**What is fairness in mediation? A practical example for the case of the month**

This month, we are looking at a case where assets held in a PERCO are locked in as the result of a default choice.

This specific example gives me the opportunity to highlight one of the essential characteristics of the mediation process, namely fairness. This is a significant difference when compared with legal proceedings. Mediation by the AMF Ombudsman is indeed carried out in accordance with the law but also with the principle of fairness, thanks to the information provided by the parties to the dispute and their desire to reach a fair resolution amicably.

**The Facts**

Mr T., an employee with a new employer, benefited from the employee savings scheme set up by his former employer for profit-sharing in respect of the previous year.

He is required to travel in the course of his new duties and only became aware on 1st June 2017 of an option form dated 10 May 2017 that specified a response deadline of 6 June 2017.

On 2 June 2017, a Friday, he sent off his choice by post: to allocate 100% of his profit-sharing bonus to the Company Savings Plan (PEE).

On 12 June 2017, the account-keeping institution received his option form. The response deadline of 6 June 2017 had therefore already expired. Consequently, the institution applied the default investment, namely 50% to the PEE and 50% to the PERCO (collective employment savings scheme). This means that the sums invested in the PERCO are locked in not for the following five years but until retirement, unless they are released early. The reasons for early release are also very precise and more limited than in the PEE.

After receiving a negative response to his initial complaint, Mr T. requested my intervention, in order to obtain the release of his assets.

**Investigation**

After careful examination of the documents provided by Mr T. and the comments provided by the institution in question, I asked the institution to provide me with a copy of the envelope of the letter sent by the retail investor, on which the date of its own receipt timestamp (12 June 2017) and the postmark (8 June 2017) are shown.[[1]](#footnote-1)

This copy confirmed that the institution had not received the allocation choice by the specified deadline and was therefore obliged to apply the default allocation for the profit-sharing bonus, as stipulated in the collective agreements.

**Recommendation**

As the account-keeper had complied with the regulations, I could not accuse them of a regulatory breach.

However, to ensure that as many aspects as possible are taken into account when assessing retail investors’ cases, I strongly encourage them to inform me of their profession, age and the particular circumstances that led to this situation. In view of this information, I may, in certain specific cases, ask the institution implicated to reconsider its position on the grounds of fairness. In other words, I ask them to agree on a fairer solution given the specific circumstances of the case.

In this instance, the facts justified the use of the principle of fairness for a variety of reasons.

First of all, I noted that Mr T. was 47 years old, did not have a PERCO in his new role and had never invested in his previous employer’s PERCO. Mr T. would therefore be required to pay the account maintenance fees for his existing PERCO from this point until his retirement. Consequently, with the deduction of account maintenance fees, the small amount held in this scheme was likely to decrease gradually from year to year.

I also noticed that, firstly, the notification emails send to his previous business email address had not reached him, and secondly, he had been unable to log into his personal online space.

Finally, his business travel abroad, which led to the delay in his realisation that he had received the option form, also warranted consideration.

The many interactions with the institution proved fruitful. In view of all the aspects of the case, the institution agreed to respond favourably to my request and proposed transferring the assets held in the PERCO to the PEE.

Mr T. now has two options.

He can:

* either request their release via redemption on the grounds of “termination of the employment contract” as a former employee;
* or keep them locked into his PEE for the five-year lock-in period, with an obligation to pay the account maintenance fees, where applicable.

**Lesson to be learned**

In accordance with the French Labour Code, the institution responsible for managing the employee savings scheme must apply the default allocation for investing the profit-sharing bonus (50% of the assets invested in the PERCO retirement savings product, locked in until retirement, except in exceptional circumstances) when the retail investor does not send in his/her option form within the specified deadline.

As this default mechanism is a legal requirement, the mediation process uses the principle of fairness on a case-by-case basis and where the documentation and circumstances so permit, in order to reach an amicable and fair solution, which in this case was to transfer the assets held in the PERCO to the PEE.

Considering the particular circumstances of the case thereby helps to mitigate the rigour of the rule of law. I therefore recommend that retail investors requesting my intervention provide any information likely to strengthen their position.

1. *Mr T had posted his letter on Friday, 2 June, the day before a three-day weekend including a public holiday.* [↑](#footnote-ref-1)