



# 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 define the **Commercial Mediation/FinSA** procedure and complete the by-laws.
2. The rules of procedure meet the requirements of mediation within the meaning of the Financial Services Act (FinSA) and mediation within the meaning of the Code of Civil Procedure (CCP).

### 2. SCOPE

3. These rules apply to:
  - a. Parties in a mediation procedure and their representatives.
  - b. The Ombudsman Office (sec. 3).

### 3. OMBUDSMAN OFFICE

#### 3.1. Ombudsman

4. The Director of the *Ombudsman Office* ("FINSOM") is also a Mediator. He is the *Ombudsman*.
5. The appointment and duties of the Ombudsman are set out in the by-laws.

#### 3.2. Hotline

6. The Hotline receives the mediation request.
7. It carries out a *preliminary review* to determine whether the request meets the access conditions and decides whether to admit or refuse it.
8. If the request is refused, the Hotline will, as far as possible, try to direct the requestor towards a more appropriate approach or procedure.
9. If the request is admitted, the Hotline takes the appropriate measures to organise the mediation procedure.

#### 3.3. Mediators and Experts

10. Persons appointed by FINSOM to conduct mediation procedures and perform independent assessments are *Mediators*.
11. The persons appointed by FINSOM to perform independent assessments are *Experts*.

#### 3.4. Independence and impartiality

12. The Ombudsman, Hotline, Mediators and Experts freely assess the cases submitted to them. They are not subject to any directives.

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### 4. COMMERCIAL MEDIATION

#### 4.1. Scope

13. Commercial Mediation concerns the relationship between *professionals and their clients* (individuals or companies).
14. If dissatisfied, the customer should first complain to the professional and try to reach an agreement with him before referring the matter to the Ombudsman Office.
15. In case of commercial conflict, Commercial Mediation encourages the parties to try to find solutions themselves *before* the situation degenerates to the point of terminating a business relationship or referring the matter to a conciliation authority, a court, a court of arbitration or an administrative authority.
16. FINSOM can also be designated for a mediation procedure *after* referral to a conciliation authority, a court, a court of arbitration or an administrative authority.
17. The grounds for dissatisfaction may relate to claims, but also to any type of legitimate right, such as the right to obtain documents or data protection, as well as compliance with the rules of conduct, transparency at the point of sale, quality or after-sales service.<sup>1</sup>
18. The mediation procedure can be an alternative to a conciliation, judicial, arbitration or administrative procedure.
19. The Ombudsman Office is not a substitute for consumer protection organisations or organisations that defend the interests of professionals. FINSOM is neither a legal, social, medical, nor a therapeutic counsel.

#### 4.2. General rules

20. FINSOM is competent to conduct mediation concerning an affiliated company (or "professional").
21. Provided that the conditions for access (sec. 4.4) are met, the mediation procedure can be opened at any time.
22. If a client's unilateral request for mediation is admitted, the professional must participate.
23. If the same problems involving the same professional affect several clients, they may appoint a common representative.
24. The mediation procedure must be unbureaucratic, fair, quick, and impartial. It is confidential (sec. 4.3).
25. The outcome of the procedure depends on the willingness of the parties. FINSOM does not issue a decision or propose a judgement.
26. The filing of a mediation request with FINSOM does not preclude a civil action. However, the request does not suspend or limit legal time limits, such as those relating to limitation, confiscation

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<sup>1</sup> FinSA Message p.8195

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or judicial or administrative proceedings. The parties are responsible for complying with these time limits.

### 4.3. Confidentiality

27. If the request is unilateral (sec. 4.4), FINSOM does not take any steps to contact the other party without the consent of the requesting party.
28. The statements made by the parties within the framework of mediation proceedings and the correspondence between a party and FINSOM may not be used in other proceedings.
29. Parties are not allowed to consult the correspondence between FINSOM and the opposing party.
30. If one of the parties transmits information to FINSOM that it does not wish to share with the other party, the first party must specify this in writing when transmitting the information. In the absence of such a specification, the information provided by one of the parties may be shared with the other party.
31. FINSOM may not share any of the above information with third parties, including judicial authorities.

### 4.4. Access Conditions

32. The mediation request must be submitted in accordance with FINSOM's instructions.
33. To be admitted, mediation cannot appear from the outset to have no chance of success and the mediation request must meet the following conditions:
  - a. If no conciliation authority, court, court of arbitration or administrative authority is or has been seized of the case, and if mediation has not already been conducted in the same case, the request *can be unilateral or joint*.
  - b. If a conciliation authority, a court, a court of arbitration or an administrative authority is or has been seized of the case, or if mediation has already been conducted in the same case, the request *must be joint*. Ongoing civil or criminal proceedings must be suspended or replaced by mediation.
34. If the Commercial Mediation request is unilateral, the requesting party must credibly prove that they have previously informed the other party of their point of view and attempted to reach an agreement with them.
35. Requests that do not meet the above conditions or that are obviously vexatious are refused.

### 4.5. Procedure

36. The procedure may take place at a distance or in person, at the decision of the Mediator.
37. The procedure can be conducted in French, English, Italian or German, depending on the language agreed between the parties or chosen by the requestor.
38. The Mediator hears the parties and tries to conciliate them.

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39. The Mediator can request discussions, information, or documents from the parties at any time.
40. The Mediator can perform an *independent material and/or legal assessment* based on the information at his disposal but does not issue a decision or propose a judgment.
41. The Mediator brings in an Expert to complement his skills, if necessary.
42. The conclusion of an agreement is subject to the willingness of the parties.
43. At the end of the procedure, the Mediator notifies the parties of its closure.

#### 4.6. Duration

44. The outcome of the mediation is communicated within 90 calendar days from the date the Mediator receives the complete file.
45. The Mediator can extend this time limit if he deems it useful. The parties are informed of any such extension.

#### 4.7. End of the procedure

46. The mediation procedure ends if:
  - a. The parties reach an agreement.
  - b. The conditions for access are no longer met.
  - c. A requestor withdraws their request or terminates the mediation procedure.

#### 4.8. Procedural fees

47. In the event of a request as per art. 33 let. a, the procedural fees are borne by the affiliated professional.
48. In the event of a request as per art. 33 let. b, the division of the procedural fees must be agreed between the parties.
49. FINSOM may request advance payments.

## 5. ENTRY INTO FORCE

This regulation was adopted by the Director on **4th August 2023**. 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.*