



An independent, impartial, specialised and confidential alternative for conflict management and dispute resolution in the Swiss financial sector.

ACTIVITY REPORT 2023

Financial Services Ombudsman (FINSOM) is a specialised mediation body for conflict management and dispute resolution in commercial and work relations in the Swiss financial sector. Recognised by the Federal Department of Finance (FDF) under the Financial Services Act (FinSA) in effect since 1st January 2020, FINSOM is also a member of INFO-Network¹ and an affiliate member of FIN-NET². Tax-exempt since 2018, FINSOM is the first public service mediation body in the Swiss financial sector. Its governance assures its independence from individuals, private interest groups and the public administration. This is FINSOM's public report on Commercial Mediation for the calendar year 2023 as required under art. 86 FinSA and art. 7 para. 2 Directive 2013/11/EU. For further information regarding FINSOM please visit : www.finsom.ch

¹ International Network of Financial Services Ombudsman Schemes (INFO-Network), <https://www.networkfso.org/>.

² Financial Dispute Resolution Network (FIN-NET), https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net_en.

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SUMMARY OF MEDIATION ACTIVITIES 2023

Total requests 2023	91
Commercial mediation/FinSA	86
Complaints	81%
Information requests	16%
Concerning an affiliated company	14%

Preliminary review of complaints	70
Admitted complaints	7%
Rejected complaints	93%

Plaintes admises	6
Vexacious but « not obviously »	33%
Company participation required	83%
Company participation not required	17%

Rejected complaints	64
Obviously vexatious	3%
Art. 75 para 4 let. b FinSA	6%
FINSOM isn't competent - referred	91%

Rejected complaints	58
Other financial Ombudsman CH	50%
Foreign financial Ombudsman	9%
Other commercial Ombudsman CH	7%
Company concerned	17%
Other organisations or authorities	17%

Residence	91
Foreign	56%
Switzerland	34%

Languages	91
EN	70%
FR	16%
DE	12%
IT	1%

Amount	CHF
Min.	0
Max.	>1mio

Duration	Average
Preliminary review	< 3hr/< 3days
Procedure	< 90days

Fraud	21
Online investment	76%
Asset recovery	5%
Other	19%

In 2023, FINSOM handled a total of 91 requests, 86 of which concerned relations between clients and professionals (commercial mediation), 70 complaints from dissatisfied clients and 16 requests for information. Less than 15% of the 86 requests concerned companies affiliated to FINSOM.

Of the 91 requests, 5 concerned work relations (workplace mediation) or relations between a private individual and the public administration (administrative mediation). The latter did not concern affiliated companies.

Requests generally come from dissatisfied private clients. However, FINSOM also handles requests from professional clients and employees, and responds to requests from affiliated companies and the public.

If a company doesn't meet expectations

If an affiliated company doesn't meet the expectations of a client or employee, it is possible to contact FINSOM free of charge by phone, e-mail or by post, to request general information³ or mediation (or 'file a complaint').

³ FINSOM does not provide legal advice or distribute the services of third parties.

If it is a complaint (preliminary review)

Before admitting a complaint to mediation or mandating a mediator, FINSOM first verifies its competence as defined under Art. 98 FinSO⁴. If FINSOM is competent, it will examine the conditions for admission under Art. 75 para. 4 FinSA. If a complaint is admitted, FINSOM also assesses the chances of success of mediation (art. 75 para. 7 FinSA) before mandating a mediator (art. 84 para. 2 lit. a and b FinSA) or contacting the affiliated company for its participation (art. 78 FinSA).

A complaint may concern an amount from CHF 0. On average, FINSOM responds to requests within 1 to 3 working days and the preliminary review takes less than 3 working hours once the client has submitted all the necessary information.

If a complaint is admitted to mediation

If a complaint is admitted to mediation, the mediation procedure can take place at a distance, by telephone, videoconference or in writing. One of the parties may be domiciled abroad, and proximity is not necessary to conduct a commercial mediation procedure. Face-to-face sessions may, however, be more efficient and effective for workplace mediation.

The procedure may be conducted in French, German, Italian or English. The maximum duration of a mediation procedure is usually limited to 90 days. This limit may be extended if the procedure has a chance of success.

If the complaint is admissible under the conditions of art. 75 para. 4 FinSA but doomed to failure within the meaning of art. 75 para. 7 FinSA, the complaint will be admitted but the participation of the company concerned will not be required. FINSOM will try to help the complainant find a satisfactory solution, if possible.

If a complaint is rejected

If FINSOM is not competent (Art. 98 FinSO) to deal with the complaint or if the complaint is not admissible under the conditions set out in Art. 75 para. 4 FinSA, the complainant will be oriented to the extent possible.

