OFS

Ombud Finance Switzerland
Ombud Finanzen Schweiz
Ombud Finance Suisse
Ombud Finanza Svizzera

Mediation Report

2020-2024

The scope of this report covers all mediations started from commencement of Ombud Finance Switzerland's activities up to 31 December 2024.

OFS was established as a foundation under Swiss law. Its purpose is to offer the services of recognized mediators who have qualified in two disciplines: as lawyers in the commercial/asset management field and as SBA-certified mediators*. Most mediation requests received by OFS are in the field of financial services. The mediations started in the period under review were only cases concerned with the relations between financial service providers and their clients.

* For the sake of simplicity and to assist the reader, we use the gender-neutral pronoun "they" to refer to the singular nouns "attorney" and "mediator".

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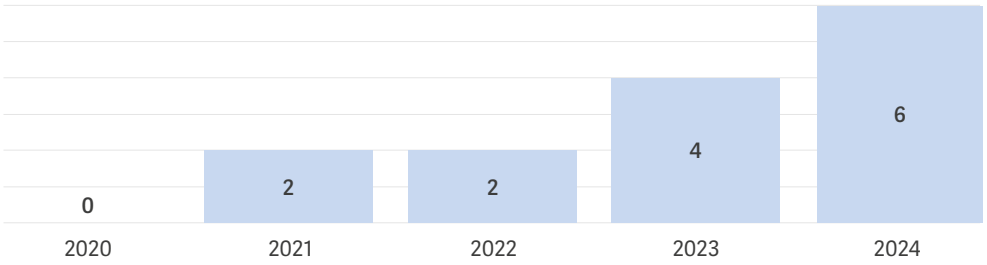
Content

1. Mediations started

Mediations 2020-2024

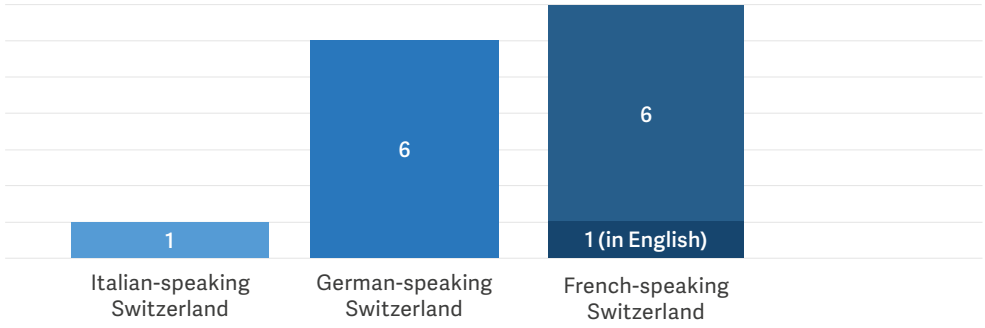


Thus a **total of 14 mediations** were started in the period under review.

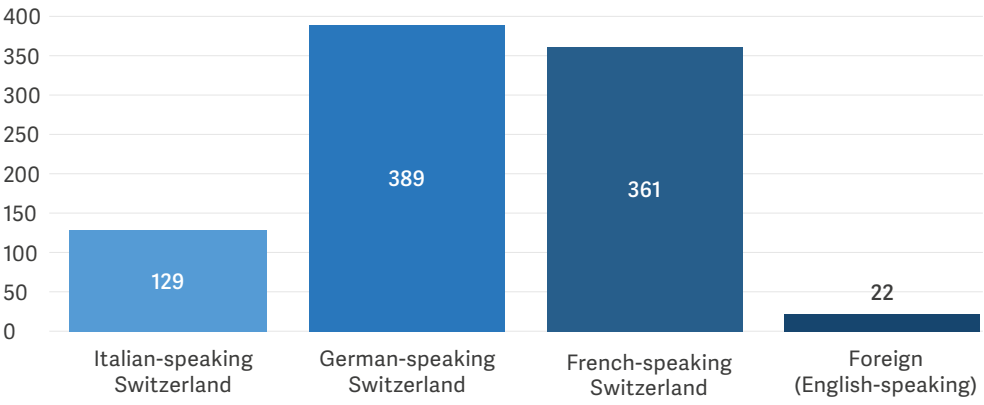
These were requests for mediations which were started and had led to mediation proceedings initiated or completed by the end of 2024. We will review these cases in greater detail below.

Cases are allocated to OFS mediators according to the parties' language of communication. Turns are then taken between mediators of the same language. Exceptions are made if a mediator is unavailable, a conflict of interests exists, or the parties have made a specific request.

