Refusal of the bank to maintain a business relationship with an LLC after opening a capital deposit account for it

Topic: **Account / savings book** Case number: **2023/02**

The complainant was in the process of setting up an import-export business with a large Asian country. He founded a limited liability company for this purpose and opened a capital deposit account at the bank. After the company was founded, the bank refused to enter into a business relationship with it. The complainant then contacted the Ombudsman and demanded that the bank either opens a business relationship with the newly founded company or compensates him for the expenses incurred. After examining the documents submitted to him, the Ombudsman came to the conclusion that the bank's refusal to open a business relationship constituted a permissible business policy decision and that there was no basis for mediation proceedings.

After the bank had examined the account opening documents submitted by the complainant and informed him, without giving reasons, that it would not open a business relationship with the company, it demanded that he balance the capital deposit account and transfer the founding capital paid into it to an account in the name of the company. It justified this with the provisions of Art. 633 OR. It stood by its decision even after an appeal. After two other banks refused to enter into a business relationship with the newly founded company, the complainant turned to the Ombudsman. In the complainant's view, the bank acted inconsistently because it had readily agreed to open the capital deposit account before the company was entered in the commercial register. In his opinion, by opening this account and accepting the founding capital without reservation, the bank was also obliged to open a business account for the company. By refusing to do so, the bank had therefore violated the principle of good faith. This was not least because it had not warned him of the risk that it might refuse to open a business account after the company had been established.
The complainant was also of the opinion that the bank's conduct bordered on a criminal offense. He accused her of embezzling the company's nominal capital. Finally, he claimed that the bank's refusal to open a business account in the company's name had caused him damage. As the bank and two other financial institutions had refused to open a business relationship, the liquidation of the company was the only way for him to recover the paid-in capital. The applicant therefore asked the Ombudsman to order the bank to open the desired business relationship or at least to reimburse him for the costs of founding and liquidating the company, which he estimated at around CHF 4 000 in total.
The Ombudsman found no evidence in the documents submitted by the complainant that the bank had in any way undertaken to open a business account for the company after it was founded. In the opinion of the Ombudsman, the decision to open a new business relationship or to maintain an existing one depends on the business policy and strategy of each financial institution. The principle of contractual freedom and the general rules of contract law allow both the bank and the client to decide freely whether and under what conditions they wish to enter into or maintain a business relationship. The bank was therefore free to decide whether it wanted to open a capital deposit account for the company to be founded. As a result of the positive decision, it was not forced to enter into a business relationship with the established company.
This also meant that there was no basis for a claim for damages. At best, this could have been discussed on the basis of the so-called "culpa in contrahendo", i.e. the breach of obligations in the

pre-contractual relationship. This would have been possible if the bank had already known when the capital contribution account was opened that the founders intended and expected to open a business relationship with it for the established company and that it would not be prepared to do so. Moreover, it should have known or should have had reason to believe that no other bank would do so either. However, there was no evidence of this in the case presented.
As a neutral mediator, the Ombudsman is not authorized to issue binding instructions to the parties to the dispute. For this reason, it would not have been possible for him to oblige the bank to agree to the opening of a business account in favor of the company anyway. Finally, the bank's demand to transfer the company's capital only to an account in its own name seemed to him to be correct in accordance with Art. 793 para. 2 CO, i.e. with the prohibition of the so-called return of deposits to the shareholders.
In view of these elements, the Ombudsman took the view that he lacked arguments that would enable him to intervene with the bank with any prospect of success.
Before closing his file in this matter, the Ombudsman recommended that the complainant ask other banks whether they would be prepared to open a business relationship with the company.