Among other things, if the client has not made a reasonable attempt to find a solution with the affiliated company before referring the matter to the ombudsman office (Art. 75 para. 4 let. b FinSA), FINSOM will refer the client to the company concerned. If another mediation body is competent, FINSOM will refer the complainant to that body. If there is no competent mediation body, FINSOM will refer the complainant as best it can depending on the available options.

If the company is fictitious, if there is identity theft or illegal activity

If a complaint contains concrete evidence of a fictitious company purporting to operate in the Swiss financial sector and/or of identity theft, the ombudsman office is not competent. Complainants will be referred to the competent criminal authorities in Switzerland and/or abroad. If the name of the company or website involved is not already on the warning list⁵ of the Financial Market Supervisory Authority (FINMA), FINSOM will inform the latter (art. 88 FinSA).

If a complaint presents concrete evidence of an activity carried out illegally⁶ in the Swiss financial sector (i.e. without the necessary authorisation), the ombudsman office is not competent. Complainants will be referred according to the circumstances and FINSOM will inform FINMA (art. 88 FinSA).

⁴ Financial Services Ordinance (FinSO)

⁵ <https://www.finma.ch/en/finma-public/warnungen/>

⁶ <https://finsom.ch/the-fight-against-unauthorised-providers/>

COMMERCIAL MEDIATION 2023 IN BRIEF

“In the majority of admitted complaints, the mediation body was able to help the client or the parties find a satisfactory solution”

Of the 70 complaints processed in 2023, FINSOM admitted 6 complaints according to the conditions of Art. 75 para. 4 FinSA. Of these complaints, 4 concerned affiliated companies, 2 of which were vexatious but not “obviously” within the meaning of Art. 75 para. 4 let. c FinSA. FINSOM also admitted 2 complaints concerning a financial services provider whose Swiss distributor was the only one affiliated.

FINSOM is pleased to note that most of the affiliated companies concerned by admitted complaints participated in the mediation procedure, as necessary, so that client complaints could be resolved quickly. In the majority of admitted complaints, the mediation body was able to help the client or the parties find a satisfactory solution, without always requiring several meetings (or mediation sessions). The company's participation wasn't always necessary.

According to the information available to FINSOM, the mediation body was able to avoid some hasty denunciations to the prudential supervisory authority and some unfounded civil or criminal complaints to the Swiss judicial authorities, that could be resolved otherwise. In some cases, FINSOM was also able to help maintain the business relationship, even though it wasn't always possible to meet the client's demands.

In 2023, most of the complaints were rejected because FINSOM wasn't competent (art. 98 FinSO). In a few cases, the client hadn't yet complained to the company concerned seeking a solution (art. 75 para. 4 let. b FinSA). In 2 cases, the complaints were “obviously vexatious” (art. 75 para. 4 let. c FinSA).

“Most of the complaints were rejected because FINSOM wasn't competent”

FINSOM also rejected a few complaints from private clients who had been victims of fraud. In some cases, private clients tried to take action against a financial intermediary with the “help” of a dodgy asset recovery service. The financial intermediary was sometimes affiliated to another mediation body and FINSOM was able to refer the complaint to it. In other cases, the financial intermediary did not have a mediation body or the complaint was directed against a fraudulent website or a fictitious company. In one case, the fraud involved the identity theft of an affiliated company and its administrators.

FINSOM reminds that a mediation body is not competent to investigate, nor to force a party to do or not to do something, nor to order the restitution of assets or compensation, nor to seize funds, nor to judge or condemn one or other of the parties, nor to withdraw a licence to practice.

A commercial mediation body can, however, contribute to the appropriate management of enterprise risks and the protection of the reputation of an economic sector, by helping a company and a client resolve a complaint resulting from the client's dissatisfaction. The commercial mediation body can also contribute to relieving the civil and criminal justice systems and the financial markets' prudential supervision, by carrying out a preliminary examination of a complaint on the basis of the information at its disposal. In some cases, it can also help the complainant find a better solution than a denunciation or

the filing of a judicial complaint in Switzerland, which has little or no chance of success.

“FINSOM also rejected a few complaints from clients who had been victims of fraud”

Because of the confidentiality of the mediation procedure (art. 75 al. 2 and 3 FinSA), FINSOM shares below some comments and reminders relating to the complaints admitted and rejected in 2023 in compliance with this confidentiality.

COMMENTS REGARDING ADMITTED COMPLAINTS

The importance of transparency with the mediation body and confidentiality

The 2 complaints that turned out to be abusive, after having been admitted, were defended by a legal representative. The represented clients were seeking restitution of their assets following investment losses. According to the clients, the financial services provider had not adequately informed them of the risks involved. In support of their claims, the clients submitted excerpts from their client files, among other things.

“Excerpts from the client files were incomplete, even selective”

During the first exchange with the financial services provider, it quickly became apparent that the excerpts from the client files were incomplete, even selective. Additional information and explanations provided by the affiliated company revealed that the complaints were vexatious.

