

# COMMERCIAL MEDIATION

**FINANCIAL SERVICES OMBUDSMAN (FINSOM)**

**Commercial Mediation**

*Any reference to the masculine also applies to the feminine.*

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### 1. PURPOSE

1. Based on the Director's duties and competencies provided in the by-laws, these rules establish the rules of procedure for **Commercial Mediation** and complete the by-laws.

### 2. SCOPE

2. These rules apply to:
  - a. Affiliated companies (or "professionals") and their clients
  - b. FINSOM Mediators and Experts

### 3. OMBUDSMAN'S OFFICE

3. FINSOM is "the Ombudsman Office" or "Mediation Body". The Director is "the Ombudsman".
4. The persons appointed by FINSOM to conduct mediation procedures are "Mediators". The persons who support the mediators in a material and legal assessment are "Experts".
5. FINSOM can take action in cases of civil disputes between affiliated professionals and their clients.
6. Commercial Mediation gives clients the possibility to act, with the means at their disposal under civil law, in the event of possible misconduct by financial service providers.<sup>1</sup>
7. In principle, the FINSOM mediation procedure takes place before referring the matter to a conciliation authority, court, arbitration tribunal or administrative authority. However, it may also be initiated in the context of civil proceedings within the meaning of the Swiss Civil Procedure Code (CPC), an arbitration or administrative proceedings. In such case, these Rules apply by analogy with the exception of costs which may be apportioned between the parties.
8. The subject matter of Commercial Mediation may relate to actual disputes concerning claims, but also to any type of legitimate right, such as the right to the handing over of documents, data protection or compliance with rules of transparency or conduct.<sup>2</sup>
9. FINSOM does not accept disputes concerning financial service providers who are not affiliated.

### 4. HOTLINE

10. The hotline is the first point of contact. It deals with enquiries or complaints from companies and their private, professional or institutional clients. It provides guidance on the various methods of dispute resolution, assesses the suitability of mediation, checks the conditions of access to mediation and organises the mediation procedure.

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<sup>1</sup> FinSA Message p. 81035

<sup>2</sup> FinSA Message p.8195

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### **5. MEDIATORS AND EXPERTS**

11. The Mediator appointed by FINSOM directs and organises the mediation procedure independently without third party instructions.
12. The Mediator does not take sides and remains objective.
13. The Mediator must assess the limits of his expertise and knowledge and call on Experts for support, if necessary, in the material and legal assessments.
14. The principles of independence, impartiality, competence and confidentiality also apply to Experts appointed by FINSOM.

### **6. COMMERCIAL MEDIATION PROCEDURE**

#### **6.1. General Rules**

15. The Commercial Mediation procedure (hereinafter “the procedure”) must be fair, quick, objective, impartial and unbureaucratic.
16. The procedure is confidential:
  - a. Statements made by the parties during the procedure and correspondence between one of the parties and a FINSOM Mediator cannot be used outside of the procedure. This includes all material and legal assessments and the suggested solutions.
  - b. Parties are not allowed to consult the correspondence between the Mediator and the opposing party.
  - c. The Mediator may not share any information relating to the procedure with third parties including the legal authorities.
17. The procedure may be initiated at any time at the request of the client, the professional or their representative. The professional concerned has an obligation to participate.
18. If the same problems involving the same professional affect several clients, the clients may appoint a common representative.
19. The proceedings may be conducted in English, French, Italian or German, depending on the language agreed between the parties.
20. Reaching an agreement depends on the willingness of the parties and their participation in the procedure. FINSOM, the Mediator and the Experts do not have any decision-making authority.
21. Parties can use mediation without needing to call a lawyer or legal adviser. The procedure does not, however, preclude the parties from their right to an independent opinion or their right to be represented or assisted by a third party at any stage of the procedure.

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22. Filing a request for mediation with the ombudsman office does not prevent or prejudice a civil action. Nevertheless, recourse to the ombudsman's office does not suspend or limit the legal deadlines pertaining to limitation, forfeiture, or legal or administrative proceedings. The parties are responsible for adhering to these deadlines.
23. After bringing proceedings before an ombudsman, the plaintiff may unilaterally waive conciliation proceedings under the Civil Procedure Code.

### 6.2. Access Conditions

24. A request for mediation is admissible under the following *five* conditions:
  - a. The request is filed according to the instructions available on the FINSOM website.
  - b. The initiator credibly proves that they previously informed the other party of their point of view and attempted to reach an agreement.
  - c. The request is not obviously vexatious.
  - d. A mediation procedure has not already been conducted in the same matter.
  - e. The case is not being or has not been dealt with by a conciliation authority or by a court, court of arbitration or administrative authority.
25. Requests that fail to adhere to these criteria will be rejected.

### 6.3. Procedure

26. The Mediator hears the parties and tries to reconcile them.
27. The Mediator may ask for information or documents from the parties at any time.
28. If the Mediator considers that it is unlikely that the parties will come to an agreement or they do not come to an agreement between themselves, he can proceed to an independent material and legal assessment and suggest a non-binding solution or terminate the mediation.
29. The material and legal assessment is carried out on the basis of the information available to the mediation body. The Mediator must call upon an Expert to supplement his skills, if necessary.
30. The Mediator will give the parties a closing statement at the end of the procedure.
31. The procedure may take place at a distance or in person, at the request of the parties and the decision of the Mediator.

### 6.4. Duration

32. The outcome of the mediation is communicated within 90 calendar days from the date the Mediator receives the complete file.
33. The Mediator may, if he deems it useful, extend the deadline in a particularly complex dispute. Parties are informed of all extensions of the deadline and the estimated time required.

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### 6.5. End of the procedure

34. The mediation procedure ends if:

- a. The parties come to an agreement.
- b. The Mediator believes the mediation is destined to fail.
- c. Proceedings are brought before an arbitral authority, a court, an arbitral tribunal or an administrative authority.
- d. The client<sup>3</sup> withdraws their request or terminates the mediation procedure.

### 6.6. Costs

35. The procedure is free for the client.

## 7. ENTRY INTO FORCE

This regulation was adopted by the Director on **30 July 2020**. It is approved by the Federal Department of Finance (FDF).

*If there are any difficulties of interpretation due to a difference between the French and English version of these rules, the French version prevails.*

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<sup>3</sup> Art. 76 para. 2, Art. 75 para 4 let. b and Art. 78 FinSA.