Disputed advisory fees

Topic: **Fees and charges** Case number: **2022/20**

> The client complained to the bank that it charged him quarterly advisory fees of around CHF 100 in addition to the custody account fees of around CHF 200, even though he did not use any advisory services. The bank replied that it had qualified his client relationship as an advisory relationship in the course of the implementation of the Financial Services Act and had charged the fees provided for this. It invited him to make use of the advisory services. The client was dissatisfied with this answer and submitted the case to the Ombudsman, as he still believed that he did not owe any advisory fees. During the ombudsman proceedings, the bank was able to show that the client had acknowledged the advisory contract and the associated fees by signing it.

The present case provides an opportunity to draw attention once again to the principles which the Ombudsman applies in fee disputes. Such disputes are frequently brought before him. The year under review was no exception.

Bank fees are usually owed if they are customary or agreed. Normally, when opening an account, clients accept the bank's general terms and conditions, which refer to fee tables. In other cases such fee tables are referred to in other general contractual conditions. The banks usually reserve the right to adjust the fee tables periodically. If new fees are introduced or adjusted in an ongoing business relationship, this constitutes a change to the contract which must be communicated to the clients concerned by the usual means of communication in sufficient time for them to be able to adjust their behavior and, if necessary, to terminate the banking relationship if they do not agree with the change. If the client is bound by a contract with a fixed term, an adjustment of a fee essential to the contract cannot be enforced against his will during the term. An agreement may also be tacit, e.g. if corresponding communications from the bank remain unchallenged by the client. If these principles are adhered to, the Ombudsman does not comment on the appropriateness of fees, as disputes on business policy and tariff issues are excluded from his assessment according to the Rules of Procedure. A detailed presentation of these principles with case examples can be found on pages 13ff and 21ff of the 2016 annual report at https://bankingombudsman.ch/Jahresberichte.

In the present case, it was unclear from the documents and in particular from the bank's reply whether there was a valid fee agreement. The Ombudsman therefore contacted the bank and asked it for a more detailed statement. The bank told him that the basis for the advisory fees was the contract for a transaction-related advisory mandate that the client had signed in 2019 in connection with the aforementioned reclassification of client relationships due to the Financial Services Act. The fee subsequently charged to the client was listed in the annex to this contract. At the meeting at which this contract was signed, the client's attention was drawn to the fact that he could also opt for an execution-only relationship, i.e. a relationship in which the bank merely executed his orders and held his securities in safe custody without providing advisory or asset management services. He had then opted for the aforementioned advisory mandate.

On the basis of the transaction-related advisory mandate, his advisor submitted investment proposals to him on request. For the possibility of making use of this advice, the bank charged the fee disputed by the client, which was calculated according to the value of the custody account. The client had in

fact not used any advisory services until now. Nevertheless, the bank considered the charge to be justified.

The Ombudsman subsequently informed the client in a letter that, in his view, there was a valid fee agreement. It was obvious that the agreement was unfavorable to him, as he had never used the advisory services he regularly paid for. However, due to the agreement, there was no possibility to reclaim the fees retroactively because of this. Whether a contract makes sense for the client is usually irrelevant in a legal assessment of its binding nature. In principle, every person in legal transactions is free to conclude contracts that are unfavorable to him or her. As long as there is no specific reason for the contract to be invalid, it is binding and enforceable. The fee principles were observed in the present case and no misconduct on the part of the bank was evident.

The client reacted to the decision and wrote to the Ombudsman that he had hoped for a different solution, but that he could understand the explanations about the case.