As mediation was bound to fail, FINSOM drew the clients' attention to the relevant information that they had not provided at the outset, and possibly to their legal representative. FINSOM also drew the clients' attention to the low chances of success in court. According to the information available to FINSOM, the clients did not pursue their claims against the company.

“Transparency towards the mediation body is essential to determine the chances of success”

FINSOM reminds clients of the importance of being transparent with the ombudsman office when lodging a complaint or requesting mediation. If relevant information in the client file is not provided for the purpose of initiating a mediation procedure, it will probably be provided by the affiliated company. Even if the client is at fault, an attempt at mediation is not necessarily out of the question. However, transparency towards the mediation body (respectively the mediator) is essential to determine the chances of success.

In the same sense, FINSOM reminds companies that it is useful to take part in the mediation procedure by also being transparent, even in the event of a complaint deemed to be vexatious. The aim of the FinSA is to strengthen the protection of clients (trust), but the mediation body doesn't have a mandate to defend either party, as a representative or legal service, a consumer protection association or a branch organisation would.

The aim of the FinSA ombudsman office is above all to help the parties resolve their disputes quickly and efficiently if possible, in the interests of both parties. It is not impossible that the mediation body might be able to achieve this goal, even in the case of vexatious or unfounded complaints, or if the client alleges a criminal offence against the professional accompanied by civil claims.

FINSOM also reminds that the transparency of the parties with the mediation body (respectively the mediator) is protected by confidentiality rules. Statements made by the parties during the mediation procedure and correspondence between one of the parties and the ombudsman office may not be used in any other procedure (art. 75 para. 2 FinSA). The parties also do not have the right to inspect correspondence between the ombudsman office and the opposing party (art. 75 para. 3 FinSA).

“The transparency of the parties with the mediation body is protected by confidentiality”

Participation of the company isn't always necessary

"A mediation procedure was bound to fail even if the conditions for admission to mediation were met"

FINSOM handled a complaint from a client who complained about a false document. The document had been sent to a financial services provider, who had refused it and sent it to the client. The client's main aim was to determine the origin of the document without seeking financial compensation or the restitution of assets.

In view of the information provided by the client, including the affiliated company's responses to their written complaints, it was clear that a mediation procedure was bound to fail even if the conditions for admission to mediation were met.

The ombudsman office therefore assisted the client in finding alternative solutions that would meet its needs. The client found satisfactory solutions. The case was closed without the company's participation. The company was also not informed of the client's complaint. According to the information available to FINSOM, the business relationship was maintained between the parties.

FINSOM draws the attention of affiliated companies to the fact that they will not always be informed of the complaints handled by the mediation body, nor of the work carried out by it. The ombudsman office will take the appropriate steps to mediate, provided that mediation doesn't appear to have no chance of success from the outset (art. 75 para. 7 FinSA).

Even in the case of a complaint admissible under art. 75 para. 4 FinSA, the company's participation is not always necessary. However, this does not rule out the possibility of the commercial mediation body contributing to the resolution of a client complaint by helping the client find a satisfactory solution. The mediation body can even help resolve a rejected complaint that is "obviously vexatious".

To reduce the need for the affiliate company to allocate time and resources to participate in a mediation procedure, a fair complaints management policy as well as clear and complete written responses to their clients' complaints are always helpful.

"A fair complaints management policy as well as clear and complete written responses to their clients' complaints are always helpful"

A financial services provider without an Ombudsman Office

FINSOM handled a complaint concerning a financial services provider that was not affiliated to a mediation body in Switzerland. The private client requested the restitution of their funds following the termination of a contract. The financial services provider wasn't replying to the client's letters. The client announced their intention to report the company to the authorities.

As the company mentioned on the financial services provider's information sheet as a distributor in Switzerland was affiliated to FINSOM, the mediation body contacted the distributor. However, the latter replied that the client's complaint did not concern the distribution but the services provided. FINSOM therefore contacted the financial services provider, urging it to respond to the client. The latter contacted

"The mediation body could not therefore conduct the mediation procedure without the voluntary participation"

the complainant and the parties were able to reach an agreement on their own. However, the client returned a second time, complaining that the agreement between the parties had not been respected and that the financial services provider was again failing to respond.

Although FINSOM was able to contact the financial services provider concerned in both cases to encourage it to respond to the client, FINSOM was not competent within the meaning of Art. 98 FinSO given the lack of

affiliation. The mediation body could therefore not conduct the mediation procedure without the company's voluntary participation. FINSOM was also unable to refer the private client to another competent ombudsman office.

