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IPOs: the loss may be more than just the non-execution of the subscription order

When an IPO subscription order is not executed on account of an error acknowledged by the account keeper, the compensation for the loss suffered requires the parties to be placed in the situation in which they would have been if the error had not occurred, and also the investor's profile and usual behaviour to be taken into account, as we will see in this mediation case.

The facts

At the end of November 2019, Mr and Mrs B went to their bank branch to subscribe to the initial public offering (IPO) of Française des Jeux (FDJ) by depositing a cheque in their joint securities account. They signed a subscription order form for a maximum amount of €1,000, corresponding to 51 shares at a unit price of €19.5. However, this subscription request was not executed.

A few months later, after seeing the value of the security, Mr and Mrs B realised that their loss resulting from the non-execution had increased, and made a complaint. They finally received a response by mail dated 20 December 2020, telling them that it was impossible to go back on a transaction dating from 2019 and to re-allocate to them the shares they had requested. According to the account keeper, since the quota of shares made available to the public had been limited, they had not been able to execute all requests.



As Mr and Mrs B challenged this position and wished to have their initial instructions carried out, they referred their dispute to me.

The investigation

After carefully examining their case and the documents submitted by Mr and Mrs B to support their request, I questioned bank X, which provided me with its observations.

Bank X acknowledged that it was because of a human error that the processing of the couple's subscription request, which had been properly signed, had not been fulfilled.

It also confirmed to me that they had noted that Mr and Mrs B had gone to their branch with the clear intention of subscribing to the IPO in question. The couple had given a cheque for €1,000 to their adviser at the branch.

The bank also told me that the details of events traced on Mr and Mrs B.'s account revealed that they were at the branch from 4:12 pm. According to the bank, this meant that the adviser could have placed the deposit cheque on their account and entered the IPO subscription before the 5 pm deadline set by the AMF, in coordination with Euronext.

However, according to X, since the cheque was deposited after 5 p.m., the subscription transaction could not be carried out: this is evidenced by the absence of a transmission report mentioning the transaction reference and its time stamp.

Lastly, before they left the bank, Mr and Mrs B were given the subscription order form, which they had signed. For them, this was confirmation that the transaction had been completed.

Bank X therefore considered that the order should have been transmitted and executed, and that Mr and Mrs B should have been served with 51 shares at the time of the first listing.

Recommendation

After receiving this response, I carried out an in-depth analysis of the case, which led me to get back in touch with bank X.

I informed the bank that it would be appropriate for the regularisation to lead to a complete reversal of the situation, i.e. a return to the status quo ante, according to the initial instructions given by Mr and Mrs B in order to compensate for the loss resulting from a



failure to carry out an IPO subscription operation (with the bank bearing the cost of any price difference).

However, according to the terms laid down by the Ministry of the Economy and Finance in an order dated 6 November 2019 setting out the procedure for transferring the majority of the capital of FDJ to the private sector, holders of the securities in question who had held their shares for an uninterrupted period of 18 months as from the IPO were allotted one bonus share for every 10 shares held, on 25 May 2021.

On the premise that Mr and Mrs B had subscribed to the shares at the time of the listing and had held their shares for 18 months, I argued that they could also have benefited from the advantageous provisions of the order.

I therefore questioned the bank again about the investment habits of Mr and Mrs B, indicating that it would be preferable to be able to obtain information on their investment history (frequency of investment, probability of the intention to sell or buy certain shares, number of arbitrages made on the portfolio in the past, length of holding period, etc.) in order to determine whether it could be legitimately inferred that, at the time of their application, the couple intended to hold these FDJ shares for a relatively long period), at least more than 18 months, which would make them retroactively eligible for the bonus share allocation scheme.

The bank then confirmed to me that it was willing to restore the situation in which they would have been if the €1,000 subscription order had been executed and that this would also take into account the allocation of bonus shares. In fact, the bank told me that, after consulting the investor profile of Mr and Mrs B, there was no doubt that they had planned to subscribe to the IPO and to keep their shares for a long period (at least five years).

Consequently, it accepted my proposal to allocate 51 shares to their joint securities account and five additional free shares that they would have been entitled to if the subscription order had been effective and they had kept their shares without interruption for 18 months, i.e. a total of 56 shares.

Mr and Mrs B's request therefore resulted in a recommendation in their favour. They have confirmed that they have received their shares.

Lessons to be learned



As the case in point illustrates, the consequences of a poorly executed order can be detrimental to investors wishing to participate in an IPO.

While investors are of course responsible for performing the necessary formalities to participate in such a transaction, it is the professional's duty of care to ensure that their instructions are carried out promptly.


This case therefore sheds light on how a loss can be assessed in an AMF mediation.

As I have already had occasion to point out,^[1] the purpose of civil liability, as case-law regularly reminds us, is to re-establish the balance that has been destroyed as accurately as possible and to restore clients who have suffered the loss to the situation in which they would have been if the harmful act had not occurred (in this case, the non-execution of the subscription order).

In this case, the examination of the entire loss led me to take into account the profile of the investor and the usual behaviour, as also recognised by the account keeper. Thus, in addition to the shares to which they were entitled as a result of the IPO, the benefit of the allocation of free shares was included in the calculation of the loss.

[1] Misexecution of trade orders: when a complainant is mistaken about his actual loss

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