

Acceptance of costs for CAPA clarifications regarding a customer's mental competence

Topic: **Account / Savings account** Case number: **2018/02**

The bank had doubts that its long-standing customer was of sound mind and judgement to make asset management decisions and requested confirmation from the Child and Adult Protection Authority (CAPA) of the customer's mental competence for an account closure he had requested. The latter arranged for a psychiatric assessment of the customer and, after submission of the expert opinion, refrained from implementing adult protection measures in relation to asset management matters because the expert concluded that the customer's mental competence was not impaired. The customer demanded that the bank bear the costs associated with the CAPA process, amounting to approximately 5,000 CHF. The bank was not willing to do so. The customer therefore asked the Ombudsman to initiate mediation proceedings. The latter found the customer's arguments unconvincing. He therefore closed the case with an explanatory notice to the customer.

The customer wished to transfer a large sum of money to a company account in a remote foreign country. The bank had doubts in connection with this transfer regarding the customer's mental competence in asset management-related matters. In particular, the bank feared that the customer was being heavily influenced by a closely associated person which was affecting his ability to make sound decisions in such matters. The bank therefore monitored the customer's instructions closely and restricted his ability to access his funds. As a result, the customer wished to terminate the account relationship. For the corresponding instruction to close the account, the bank requested confirmation from CAPA that the customer was mentally competent in asset management-related matters. The latter arranged for a psychiatric assessment of the customer. In a detailed report, the psychiatrist responsible concluded that the customer's mental competence was not impaired. Based on the results of the expert assessment, CAPA refrained from initiating adult protection measures and confirmed the customer's mental competence in asset management-related matters.

The cost of the CAPA process, together with the assessment, was approximately 5,000 CHF. The customer, represented by a lawyer, claimed that the bank had to bear these costs since they had been incurred as a result of its requests. The bank refused to do so. It claimed that seeking clarification regarding a customer's mental competence was part of its duty of care where it had doubts in this respect. The customer, through his lawyer, disagreed with this and asked the Ombudsman to initiate mediation proceedings. The lawyer claimed that the bank's requirements were not comprehensible. At no point had the customer's capacity to act been restricted by CAPA. According to the lawyer, it was not for the bank to make judgements as to why a customer may wish to close his account. On the contrary, the customer was entitled to close said account at any time without giving a reason. Since the expert report ultimately confirmed that there was no impairment of the customer's mental competence, he was clearly entitled to full compensation for the costs incurred.

Based on the documents submitted to him by the customer's lawyer, the Ombudsman first considered the question of what the legal basis could be for the request to bear the costs of the CAPA procedure.

In his opinion, such a claim for compensation would require the bank to have caused the damage asserted by the customer through a breach of contract with a sufficient causal connection, and fault on the part of the bank. An agent can in principle make assumptions about a client's mental competence. If, however, there are reasons to doubt said competence then, under his duty of loyalty, he is required to clarify, or seek clarification regarding, the issue of mental competence by appropriate means. This is usually extremely problematic. The Ombudsman receives roughly the same amount of complaints in which it is asserted that the bank neglectfully authorised instructions from a mentally incompetent customer as those claiming that the bank questioned a customer's mental competence unnecessarily.

In the Ombudsman's view, the CAPA confirmation requested by the bank is always a reasonable and appropriate means of seeking such a clarification. In the present case, without expert support, CAPA was clearly not in a position to issue the requested confirmation and therefore commissioned a psychiatric assessment which ultimately enabled it to issue said confirmation.

The Ombudsman considered that the bank's actions could then be deemed in breach of contract if the doubts regarding the customer's mental competence had been completely arbitrary and unfounded. The information that could be gleaned from the documentation did not give the Ombudsman a clear and full picture of the exact circumstances that induced the bank to request confirmation of the customer's mental competence from CAPA. Having said that, there was also no indication in the information available that this had happened arbitrarily and without good reason either however. The customer did not provide him with the psychiatric assessment report. The Ombudsman had to assume that CAPA would probably not have enlisted the help of an external expert if there was no reason to doubt the customer's mental competence. In the Ombudsman's view, there was no obligation on the part of the bank to provide compensation simply due to the fact that, after extensive clarifications, the expert ultimately concluded that the customer was mentally competent. The Ombudsman therefore concluded that there were no compelling arguments to motivate the bank to offer the customer a gesture of goodwill in mediation proceedings and closed the case with a notice sent to the customer's legal representative.