"If a private client opts out or a professional client opts in, the service provider no longer exclusively serves professional or institutional clients"

FINSOM reminds that *"financial services providers that do not provide financial services exclusively to institutional or professional clients in accordance with Article 4 paragraphs 3 and 4 must affiliate to an ombudsman at the latest on commencing their activity"* (art. 77 FinSA). In addition, the obligation to affiliate to a mediation body may also apply to client advisers registered in a FinSA register of advisers (art. 29 para. 1 let. c and 30 let. f FinSA). However, unlike the registration of client advisers (natural persons) in a FinSA register of advisers, affiliation to a mediation body is typically in the name of the company for which they carry out their activities. This company may be a sole proprietorship.

Art. 5 para. 1 FinSA provides the possibility for certain private clients and private investment structures set up for them to declare that they wish to be treated as professionals ("opting-out"). According to art. 5 para. 7 FinSA, financial service providers must also inform clients who are not private about the possibility of choosing to be treated as such ("opting-in") before providing any services. If a private client "opts out" or a professional client "opts in", the service provider no longer exclusively serves professional or institutional clients within the meaning of art. 77 FinSA and falls under the obligation to be affiliated to a mediation body.

FINSOM also reminds that "qualified investor" within the meaning of art. 10 of the Collective Investment Schemes Act (CISA) refers to "professional clients" within the meaning of art. 4 paras. 3 to 5 or art. 5 para. 1 (i.e. opt-in private clients) and 4 FinSA. However, the exemption from the obligation to affiliate to a mediation body refers only to "professional clients" within the meaning of *art. 4 para. 3 and 4* FinSA.

Finally, the obligation to affiliate to a mediation body is not limited to companies that offer financial instruments or services to private clients (including opt-out and opt-in clients) in Switzerland or from Switzerland. This obligation also applies to companies that provide the offered financial instruments or services.

COMMENTS ON REJECTED COMPLAINTS

Obviously vexatious complaints concerning AML due diligence

The "obviously vexatious" complaints handled by FINSOM in 2023 concerned anti-money laundering (AML) due diligence duties.

The first concerned a client who refused to renew the verification of their identity, arguing that this verification had already been carried out when the account was opened. The client demanded that the account be closed and to be allowed to withdraw the small balance, accusing the company of theft. Among other things, the client threatened to file a criminal complaint and to involve the press. FINSOM reminds clients that financial intermediaries are obliged to fulfil their AML due diligence duties and that the mediation body cannot and will not require them to do otherwise – even for small amounts.

"The obviously vexatious complaints concerned anti-money laundering (AML) due diligence duties"

The second case concerned a beneficial owner who had asked an acquaintance to open an account for them in order to circumvent the rules of the affiliated company. The beneficial owner wished to close the account and withdraw the balance of several thousand Swiss francs. The beneficial owner complained that the affiliated company did not recognise them as the contractual counterparty entitled to give such instructions. FINSOM

reminds that the contractual counterparty is entitled to give instructions to a financial intermediary, not the beneficial owner. Furthermore, it is not advisable for clients to attempt to circumvent a professional's rules in such a way.

Investment fraud and identity theft of an affiliated company

One of the complaints handled by FINSOM in 2023 concerned an investment fraud with no apparent link to Switzerland other than the identity theft of a FINSOM-affiliated company and its directors on a website under US jurisdiction.

"A criminal complaint had no chance of success"

Thanks to the company's information on its affiliation to FINSOM being easily accessible to the public (on the company's website), a person knowing victims contacted FINSOM to warn it of the fraudulent website.

Following a review of the website, which showed all the signs of fraud, FINSOM informed the affiliated company of its reputational risk and advised it on the steps to take to inform the public and report the website to the domain registry and the relevant foreign authority. The site was quickly shut down, but two others reappeared immediately afterwards, necessitating a repeat of the procedure. There is still one video on an online video-sharing platform that the company is struggling to have removed.

As identity theft was not yet a criminal offence in Switzerland at the time of the incident, a criminal complaint had no chance of success. As the perpetrator of the identity theft was unknown, it would also have been necessary to file a criminal complaint against an unknown person (or 'X') and first identify the perpetrator. In addition, regarding the fraud, a rogatory commission would have been too complicated for the Swiss criminal justice to carry out on the basis of a report from the affiliated company that had little information. Apart from the impersonation of Swiss persons, there were no other apparent links to Switzerland. The victims of the fraud were domiciled abroad, and the perpetrators were most likely domiciled abroad as well. If a criminal complaint were to be filed, it would be more logical for the case to be reported to the foreign authorities by the clients.

"A rogatory commission would have been too complicated"

Victims of fraud sometimes try to turn against the financial intermediary

Among the complaints that FINSOM referred to other ombudsman offices or to companies that were not affiliated to an ombudsman office, some came from victims of fraud who were seeking redress against the financial intermediary. With the help of dodgy asset recovery services, the clients were accusing the latter of having failed to meet their obligations⁷.

