Poor performance of an investment fund

Topic: **Investment advice** Case number: **2019/06**

> One client in advanced age invested in an investment fund after receiving advice from the bank. He complained to the ombudsman that the value of his fund units had fallen continuously over eight years and that he ultimately had to sell them at a loss. After further enquiries, the ombudsman established that the fund was a bond fund whose earnings potential had been steadily diminishing in recent years due to the interest rate situation. However, there was no evidence of misconduct on the part of the bank in providing investment advice. After receiving the Ombudsman's statements, the client decided not to pursue the matter further.

The customer was contacted by the bank with an investment proposal after medium-term notes with an interest rate of 2.75%, which from today's point of view is a proud rate, had become due. Based on this advice, he invested in an investment fund. He was disappointed with the fund's performance after eight years and, according to him, sold the fund units at a loss. He then contacted the Ombudsman because he believed that he had been given wrong advice in the purchase. He also stated that he had discovered that the fund had been converted without having been informed.

The Ombudsman had to ask the customer some questions in order to get a sufficient picture of the facts of the case. He also asked him to inform him to what extent he had suffered damage as a result of the conversion of the fund. It turned out that the disputed investment fund was a bond fund. Due to the interest rate situation, it has hardly been possible to generate positive returns with such a fund for several years now, which was also the case here. However, the customer had forgotten to include the distributions in his calculation. If this was done, the result was approximately a black zero for him, i.e. he had made neither a profit nor a loss without taking taxes into account. The conversion of the fund, which the client objected to, was merely a change of name, in which the essential characteristics of the fund were retained. The client could not name any damage in this context. He only claimed that he would probably have become aware of the poor performance of the fund earlier if he had noticed the change.

After taking note of the additional information, the Ombudsman saw no basis for initiating a mediation procedure for the time being, as no misconduct on the part of the bank was apparent. He showed understanding for the disappointment of the customer, but had to inform him that even in the case of investments made on the basis of a recommendation by the bank, the risk basically lies with the investor, who also benefits from the opportunities of the investment. There is no general liability for estimates of the future development of financial investments proving to be correct. An obligation to compensate the customer 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 be deemed to have occurred if the bank made a recommendation which was obviously unreasonable and inappropriate for the customer concerned at the time it was made. According to the case law of the Federal Supreme Court, the appropriateness of a recommended investment is assessed in relation to the personal financial situation of the customer and his risk profile, i.e. his willingness and ability to take risks. According to the Federal Supreme

Court, the extent of the duty to inform is then determined by the experience and knowledge of the client. As a rule, it can be assumed that bank clients are generally aware of the existence of price risks in investments such as funds.

Unfortunately, the information submitted to the Ombudsman by the client did not enable him to conclusively assess whether the conditions for the bank's liability were met in his case. He made a sweeping criticism that the bank's advice was inadequate, without giving any further details. The Ombudsman therefore gave him another opportunity to explain what he believed the bank had done wrong and to what extent the recommended fund was unreasonable and inappropriate for him. He also asked the client to comment on why he had kept the investment for almost nine years, although according to his information he had noticed that it was losing value every year.

The client then informed the Ombudsman that he did not wish to pursue the matter and preferred to enjoy his holidays. In a concluding letter to him, the Ombudsman stated that the bank's original recommendation for the fund investment was probably unobjectionable, at least on the basis of the information available. He regretted that the bank had apparently never contacted him with regard to the recommended fund investment and had drawn his attention to the dwindling earnings potential. This would have been desirable in terms of a courteous customer service. In the Ombudsman's view, however, there is a legal obligation to actively monitor a customer's securities account only if this was contractually agreed, which was not the case in the present case.