Losses in connection with Wirecard shares within the scope of an investment advisory relationship

Topic: **Investment advice** Case number: **2021/17**

> The client, who had a large securities portfolio, had concluded an investment advisory contract with the bank. Based on the recommendations of his investment advisor, he had successively built up a position in Wirecard shares, with which he suffered a virtually total loss after the allegations of fraud in connection with the company became known. He was of the opinion that the recommendation of Wirecard shares was not compatible with his risk profile. In addition, he felt he had been insufficiently informed about the risks associated with this stock. He therefore asserted a claim for damages against the bank in the amount of the loss he had suffered. The bank denied the alleged breaches of duty and was only willing to grant the client, who was important to it, special conditions to settle the dispute amicably. The client considered this insufficient and submitted the case to the Ombudsman. After assessing the arguments of the parties, the Ombudsman considered a further concession by the bank within the framework of the mediation procedure to be futile and closed the case with a notice to the client.

After reviewing the documents relating to this case, the Ombudsman unfortunately found that the parties' accounts of the client's profile and the advisory process differed significantly in crucial respects. The client stated that he had a conservative investor profile and had little knowledge of the financial markets. In the client profile he signed in 2017, a medium risk profile was shown on the basis of a very high risk capacity and a medium risk appetite. Among other things, he stated that he had knowledge and experience with shares and various high-risk investment products and that he informed himself daily about developments on the financial markets. In 2020, i.e. after the successive acquisition of the Wirecard shares, a new customer profile was created with an increased risk profile compared to the one previously determined.

According to the client's account, the investment advisory relationship had actually been implemented like an asset management contract. Due to a lack of time, he had approved the investment proposals submitted to him without examining them. The bank pointed to regular investment advisory meetings, each of which lasted longer, in which the client had actively participated. It was undisputed that the publicly known, critical voices on Wirecard shares were discussed in these talks. However, the customer was of the opinion that his advisor had downplayed them and thus misinterpreted them.

Finally, the customer complained that the Wirecard share was the largest equity position in his portfolio. In fact, his loss was considerable, amounting to a mid-six-figure sum. He did not disclose his portfolio to the Ombudsman, but he did provide information on the percentage of the Wirecard position in his total stock portfolio and how much the percentage loss was in relation to his total portfolio. Both figures were in the low single-digit range. From this, one could conclude that it was a large portfolio with a considerable share of equities.

The Ombudsman may not question the credibility of the parties and cannot bindingly clarify a factual situation presented differently by the parties by means of an evidentiary procedure. He decided to give the following advice to the customer in a notice, despite the unresolved points in the facts of the

case submitted:

In the case of investments made on the basis of a recommendation by the bank, the risk lies in principle with the investor. A general liability of the bank alone for the fact that assessments of the future development of financial investments prove to be correct does not exist. A duty to compensate the client for losses therefore presupposes that the bank has breached its duties of information, due diligence or loyalty with its recommendation.

A breach of due diligence may occur if the bank made a recommendation that was obviously unreasonable and inappropriate for the client concerned at the time it was made. According to case law, the appropriateness of a recommended investment is assessed in relation to the client's personal financial situation as well as his risk profile, i.e. his willingness and ability to take risks. According to the Federal Supreme Court, the scope of the duty to inform is then determined by the experience and knowledge of the client.

Careful investment advice must also take into account the principle of diversification (avoidance of concentration risks). The term "bulk risk" is not conclusively defined. The Ombudsman is of the opinion that, as a rule, no more than approx. 10% of the total assets should be allocated to one position. However, there are also other views on this subject, and it is probably undisputed that not only a pure percentage should be used, but that other factors, such as the composition of the portfolio, the degree of risk of the investment and also the experience and risk tolerance of the client must also be included in the assessment of diversification.

Finally, the Ombudsman was faced with the question of whether the recommendation of a share with a somewhat higher volatility and a higher risk, due among other things to the start-up character of the company, was justifiable to the present extent, or whether this constituted a breach of due diligence. The presumed size of the client portfolio and the information in the client profile suggested that the client had a high risk capacity. In the Ombudsman's view, if a client's risk capacity is significantly higher than his general willingness to take risks, it is not a priori inadmissible for a bank to present and recommend a somewhat riskier investment to its client as a small addition to his other securities portfolio. Of course, this is only permissible if the bank does not provide false or misleading information about the investment and informs the client of the risks involved, or if it can assume in good faith that the client is aware of the risks. Whether this was the case in the present case is to be assessed according to the information the bank had at its disposal at the time of recommending the investment.

Following the collapse of Wirecard AG in the summer of 2020, the Ombudsman was presented with several cases of investors who suffered losses in this context. In assessing these cases, he assumed that market participants had not foreseen this downright grotesque scandal, even if it is clear in retrospect that there were various indications of misconduct that should have been followed up by those responsible. The Ombudsman therefore did not consider the incorrect assessment of critical voices on Wirecard shares, which the customer had accused the bank of, to be grounds for liability. In the present case, there were no indications that the bank had additional, non-publicly known information at the time of the recommendation that would have changed this initial situation.

The Ombudsman could understand that the customer found the loss he had suffered with the Wirecard position extremely annoying and disappointing. Whether this was attributable to a breach of duty on the part of the bank could not be conclusively clarified due to the open points in the facts of the case. The client's attention was drawn by the Ombudsman to the fact that he would have to review his signed client profile and, above all, the composition of his portfolio if he wished to adhere to his statement that he had a conservative investor profile. On the basis of the available evidence, the Ombudsman had to assume that the proportion of shares in the portfolio was probably far too

large for this.

On the basis of the information available and the consistent stance taken by the bank towards the client, which the bank had confirmed several times, the Ombudsman considered that there was no prospect of the bank accommodating the client further in the context of a mediation procedure. He closed the case with a notice. However, the Ombudsman indicated that he was prepared to review the case if the client provided him with concrete evidence that essential elements had not been taken into account in the assessment. The client did not contact him again.