These dodgy recovery services charge a few hundred francs simply to adapt a model letter, misleading clients as to its usefulness and their chances of success. Such services often increase the conviction and hope of clients regarding their right to reimbursement or the return of defrauded funds, while wasting time and costing the client more money.

While there are asset recovery services that clients can trust, others could be described as deception or a "rip-off" and contravene the rules of good faith within the meaning of the Unfair Competition Act (UCA). Others are outright scams following an initial fraud.

"The help of dodgy asset recovery services"

Furthermore, if a refund or restitution of assets by the financial intermediary is possible, the latter could be affiliated to a mediation body available to clients free of charge to examine their claims and, if possible,

⁷ Example: *Recovery of payments in an alleged fraud case*, Case number: 2020/07, Swiss Banking Ombudsman, 30 June 2021.

attempt mediation. Although some mediation bodies in the Swiss financial sector charge a fee to the client⁸, the cost of a service that only helps to lodge a complaint with the mediation body would increase the client's costs.

Asset recovery fraud can follow investment fraud

"Once a victim of a scam, the perpetrators have information regarding the clients"

Among the complaints handled by FINSOM, clients who have fallen victim to fraud sometimes explain that they were *proactively* contacted by an asset recovery service claiming to be a lawyer who is a member of the Swiss Federation of Lawyers (FSA) or a company listed in the Swiss Commercial Register. Victims are approached after unsuccessful attempts to claim the return of their assets.

Clients are so comforted by the idea of being able to recover their assets that they don't ask themselves how the recovery service could know that they needed help and had their contact details. They also don't do or know how to do sufficient due diligence to detect identity theft. Some will have tried to check the entry in the FSA's membership register or the commercial register to establish that a lawyer or company exists in Switzerland. However, they will not have sufficiently examined the data entered or consulted other sources that would enable them to detect or at least suspect a new fraud.

Unfortunately, once a victim of a scam, the perpetrators have information regarding the clients and can cleverly try to mislead them once again.

The fight against fraud also depends on the participation of clients

As for the accusations that financial intermediaries failed to fulfil their obligations, FINSOM also notes that clients who have fallen victim to fraud sometimes explain that the financial intermediary had tried to advise them against carrying out transactions. However, clients trusted the fraudsters more because they were attracted by the lure of profits and convinced by aggressive sales practices.

Sometimes, following the scammers' advice, clients even make several transfers in small amounts spaced out over time to avoid detection of unusual transactions. Some clients are so trusting of the scammers that they allow them to connect to their computers remotely to fill in online credit applications while the clients watch this "assistance".

"The financial intermediary had tried to advise them against carrying out transactions. However, clients trusted the fraudsters more"

In such cases, any attempt to take legal action against the financial intermediary for executing the client's orders has little chance of success. FINSOM reminds that the fight against fraud also depends on the participation of clients in the protection of their assets.

A NEW ONLINE TRAINING

In 2023, FINSOM also developed an online training on "The FinSA Mediation Body and Risk Management". This course is aimed at anyone working in the Swiss financial sector or interested in Alternative Dispute Resolution (ADR) such as mediation, in particular commercial mediation. This includes professionals who monitor compliance with the obligation to join FinSA Ombudsman Office and the respective duties, providers of training and advice on FinSA requirements and risk management, Risk and Compliance functions, legal services, as well as persons interested in the profession of mediator in commercial relations or in the regulation of mediation. For more information, please visit FINSOM's website⁹.

⁸ https://finsom.ch/kgeld_2-2021-3/

⁹ <https://finsom.ch/finsom-indigita-finsa-training-ombudsman-risk-management/>

COMBATING ECONOMIC CRIME

According to the 2023 Annual Report on offences recorded by the police¹⁰, a total of 354 967 offences against property were recorded in 2023. This corresponds to 67.9% of all offences under the Swiss Criminal Code (SCC) recorded in 2023. It should be noted that the statistics relate only to « offences of which the police are aware, i.e. known crime. They do not, however, contain information on the black figure of crime, i.e. crime that is not known to the police ».

After declining steadily since 2013, the number of offences against property rose again in 2023 following the rise in 2022 (+11.5% in 2022; +17.6% and +53 079 offences in 2023). The increase between 2022 and 2023 is attributable to cases of fraud (+5119, +21.2%), among others. That said, 82% of “known” property offences still concern incidents of theft, robbery and property damage.