By language region



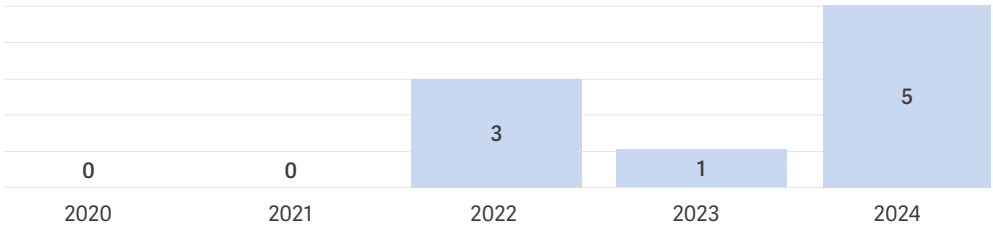
For comparison, the breakdown of languages among OFS members was as follows:



2 Most OFS members are natural persons; the majority are asset managers.

2. Other mediation-related inquiries

During this period, some parties raised questions, of which some could have prompted mediation proceedings. But such cases are relatively unusual, as the figures below show:



We passed on a small number of banking-related requests to the Swiss Banking Ombudsman. The figures listed here do not include them, as we did not keep an exact count (perhaps four over the entire period).

The inquiries on which we report here range from simple confirmations as to whether or not a financial service provider is an OFS member, to questions from dissatisfied clients. One request was for possible OFS involvement between two service providers. In one case, a mediator was brought in to help a client decide whether to commence mediation. The inquirer did not actually go ahead. Overall, we do not have enough information to examine these inquiries further.

The low number of these requests/questions is still remarkable: they are outnumbered by mediations. We believe this is probably attributable in part to the readily accessible, informal nature of the OFS mediation service.

The following is a breakdown of the languages of these inquiries:

	Italian-speaking Switzerland	German-speaking Switzerland	French-speaking Switzerland	Foreign
Clients	–	4	1	4
Service providers	–	6	3	–

Logically, these figures seem primarily to reflect the economic value of the contracts at issue. Of the foreign clients, two were German, seeking mediation with Zurich-based providers, while the other two international clients, not of German origin, sought mediation with providers based in Geneva. The four requests from German-speaking Switzerland related to providers in German-speaking Switzerland.

3. Mediations started and closed

Of the 14 mediations started up to 31 December 2024, two are still pending. All the others have been brought to a close.

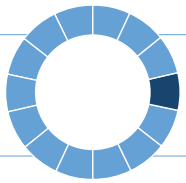
Five closed with a notice of termination of the mediation, i.e. agreement was not reached. One of these was settled by written assessment sent to the parties with the notice of termination of the mediation.

Seven finished in a negotiated settlement. These account for 58% of the mediation cases (7 out of 12).

4. Types of case mediated

4.1 Who requests mediation?

13 cases started by a **client**[3] (counting the two pending)



1 case started by a **service provider**

4.2 Amounts in dispute

Clear amounts in dispute were quoted in 12 of the 14 cases in progress at the end of 2024. This indicates a mean value in dispute of around CHF 350,000. Values range from CHF 40,000 to over CHF 1 million. Median value is CHF 170,951.50.

The remaining two cases are harder to quantify: the value of one was very low (CHF 2000 to CHF 10,000), while the other exceeded the mean quoted above. In the former case, only the management charges were in dispute whereas, in the latter, the claim was unquantified.

The compensation settlements agreed through mediation are often much lower than the sums quoted/claimed. The explanation is that parties claim recompense for their losses irrespective of whether there is any direct link to breach of an obligation, or without distinction between the different types of problem at issue. Another likely reason is a strategy of anchoring[4].

4.3 What types of case?

This report only covers the 12 mediated cases closed by 31.12.24, because case content is often revealed by the mediation, not just by the claim.

We have endeavoured to classify cases by type. Thus, we have identified nine relating to the general problem of loss of asset value, two concerned with charges alone and one special case.

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3 To preserve confidentiality/anonymity, all clients are referred to in gender-neutral terms. In fact 5 of the 14 requests were from women.

4 A negotiating strategy which consists of making a very high or very low opening offer, depending on the interest served, to steer the negotiation towards that figure.

Number of settlements reached by case type

	Special cases	Charges	Loss of asset value		
			No fault	Mismanagement	Serious mismanagement
Cases	1	2	4	3	2
Including agreements reached	_	1	3	2	1

Four of the nine cases relate to loss of asset value and raise problems of investments not conforming to client profile. These problems are often linked to breach of other duties, mainly that of information (especially far-reaching under asset management mandates). Mediation then enables the parties to reach a compromise between the client's position, including any degree of risk appetite or aversion, the management actions of the financial service provider, the contract documentation and the communications and relations between the parties during the mandate term. The discussions during mediation enable the parties to compare their understanding with the facts; to step back and explicitly or implicitly acknowledge their mistakes; and find common ground for possible agreement.

