

Swiss Banking Ombudsman - Annual Report 2011

Core points

The continuously changing banking world and even more so the deep shocks from the financial crisis of 2008/2009 led both the Foundation Board and the Ombudsman to evaluate if changes in the mission and self-conception of the institution are necessary, thus in view of the ability to offer an optimal support for banking customers to cope with the new circumstances. In the year under review, following issues were at the center of this dispute:

Should the Ombudsman not only support achievement of amicable solutions but also have the power to decide?

Distribution of Madoff- and Lehman products has caused problems to numerous investors. A survey conducted by the financial supervision FINMA has indicated that the primary reasons for this were shortfalls in the rules governing the relationship between bank and customer. With its report "rules on production and distribution of financial products to private customers, status, shortfalls and options for actions" (www.finma.ch-media-press releases 2010 → 10.11.2010: Distribution rules - FINMA launches discussion on ways to improve client protection - the report was released for public consultation on November 10, 2011), FINMA wanted to open a wide discussion in view of an improved customer protection and namely suggested to create an Ombudsman scheme for all financial service providers and to equip this entity with decision power. With this, the ombudsman would be in a position to issue decisions binding for the bank. One consumer organisation appreciated FINMA's respective position. Also, media covered the theme and the role of the Ombudsman was critically questioned.¹⁾

We, however, for valid reasons, could not adopt FINMA's suggestion, because we do not think that it would be in the customer's interest if the Ombudsman scheme would be converted into a kind of tribunal for the business sector. The advantages of the current solution are too obvious: Without decision power, the banks as well as the customers can communicate with the Ombudsman in a more open way since it must not be assumed that the details of this communication could in any way be held against them. In addition, we are convinced that the conversion of a mediation scheme into a legal procedure would increase the pressure on customers to gather legal assistance already in the stage of their contacts with the Ombudsman. As long as the decision power lies with them, the parties decide how far they want to commit themselves to something. On the other hand, we encouraged to amend the current concept for the - few but undesirable - cases when a bank, clearly against better knowledge, tries to elude from its responsibility. (Consultation for download in PDF: <http://bit.ly/IjjVvKR>.)

Position analysis

The internal and external discussion about the role of the Banking Ombudsman as well as the fact that the organisation can celebrate its 20-year existence in 2013 led the Foundation Board to decide for a position analysis. Main factors for this decision were the strong increase in the number of cases (keyword: "mass cases") and the related considerably reduced willingness of a

¹⁾ On 2/24/2012, FINMA published, as a result of consultation, a "Position paper FINMA rules of distribution" (regulation of production and distribution of financial products: www.finma.ch-media-press-releases-24.2.2012: FINMA proposes ways to improve client protection)

few banks to accept solutions suggested by the Ombudsman. The Foundation Board thus entrusted the former CEO of the Swiss Bankers Association, Urs Philipp Roth-Cuony, with the task to establish a study ("Evaluation BOM"). In view of the continuous discussion, the purpose of this study was to provide a founded analysis of the institution and the tasks of the Ombudsman as well as suggestions for further development of the scheme. Roth's 90-page report (Download: <http://bit.ly/JllQ6R>) addresses all questions and contains 10 specific recommendations for the future organisation. The Foundation Board has examined these recommendations and decided to adopt the majority of the suggested improvements of the rules and the procedure.

The study concludes: The concept of the Swiss Banking Ombudsman has proven to be successful and does in no way have to fear comparisons to foreign schemes. The basic rules and the informal procedures developed match the recommendations of the EU-commission and offer a guarantee for:

- Independence and neutrality
- Transparency and efficiency
- Comprehensive authority to clarify (obligation of banks to respond and disclose records)
- Fair and contradictory process, right to be heard
- Judgement of the complaints under the concept of justice and fairness
- A process free of charge and a low-threshold to contact the Ombudsman
- Freedom of action and the right of substitution.

Roth concludes that the competence to decide, as considered by FINMA, would not make sense. He points out that such a competence did not establish itself as a standard within Ombudsman schemes for international financial providers and is even alien to the classical concept of the Ombudsman.

Statistics

The statistical part reflects the development of the number of cases and its repartition following the different banking segments, geographical distribution and other meaningful criteria. In the year under review, a total of 1889 cases were submitted, which represents a small decrease versus 2010.

This number, however, is still considerably higher than the volume recorded before the all-time highs in 2008/2009. The further rise in the acceptance quote is remarkable: In 91% of all cases in which the ombudsman asked banks to take corrective action, the bank agreed. On the other hand, the trend for customers to challenge the Ombudsman's judgements not favourable for them continued. This trend, however, is most probably not limited to our area of activity. Many banking customers negatively recorded the situation around adverse currency- and debt developments, amply covered by media. In addition, the acceptance of opinions that deviate from the own one seems to be generally decreasing. To concede that a bank can be "right" seems, as a matter of principle, not acceptable to some banking customers.

At the same time, we do not want to hide that, every now and then, we have to struggle with banks - with a considerable investment in time and effort - in order to reach solutions and that, in some cases, our efforts are in vain even if the facts are clearly speaking for the customer. Whereas this happens rarely, it does evidently not promote the confidence of banking customers.

Unsatisfactory are also the cases with contradictory statements about what was said in verbal discussions, thus if a possible liability from the part of the bank exclusively depends on verbal statements, such as orders or verbal conclusions of contracts. In such cases, only evaluation of proof - the judge can do this - can, if at all, clarify matters.

Case examples

By selecting the interesting cases for the annual report, we found out - to our own surprise - how often the legitimation plays an important role, i.e. the question if somebody is entitled to dispose of account balances, to issue orders or has the right for information about the existence of a relationship. Such issues arise specifically in connection with heritages or assets belonging to minors. The examples demonstrate also that the office of the Ombudsman must, at all times, be in a position to deal with complex issues in the area of bank and customer and must keep an eye on and be able to cope with the ever changing developments in the banking business.

Generally, the examples are presented and weighted in a way that the key issues are addressed, but also that the possibility to draw conclusions on the identity of the customer and the bank is eliminated. They reflect the versatile and complex details and thoughts that flow into the Ombudsman's reflections and recommendations. It goes without saying that many customers are surprised by this complexity, as legal and aspects of fairness as well as the state of the art in banking need to be considered. It is our goal to inform customers in an understandable way about the decisive factors for the judgement and to argument in a way that the customer can share.

Dormant accounts

The number of demands in the area of search for dormant accounts slightly declined in the year under review. The resulting "hits", however, were lightly above the previous year, whereas the assets determined (5.4 million) moved below the year before. Since introduction of the search guidelines in 2001, a total of 268 dormant accounts and 30 bank safes could be identified and total assets of 37.1 million could be made available to beneficiaries. This underlines the still unbroken importance of this function.

Thank you

Our gratitude goes, also in this eventful year, to all involved parties:

- To the banking customers seeking our help and advice for their confidence in the institution and for their continuous hints about how to improve our activities
- To the banks for their predominantly constructive approach
- To the Foundation Board for its continuous and inspiring support of our activities
- To the media for the factual and informative media coverage
- To all employees for their commitment and their readiness to face future challenges with audacity and vigour.

Hanspeter Häni
Ombudsman