Investments within the framework of an “execution only” relationship

Topic: **Stock exchange and custody accounts** Case number: **2017/12**

> The client instructed the bank to purchase shares in a company outside the domestic market. After checking, his adviser informed him that the shares in question were not available to foreign investors. Following a meeting with the advisor who told him about a company with a very similar name listed on a different stock exchange, the client instructed the bank to make the investment on this other exchange. Three years later, after transferring his custody account to another bank, the client realised that his investment had been made in a company other than the desired one. He complained to the bank who denied any responsibility. In mediation the bank agreed to compromise.

The client asked the bank to purchase shares in a company listed on the Shanghai stock exchange about which he had read positive reports in a newspaper article. After checking, his adviser told him that these shares were not available to purchase for foreign investors. According to the client, he then suggested purchasing shares in the same company with the Hong Kong stock exchange, identified – for this purpose – by a different securities no. (ISIN) to that stated in the press article. The client then purchased shares in the sum of 88,000 EUR. The client further stated that it was only three years later, after transferring his custody account to another bank, that he realised the investment had been made in a company other than the one he wished to invest his money in initially. During a lively exchange with the bank, which went on for almost four years, the client asked the bank to pay him compensation of approximately 100,000 EUR corresponding to the difference between the market value of the actual investment and that of the investment originally requested. The bank disputed this version. It claimed that its back office had simply told the adviser that a company with an almost identical name was listed on the Hong Kong stock exchange. The latter then reported this to the client who decided upon the investment himself in accordance with his “execution only” contract with the bank.

As the bank refused to discuss the matter, the client contacted the Ombudsman. In his request for mediation, he insisted that his decision to invest in the securities traded on the Hong Kong stock exchange was based solely on the incorrect information provided by his bank adviser. He also pointed out that the securities number (ISIN) or slight difference in the company name did not themselves enable him to recognise the error. He further claimed that he did not have access to information that would have enabled him to check the information provided by his adviser or to realise the mistake. Moreover, the client claimed that the bank could have easily recognised the error by its advisor because the investment made had a risk profile that was incompatible with the conservative investments he had been in the habit of making for many years.

For the most part, the bank confirmed to the Ombudsman the position it had already communicated to the client in the past. Given that over seven years had passed since the events, it claimed that it was no longer possible to retrace exactly how they happened. The bank did however point out that the investments were made within the framework of an “execution only” relationship and that, as a result, the client made the decision to invest in the company traded on the Hong Kong exchange of his own volition. The bank therefore did not believe it had any obligation to offer advice to the client. In addition, the client never objected to the custody account statements sent to him on a regular

basis to hold mail. In spite of this, the bank offered the client compensation of 20,000 EUR, said amount corresponding to half of the difference between the price at which the shares were subscribed and the market value at the time the client first disputed the investment.
The Ombudsman found this proposal to be fair and recommended that the client accept it. He considered that the fact that the client had failed to fulfil his duty to monitor and duty to complain had been established. Given that the name of the actual investment was not the same as the one initially desired, the Ombudsman believed the client should have carefully monitored the price of the securities on both stock exchanges and, because of their differing development, should have intervened with the bank to obtain an explanation from it regarding this unexpected situation. Even in the absence of specific financial information, it would have been possible on this basis for the client to notice that the actual investment was not in keeping with the one he desired. The Ombudsman also pointed out that, given the general principle that everyone must take all necessary measures to avoid aggravating a loss, the compensation demanded could not be calculated taking into account changes in the market value up to the mediation request being filed. It was in fact the client’s responsibility to liquidate the disputed investment as soon as he became aware of the error. The client accepted the bank’s offer.