefits for customers, so such a step is not considered essential.

"The picture is mixed at international level, but single ombudsman's offices are very much in the minority. It remains the case that not all segments of the financial industry in Switzerland have an ombudsman. If the banks were to decide to do this or be made to do so by FINMA, there would be a need to examine whether other segments of the financial services industry could be added to the existing ombudsman systems for insurance companies and banks."

Mediation role for the ombudsman:

The author also considered whether the Banking Ombudsman could additionally perform a mediation role in suitable cases. The liberal rules of procedure of the Swiss Banking Ombudsman would in any event allow for such an interpretation of his role.

"The role and value of mediation was fully recognised in the discussions with the various stakeholder groups. At the same time, however, it was rightly pointed out that there are sufficient professional providers in the market offering such a service. As such, there is no perceived need for the Banking Ombudsman to also move into mediation. The author has nothing to add to this view."

Recommendations

Based on his in-depth study, Dr Roth made the following recommendations to the Foundation Board:

- Recommendation 1: Amend the foundation deed, introducing a provision that the majority of Foundation Board members must be independent of banks. (Page 5)
- Recommendation 2: Introduce majority decision-making for budget decisions. (Page 6)
- Recommendation 3: Amend the contract of employment for the Banking Ombudsman to specify that his term of office is 5 years, as provided in the foundation deed. (Page 6)
- Recommendation 4: Create and publish a set of regulations governing possible conflicts of interest for employees of the Banking Ombudsman's Office and members of the Foundation Board. (Page 6)
- Recommendation 5: Publish the regulations governing the Ombudsman with the annex, together with the procedural provisions in the technical specifications; integrate the provisions on internal powers and organisational structure – which are not for publication – into a separate set of regulations. (Page 7)
- Recommendation 6: Clarify the “absence of jurisdiction rule” in relation to “official proceedings”. (Page 7)
- Recommendation 7: Investigate the possibility of joining the European FIN-NET network and join if appropriate. (Page 7)
- Recommendation 8: Define and publish a process for a collective dispute resolution, covering in particular rules (which may be authoritative) to establish criteria and categories for cases covered by the ombudsman, communication with stakeholder groups and the internal organisation of the Ombudsman's Office. (Page 8)
- Recommendation 9: Oblige banks to make their customers aware of the Banking Ombudsman's Office in a suitable manner. (Page 8)
- Recommendation 10: Maintain the separate ombudsman systems for the insurance and banking industries. (Page 11)

The complete study is available in German only and is published on our website.