The few complaints concerning investment fraud handled by the financial sector ombudsman bodies are incomparable with the statistics of the criminal authorities¹¹:

Année	Fraud (art. 146 SCC)			Online investment		
	Police	Elucidation ¹²	Digital	Convictions ¹³	Police	Elucidation
2020	19 338	46,6%	70.4%	10.7%	-	-
2021	22 597	41.8%	76.2%	9.5%	5.5%	22,6%
2022	24 195	40.5%	75.8%	9.3%	6.6%	20.0%
2023	29 314	27.4%	79.8%	-	8.0%	5.6%

In addition, since the entry into force of Art. 179decies SCC on 1 September 2023, Switzerland had already recorded 478 cases of identity theft in 2023, 60.7% of which involved digital crime¹⁴. The elucidation and conviction rates are not yet available.

As for the figures for misappropriation (Art. 138 SCC) and criminal mismanagement (Art. 158 SCC), the number of recorded criminal offences is significantly lower than for fraud, with a higher elucidation and conviction rates. On average between 2020 and 2022, Switzerland recorded 1770 offences of misappropriation, with an elucidation rate of 88% and a conviction rate of 34%. For criminal mismanagement, the average was 311 criminal offences, with an elucidation rate of 94.3% and a conviction rate of 45.1%.

“Switzerland recently regulated part of the marketing activities in financial services through the FinSA”

Regarding unfair commercial practices (or unfair competition, art. 23 UCA), according to SECO's complaints statistics for 2023¹⁵, there were only 22 complaints relating to investments. What would upset the Swiss population the most would be advertising calls. Deception would only be in 3rd place. In total, only 11 criminal complaints were recorded in 2023, with 6 convictions and 9 dismissals. While telemarketing can be disturbing, it is hard to believe that it is the most significant risk of unfair competition for competitors, clients or the Swiss economy. Among other things, Switzerland recently regulated part of the marketing activities in financial

¹⁰ <https://www.bfs.admin.ch/bfs/en/home/news/whats-new.assetdetail.30566147.html>

¹¹ <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice.html>

¹² An offence is considered to have been solved when, from the point of view of the police, a person can be identified as a suspect in the offence. In the case of a collective offence, i.e. a group of suspects, the offence is deemed to have been solved as soon as only one of these suspects has been identified.

¹³ The rate includes both adult and juvenile convictions : <https://www.bfs.admin.ch/bfs/fr/home/statistiques/criminalite-droit-penal/justice-penale.html>

¹⁴ <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/police/digital-crime.html>

¹⁵ https://www.seco.admin.ch/seco/fr/home/Werbe_Geschaeftsmethoden/Unlauterer_Wettbewerb/statistische_angaben.html

services through the FinSA, including information duties on the risks (or “dangers”, art. 3 let. i UCA) relating to investments and financial services. FINMA also plays a role in combating unfair commercial practices in the financial sector.

“Fraud is the most recurrent digital crime offence in Switzerland in 2023”

It can be noted that fraud appears to be the most recurrent digital crime offence in Switzerland in 2023¹⁶. The number of fraud offences recorded by the police in Switzerland is rising, while the elucidation rate is falling, as is the number of convictions. The latter do not reach 50% of fraud offences elucidated by the police. The increase in offences relating to online investment fraud, with 2356 incidents recorded in 2023, follows this trend, with an elucidation rate in 2023 of less than a third of the rate recorded in the previous two years.

The reasons for these upward and downward trends are certainly diverse. The increase in online sales, the arrival of cryptocurrencies and the development of online financial services, which reduce the need for proximity to the company (or the adviser), are certainly contributing to the rise in recorded frauds. The perpetrators are not always in Switzerland and the websites used to commit the offence can be under foreign jurisdiction. The length of criminal investigations and appeals that influence when a conviction is entered in the criminal record¹⁷ also play a role. The alarm sounded in April 2024 regarding the overload of the Swiss criminal justice system - “*on the verge of collapse*”¹⁸ - could also explain a drop in the elucidation rate as well as the low conviction rate.

“The Swiss criminal justice system - on the verge of collapse”

Even if fraud (art. 146 SCC) represents only a “medium risk” of money laundering¹⁹, fraud involving identity theft (art. 179decies SCC) and/or fraudulent use of a computer (art. 147 SCC) are important risks for clients. While account balances are often less than CHF 10'000.00 when reporting a suspicion of money laundering to the Money Laundering Reporting Office (MROS) as a predicate offence, these balances do not reflect the amounts defrauded. Indeed, clients can lose all their savings, or even their retirement pension, sometimes exceeding several hundred thousand Swiss francs.

Generally speaking, economic crime also poses a significant risk to the reputation of professionals in various economic sectors and to the trust of clients, not to mention the successful development of the Swiss economy. While it is possible to insure against certain risks, i.e. to transfer part of the risk to insurance companies, this is not always the case. While it is not impossible to lodge a criminal complaint or to secure a conviction, this is not the quickest route and there is no certainty that the funds will be returned or that compensation will be paid. When it comes to fighting economic crime, the best thing is to prevent it.

