

# Damage due to inadequate monitoring of the securities portfolio by the bank as part of an investment advisory mandate

Topic: **Investment advice** Case number: **2023/15**

The client had concluded an investment advisory agreement with the bank in 2018. She had her banking transactions carried out by her husband, who was authorized to do so. Both were at an advanced age and had major health problems in 2022. Her securities portfolio consisted exclusively of equities, specifically a few individual stocks that had performed exceptionally poorly in 2022 compared to the market as a whole. The book losses were considerable at the end of 2022. The authorized husband accused the bank of having seriously breached its obligations under the investment advisory agreement by never informing him of the poor performance and not making any suggestions for further action. The bank rejected these accusations. The dispute could not be resolved in the Ombudsman proceedings, particularly as the parties provided completely different accounts of the events.

The parties only agreed on a few points with regard to the facts relevant to the dispute. They agreed that the investment advisory agreement was only chosen because it was associated with a fee model that was more favorable for the couple's needs than the so-called execution-only model at the specific bank, since it provided for a flat rate for transaction and custody fees. Otherwise, the couple would have chosen an execution-only agreement as they had no need for investment advice. There was also agreement that the securities in the securities portfolio had been acquired on the authorized husband's own initiative, without investment advice from the bank, and to a large extent before the investment advisory agreement was concluded.

The investment advisory agreement provided for the bank to draw up investment advice proposals for the client on request. It was also agreed that the securities account would be monitored for compliance with the selected investment strategy and that periodic investment reports would be prepared. Further, the "Focus" strategy was determined for the client, which is suitable for opportunity-oriented investors and in which large fluctuations in assets must be expected.

The authorized representative accused the bank of never informing him of the significant fall in the price of most securities during 2022, of not providing any assessments of possible price developments and of never advising him on how he should act in view of the considerable book losses. He was unable to assess whether he should keep or sell the securities. This caused considerable damage to the client. He expected the bank to make a substantial contribution to the loss incurred.

According to the bank, it had already warned the authorized representative about the high cluster risks in the client's securities portfolio when the investment advisory agreement was concluded and had pointed out the need to take appropriate action. He had not heeded these warnings and mentioned that he even wanted to increase the positions. The couple had only provided very cautious information about their financial circumstances, but had informed the bank that the authorized representative had acted as an asset manager.

The bank further brought forward that the considerable losses were evident in the quarterly fee statements and in the semi-annual investment reports. In the latter, the cluster risks were also pointed out. The client advisor had also discussed the current prices of the securities with the authorized representative by telephone. The bank finally established that the authorized representative had logged into e-banking several times a month in 2022 and had accessed the securities custody account. It concluded that he had followed the courses closely. This is also shown by the fact that he independently sold the only title that performed significantly less badly in 2022.

The authorized representative disputed the bank's representation. He and his wife ran a small business that had nothing to do with the financial services sector. He had merely helped friends from abroad to manage their accounts in Switzerland free of charge. He had never worked as a professional asset manager. In the telephone conversations, only the debit balances on his wife's accounts were discussed. Security prices were not an issue. A discussion about cluster risks did take place, but only much later, when they had already terminated the investment advisory agreement. He had only logged into e-banking to ensure payment of the bills for the considerable health costs.

The Ombudsman regretted the losses suffered by the client and the difficult situation in which the clients found themselves as a result. However, as both parties adhered to their differing representations, the Ombudsman had to inform the authorized representative that, as a neutral mediator, he was not permitted to question the credibility of the parties and could not clarify differing statements by evidentiary procedures. It was therefore not possible to verify key factual elements necessary for the assessment of this dispute.

The available reliable information nevertheless suggested that the authorized representative did not wish to receive advice and independently made very risky investments. His freedom of decision was of course not restricted by the investment advisory agreement concluded. The client therefore had to bear the consequences of the authorized representative's decisions, who had not heeded the bank's relevant warnings which were documented.

With regard to the possible decision to pursue the dispute in court, the Ombudsman also pointed out to the authorized representative that it would be up to the client or him to prove the alleged basis for a claim for damages. Experience has shown that the existing documents would play a significant role in this. The bank's position was well documented in the client history, the e-banking access log and the investment reports. Based on this, it was not prepared to make any concessions. The Ombudsman therefore had to close the case without any result for the client.