Can an account-keeping institution be held liable for the ineligibility of securities held in a PEA after subscription?

In return for the tax benefits granted to subscribers to a PEA savings plan, they are constrained in the choice of securities allowed in their accounts. Retail investors may therefore only choose to invest through their PEA in securities that are eligible under the criteria defined by the regulations.[[1]](#footnote-1) While this investment constraint is well understood at the time of subscription, what happens when the subscribed security changes and in particular when it becomes ineligible for a PEA? What recourse does the retail investor have? Can the account-keeping institution be held liable when it has informed retail investors that the security has become ineligible?

These are the questions raised in the case I am presenting to you this month.

**The facts**

On 5 October 2017, Bank Z suggested that Mr X. open an SME-PEA[[2]](#footnote-2) in order to diversify his savings, and recommended that he acquire units in Fund Y to be held in this SME-PEA for an amount of €10,000.

On 22 February 2019, the retail investor received a letter from the investment management company of Fund Y informing him that the fund had just become ineligible for the SME-PEA. On 12 April 2019, Bank Z confirmed this to Mr X.

The client does not understand this situation. He understood that funds initially eligible for the SME-PEA could not be changed without notice and without compensating subscribers. Furthermore, he believes that his account-keeping institution failed to fulfil its duty of information by recommending, in 2017, that he invest in Fund Y, a fund that subsequently became ineligible for the SME-PEA.

As a result, he is seeking compensation from Bank Z. As the account-keeping institution did not want to accede to his request, Mr X. requested my assistance with his case.

I asked Mr X.’s account-keeping institution to provide additional information on this case.

**The investigation**

The institution confirmed to me that its client had responded to the investment management company’s decision to withdraw eligibility of its Fund Y for the SME-PEA, about which the client had been informed by letter dated 22 February 2019. The client sent a complaint by letter dated 1 April 2019, to which the account-keeping institution replied by letter dated 12 April 2019. Bank Z provided me with all these letters.

Bank Z informed me that, subsequently and on the instructions of its client, the units of Fund Y were transferred from the client’s SME-PEA to his ordinary securities account. Mr X.’s SME-PEA could therefore remain open after repayment of an equivalent amount into the SME-PEA.

For my part, I carefully studied the details of this case.

In his mediation request, Mr X. raised two objections:

* He challenged the investment management company’s decision to change the characteristics of the fund in which he had invested;
* He considered that his account-keeping institution had failed to fulfil its duty of information by recommending, in 2017, that he invest in a fund that can no longer be included in his SME-PEA in 2019.

With regard to the investment management company’s unilateral decision to change Fund Y, I noted that, in its letter of 22 February 2019, the management company informed investors in Fund Y of its decision to change the investment strategy of this fund. This change made the fund ineligible for an SME-PEA. Consequently, Mr X. could no longer hold these fund units in his SME-PEA.

I informed the retail investor that the decision to change the key characteristics of a fund leading to the withdrawal of its originally intended eligibility for the SME-PEA is a management decision made exclusively by the Fund operator that is binding on all investors and on Bank X, his account-keeping institution.

According to Article 411-15 of the AMF General Regulation, two types of changes may be made, on the initiative of the investment management company, during the life of a UCITS:[[3]](#footnote-3)

- Changes subject to pre-approval by the AMF (“mutations”), which relate to transformations and merger, demerger, dissolution and liquidation transactions;

- Changes subject to ex-post notification (“changes”).

Article 8 of AMF Instruction 2011-19 states that the withdrawal of a fund’s eligibility to benefit from tax measures, such as the SME-PEA, requires only specific information to be provided to the fund’s investors and is not subject to approval by the AMF.

Furthermore, Article 7 of this Instruction states that *“all changes that do not require approval shall simply be notified to the AMF via the management company’s or SICAV’s GECO extranet no later than the day on which the change comes into force”*.

Consequently, the investment management company was entitled to modify the management of its fund on this point, as the regulations simply require specific information to be provided to investors to enable them to take appropriate action when they are no longer permitted to hold this fund in their SME-PEA.

In this case, based on the documents provided, I found that the management company had specifically informed the investor, in its letter of 22 February 2019, of the change in the characteristics of Fund Y and, in particular, of the withdrawal of its eligibility for the SME-PEA.

Regarding the lack of advice from Bank Z, while I can understand that this situation was binding on the retail investor, it cannot, however, be attributable to the account-keeping institution. This institution cannot be criticised for not being able, when subscribing to Fund Y in 2017, to inform its client of future changes in investment strategy, unilaterally decided by this fund’s management company in 2019, given that the account-keeping institution was at no time in a position to consider these changes. Since such a decision by this management company cannot by its very nature be predicted, the recommendation that a client subscribe to Fund Y made by an investment advisor a year and a half earlier cannot be blamed on that advisor.

Furthermore, to avoid the closure of the SME-PEA provided for under Article 1765 the General Tax Code, I noted that the account-keeping institution had offered its client an alternative in its letter dated 12 April 2019 to:

* either sell the fund units;
* or transfer the units to an ordinary securities account and offset the withdrawal by a payment of an equivalent amount in cash into his SME-PEA.

In the same letter of 12 April, the bank also reminded its client that, according to the regulations, he had a period of two months from the fund’s ineligibility to make his choice and instruct the bank accordingly. Ultimately, Bank Z granted its client an extension by informing him that if it did not receive his instructions by 22 May, his SME PEA would be closed.

**Recommendation**

In light of this information, I informed Mr X. that given that the change by the investment management company, making the fund ineligible for an SME-PEA, had taken place in accordance with the regulations and that the change could not be foreseen by his account-keeping institution at the time of subscription, I had no information to support his claim for compensation.

**Lesson to be learned**

An investor in a UCITS that has become ineligible for an SME-PEA one and half years after subscription may not claim compensation from his account-keeping institution for the loss he considers he has suffered, on the grounds of a failure to provide advice. The investor has no further right of recourse against the investment management company in respect of a management decision taken in accordance with regulations that includes fulfilling an obligation to inform investors.

Note that, as I pointed out in my Case of the Month from February 2015,[[4]](#footnote-4) the situation may be somewhat different when the security is ineligible at the time of subscription and the account holder provides false information to its clients by indicating on its website that the security is eligible for a PEA.

1. Listed or unlisted shares, directly or through a UCITS, complying with regulatory limits, i.e. with a turnover of less than €1.5 billion for unlisted shares and €1 billion for shares. [↑](#footnote-ref-1)
2. In this case it was an SME-PEA, but the rules are identical to those for a traditional PEA. [↑](#footnote-ref-2)
3. UCITS (Undertaking for Collective Investment in Transferable Securities) – Portfolios of securities (shares, bonds, etc.) that are managed by professionals (an investment management company) and held collectively by individual or institutional investors. There are two types of UCITS, SICAVs (open-ended investment companies) and FCPs (unit trusts). [↑](#footnote-ref-3)
4. Also read the Case of the Month from February 2015 [↑](#footnote-ref-4)