Of these four cases, three reached negotiated settlements in the form of a compensation payment.

For information, five of the 14 cases started involved retrocession (back-payment) problems, generally as an overlay to the main problem. We consider it relevant that the party requesting mediation and repayment of retrocessions in these five cases had the assistance of an attorney-at-law. This may be a "technical" or even tactical claim, as opposed to the client's direct perception of a problem of justice.

4.4 The special case

This matter involved an information request by the appointed heir of a possible client of the service provider. The facts dated back so far that the provider no longer held the requested information. As the requesting party was not the forced heir, the provider would, in any case, have been prohibited from disclosing the information. Mediation was therefore terminated without agreement.

4.5 The cases of charges

These are not cases about retrocessions but relate exclusively to charges.

The first was about the billing of charges not envisaged in the contract. The parties were: a group of clients referred by an ex-employee of the provider; the service provider; and the ex-employee. The clients only stayed while their AMLA files were being prepared: hence the charges. A solution, outlined during mediation, would have entailed extending the mediation to the the ex-employee who had referred those clients. One of the parties opposed this. Mediation was therefore terminated without agreement.

The second charge-related case was about the inexpertly negotiated implementation of the service provider's restructuring, associated with asset management for occupation pension provision (Swiss second pillar). The client felt compelled by the service provider to accept solutions in the interest of the provider, rather than of the client. The parties reached a negotiated settlement.

4.6 Cases of loss of asset value

4.6.1 Loss of value involving serious mismanagement

Both of the "loss of value involving serious mismanagement" cases also relate to unsuitable investments within the meaning of Article 12 FinSA. Both were cases of a one-man band: "managers" who combined tasks of preparing tax returns and asset management with insurance advice in the case in which the recommendation was made.

The case that ended in a negotiated settlement was between a client with no financial knowledge and the person who had filed tax returns, first for relatives of the client, then for the client personally. The asset management mandate granted was for a dynamic strategy, holding 80% in equities. The strategy was amended to "balanced" in 2019, while classifying the client as a qualified investor under the CISA. One investment, in a structured product, was lost in its entirety. The rest was invested in four funds, three of them issued by the same group. These losses were major. It is implausible that the choice of funds was strictly compatible with the client's interest. A negotiated solution was reached.

The other case concerned a person who held insurance products designed for his approaching retirement. Their advisor suggested switching to a new investment contract, including the capital from a first, matured insurance policy. The advisor drew up the contract documentation and completed the client's risk profile themselves. Apparently neither the profile, nor the "growth" strategy, still less the risks, were discussed with the client. The client learned that all the capital was invested in the management company's fund and the client would be unable to use a capital sum they needed. The management company refused to negotiate a settlement, and the mediator issued a case assessment, finding that the case should have been brought to an amicable conclusion.

In both cases, it is doubtful whether the persons claimed against held the necessary qualifications to engage in wealth management.

4.6.2 Loss of value involving mismanagement

A third case, also with an unsuitability element, likewise concerns managers whose qualifications were dubious. Prospected by telephone, a pensioner was persuaded to invest in derivatives. Though warned of possible losses, he became engaged and invested increasing amounts, urged on by the managers. A negotiated solution was reached.

The last case of potential unsuitability comprised many valid grounds relating to the contract documentation, especially a missing client profile and the choice of a dynamic strategy for an elderly person. Nevertheless, the complainants were unable to prove loss.

In response to a complaint from the client about investments made, a manager applied for mediation in the firm belief that their position was justified. The mediation revealed that the manager was probably in the wrong, but also that they lacked the resources for a possible negotiated settlement. By agreement between the parties, the mediation was brought to an end, obviously unresolved.

4.6.3 Other losses of asset value

In two cases, mediated and resolved by negotiation, the managers were not really guilty of mismanagement.

In the first, the investment made did conform to the management strategy, which was to invest in bonds only. Shortly after the disputed investment, the corporate bond issuer filed for debt restructuring. The manager proceeded to buy another tranche of bonds from the same company with a price floor which limited and even offset the loss incurred on the first investment. A negotiated agreement was reached.

In another case, the client entrusted part of their wealth to an external manager. The strategy was described as "intermediate", with risk tolerance ranging from a possible 25% return to a loss of 15%. Nevertheless, the contract documentation authorized very concentrated

investments (little diversification) and referred to a risk of total loss. The client complained when their losses reached 35%. Agreement was still reached.