“The best thing is to prevent it”

¹⁶ <https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/police/digital-crime.html>

¹⁷ Statistics on adult criminal convictions (SUS) are based on judgements entered in the criminal record. Convictions are not entered until the judgement has come into force. However, any appeals may take several years to process and, if the conviction is upheld, it is entered in the criminal record with the date of the first instance decision.

¹⁸ *Surcharge des autorités cantonales de poursuite pénale (Overburdening of cantonal prosecution authorities)*, La Conférence des directrices et directeurs des départements cantonaux de justice et police (CCDJP), 12.04.2024, <https://www.kkjpgd.ch/newsreader-fr/mm-srk-2.html>

¹⁹ *National Risk Assessment (NRA), Report on the national assessment of the risks of money laundering and terrorist financing in Switzerland*, Report of the interdepartmental coordinating group on combating money laundering and the financing of terrorism (CGMF), October 2021.

PROTECTING TRUST FOR THE SMOOTH RUNNING OF BUSINESS

“Dealing with authorised and prudentially supervised companies significantly reduces risks for clients”

FINSOM reminds that the *inherent*²⁰ risks of criminal offences against property in the financial sector are significant and concern both clients and professionals.

Regulation and prudential supervision of the financial market aim, among other things, to “*protect creditors, investors and insured persons against the consequences of a company becoming insolvent, unfair commercial practices or unequal treatment*”²¹. It also contributes to the fight against fraud and other criminal offences.

Indeed, dealing with authorised and prudentially supervised companies significantly reduces risks for clients. However, it is not enough to check that a company or adviser is authorised to operate in the financial sector²². One also needs to make sure that the person you are dealing with is who they claim to be.

To protect themselves, financial sector clients can obtain information from FINMA, which provides a range of resources to help them²³. FINSOM draws particular attention to FINMA's 10 tips for protecting oneself from unscrupulous service providers²⁴, which can also be used (by analogy) when clients do business with companies in other economic sectors. The intercantonal service Swiss Crime Prevention (SCP) also publishes useful information²⁵ to help avoid falling into certain traps.

“Make sure that the person you are dealing with is who they claim to be”

Authorised companies can also help to protect the client trust necessary for the smooth running of business, in particular by managing their enterprise risks appropriately and ensuring exemplary conduct - even in the face of dissatisfied clients. As persons with greater technical expertise in their field than private clients, authorised companies (who are themselves professional or institutional clients) can also play an important role in detecting unfair competition on the financial market. Authorised companies are also entitled to report to FINMA illegal activities in the Swiss financial sector that pose a risk both to clients and to the success of legitimate businesses, or even to the successful development of the Swiss economy. They can also report criminal offences that are prosecuted *ex officio*, such as fraud, misappropriation or criminal management, to the criminal courts.

“Authorised companies can also contribute to the protection of client trust, necessary for the smooth running of business”

Finally, clients and companies can contribute to the protection of their interests by supporting continuous improvement in the efficiency and effectiveness of regulation, prudential supervision, commercial mediation and the judicial authorities, as well as the quality of information available to the public.

²⁰ “Inherent risk” is defined as the initial risk, before any control measures are taken. A “residual risk” is the risk remaining after the implementation of control measures. Risk control includes implementing solutions to avoid, prevent and reduce risks.

²¹ <https://www.finma.ch/en/finma/activities/>

²² <https://finsom.ch/warning-against-misuse-of-public-register-entries/>

²³ <https://www.finma.ch/en/finma-public/>

²⁴ <https://finsom.ch/ten-tips-to-protect-yourself-from-unscrupulous-providers/>

²⁵ Exemple *Fraude à l'investissement en ligne (online investment fraud)*: <https://www.skppsc.ch/fr/sujets/internet/fraude-a-linvestissement-sur-internet/>

THE EXCESS AND INSUFFICIENCY OF COMMERCIAL MEDIATION BODIES

Since 2020, 8 commercial mediation bodies (or “offices”) for financial services (or “FinSA Ombudsman Offices”) have joined the Swiss Banking Ombudsman²⁶ (set up in 1993), the Private Insurance and SUVA Ombudsman (set up in 1972), and the Health Insurance Ombudsman (set up in 1993) in the Swiss financial sector.

“A higher number of mediation bodies can be seen for financial services than for banking services and insurance contracts”

Only the 8 ombudsman offices operate on the basis of a legal mandate defined by the FinSA and are recognised by the FDF and the companies affiliated to them. The other ombudsman offices act on the basis of a private mandate from the affiliated companies or their branch organisation and are recognised by their mandators.

However, all these specialised commercial mediation bodies are competent to deal with complaints from dissatisfied clients concerning the companies affiliated to them, after they have tried to find a solution with the latter. When certain conditions are met, these bodies can conduct a mediation procedure between the parties. They have no decision-making powers.