In the third case, the client asked the manager to offer them speculative investments additional to their usual investments. The client suspected a conflict of interests. Mediation allayed these suspicions and confirmed that the client had accepted the risks of this investment, after due information. Therefore the manager was not liable for the losses suffered by the client.

Three-quarters of the wealth entrusted to a manager was invested in private equity and structured products. The contract documentation and agreed initial strategy were obsolete. However, it emerged that the client wanted to invest, with the associated risks and profits. The client realized that a large portion of the proposed investments were not liquid at all and had not been informed of this. The parties finally reached agreement.

4.7 Role of lawyers

We have also compared the outcomes (agreement/no agreement) according to whether **the party requesting the mediation** was assisted by an attorney-at-law.

	Applicant **assisted**	Applicant **non-assisted**
Negotiated agreements	3	4
No negotiated agreement	3	2

The same comparison was carried out according to whether **the party claimed against** assisted by an attorney-at-law.

	Defendant **assisted**	Defendant **non-assisted**
Negotiated agreements	4	3
No negotiated agreement	3	2

A slight reservation applies regarding the last table, as the legal advisors of the service providers do not necessarily appear in the mediation. We believe that, in both the cases which ended without agreement, the party claimed against had in fact been advised by an attorney not participating in the mediation. If it were necessary to reclassify the cases, we would have five cases of assisted parties claimed against, which finished without negotiated agreement. Conceivably, an attorney's assistance may lead to a more definitely "negative" outcome, and possibly more quickly.

At this stage, however, we believe that the assistance of an attorney, or otherwise, has little bearing on the outcome of the mediation. We do believe that this analysis would have to be repeated in a year or two, carrying out a comparison with the case types (4.3 above).

For information, in the case which closed with a recommendation, both parties were represented by a lawyer/certified corporate counsel.

5. OFS mediators' method of working

The legislature has opted to leave the creation of mediation bodies to private initiative. It has also decided only to define the minimum by law, leaving mediation bodies to define and offer their services, as permitted by the Federal Department of Finance. That is why only one article describes the actual process (Article 75 FinSA).

The industry was probably too concerned about the substantive content of the FinSA and FinIA to discuss with the authorities how to implement these Acts. It showed little interest in setting up such a body. It was third parties, with a general interest in mediation, which then offered bodies providing mediation services, like OFS, to financial service providers.

In the case of OFS, Rule 3.2 of its Rules of Procedure prioritizes mediation over assessment, in accordance with the law.

Thus the OFS mediators do not offer a solution in response to the parties' written submissions. While some mediators prefer to meet or speak to the parties separately at first, the usual practice is to launch the mediation with both parties, to help them find a solution. The mediator makes sure that each party is heard and observes their reception by the other party. The fact that mediators do not propose solutions avoids or reduces adversarial discussion. The proceedings remain open until a solution is found.

The mediators believe this practice is appropriate to the main subject of disputes referred to OFS, which is loss of asset value. In such disputes, the contract documentation generally does not tell the whole story.

6. The question of tripartite mediations

Two of the cases described above actually engage three parties. In both cases, this difficulty was probably one reason why the mediation did not lead to agreement. It is hard to figure out exactly why since the links between the service provider and its staff-member could not be explored. However, it is quite probable that the provider opted to preserve its rights vis-a-vis the employee in the context of separate or subsequent litigation.

It does not seem appropriate to compel a provider's employees to engage in mediation, especially by amendment of the Rules of Procedure. This would not be in the spirit of the mediation process set up by OFS.

7. The question of the assessment and proposal

As described above, in a case classified as one of loss of asset value involving serious mismanagement, the mediator decided to issue an assessment recommending a negotiated solution, in the form of a document separate from that closing the mediation.

8. Conclusions for financial service providers

The mediations conducted by the OFS mediators prompt some basic comments for the benefit of financial service providers.

- In the asset management field, it is always essential to document the client's stated wishes and rewrite the contract documentation as those wishes evolve. The client must complete the risk profile and investment strategy, which include questions to the client.
- When the client has specific requirements, these must be documented. Where applicable, suitable contract documentation must be drawn up. Of course, these wishes must be compatible with the client profile.
- All too often, financial service providers do not manage the question of retrocessions satisfactorily. As we know, client consent alone is not sufficient. The client must be able to gain a firm understanding of the direct costs (management charges) and indirect charges in the form of back-transfers and other remuneration, in order to evaluate the cost of the service. Financial service providers should have their contract documentation reviewed by a specialist lawyer.