A higher number of mediation bodies can be seen for financial services than for banking services and insurance contracts. However, according to the public activity reports of the various bodies, the rate of complaints regarding banking services and insurance contracts is higher than the rate regarding financial services.

While Switzerland has set up too many ombudsman offices for financial services in relation to the rate of complaints, it is also noticeable that not all branches of the financial sector yet benefit from a specialised commercial mediation body that is competent and accessible at low cost, or even free of charge for dissatisfied clients, and recognised by professionals and the State. This is also not yet the case in all sectors of the Swiss economy. The existing mediation bodies in the Swiss financial sector are therefore not always competent to deal with complaints from dissatisfied clients and it is not always possible to refer clients to another mediation body.

When there is no competent commercial mediation body, it is sometimes sufficient to explain to the client that it would be preferable to try to find a solution with the company concerned before taking any further steps. If this has already been done unsuccessfully, there is still the option of referring the client to a legal adviser of their choice, a consumer protection association²⁷, the Federal Consumer Affairs Bureau (FCAB)²⁸, or a judicial authority.

“The rate of complaints concerning banking services and insurance contracts is higher than the rate concerning financial services”

It is also possible to replace the conciliation procedure with mediation in civil proceedings. However, the request for replacement must be made jointly (art. 213 Code of Civil Procedure, CPC) and the parties must agree on the organisation and funding of the procedure. These conditions can be difficult for the parties in dispute to meet.

In some cases, the client may choose to report the company to the State Secretariat for Economic Affairs (SECO)²⁹, the Swiss Commission for Fair

²⁶ The Swiss Banking Ombudsman is one of the 8 FinSA mediation bodies and is therefore recognised by the FDF for its activities relating to financial services.

²⁷ <https://www.konsum.admin.ch/bfk/fr/home/konsumenteninformationen/konsumentenorganisationen.html>

²⁸ <https://www.konsum.admin.ch/bfk/en/home.html>

²⁹ https://www.seco.admin.ch/seco/fr/home/Werbe_Geschaeftsmethoden/Unlauterer_Wettbewerb/Beschwerde_melden.html

Trading³⁰, the Competition Commission (COMCO)³¹, or a prudential supervisory authority (e.g. FINMA³², Occupational Pensions Supervisory Commission³³).

If these different options are not convincing, the client is sometimes content to tarnish the company's reputation in the eyes of those around him, the company's partners, or to publish a negative review of the company, seeking to circulate the information as widely as possible. Like legal proceedings, this last option can also damage the reputation of the economic sector concerned as a whole.

It would be preferable to be able to resolve the complaint of a dissatisfied client at the latest before a mediation body, within the framework of a confidential procedure, before taking any other steps, as encouraged by the FinSA.

“It would be preferable to be able to resolve the complaint of a dissatisfied client at the latest before a mediation body, within the framework of a confidential procedure”

THE NEED FOR REFLECTION AT FEDERAL LEVEL

“It would be preferable for Switzerland to ensure optimal conditions for the proper functioning of the free economy”

Given the size of the country and its markets, it should not be necessary to set up several commercial mediation bodies specialising in the same branch of an economic sector - especially if the majority of companies meet client expectations and manage any complaints from their clients appropriately.

When the likelihood of dissatisfied clients and failures in complaints management is low, decentralising complaints to several mediation bodies mainly generates additional costs without ensuring their effectiveness.

It would be preferable for Switzerland to ensure optimal conditions for the proper functioning of the free economy, i.e. free competition between private commercial enterprises and the protection of client trust, in order to facilitate business. It would also be preferable to find genuinely efficient and effective solutions to relieve the judicial authorities, instead of multiplying the number of mediation bodies and increasing the costs for companies, customers or taxpayers without just cause.

Given the development of mediation in Switzerland since the codification of civil procedure at federal level with the entry into force of the Code of Civil Procedure (CCP) in 2008, it is time to recognise that self-regulation of mediation bodies doesn't work any better than self-regulation of conciliation authorities or courts would.

In order to find the right balance between supply and demand for mediation as well as to guarantee the impartiality and technical skills of the mediation bodies in the Swiss financial sector, as in other sectors of the economy, the development of commercial mediation in Switzerland needs to be considered at federal level.

Consideration should also be given to improving coordination between specialised mediation bodies and the civil and criminal judicial authorities, to relieve the latter as much as possible.

“It would also be preferable to find genuinely efficient and effective solutions to relieve the judicial authorities”

³⁰ <https://www.faire-werbung.ch/fr/>

³¹ <https://www.weko.admin.ch/weko/en/home.html>

³² <https://www.finma.ch/en/finma-public/reporting-information/>

³³ <https://www.oak-bv.admin.ch/en/occupational-pension-supervisory-commission-opsc>

Thank you for your attention

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