The Ombudsman's Case of the Month
December 2015

Banks must be able to prove they gave a client a prospectus prior to investing in a collective investment scheme

My task when dealing with mediation cases is to analyse the facts and establish the obligations of the parties in dispute, notably by examining who should bear the burden of proof in court. Depending on the circumstances, I will ask a financial institution and/or its client to provide proof, in the form of documents, screenshots or telephone recordings, of what each party said and agreed to. As I explain this month, banks must be able to prove they have provided a client with a prospectus before he or she invests in a collective investment scheme (CIS); if not, they may be liable for compensation.

The facts

During a meeting at his local bank, Mr X was offered the opportunity to invest in a type of CIS known as a common fund, which, according to the client, was presented as risk-free. The bank's client service representative allegedly told Mr X that he would recoup his principal in full, even if the stock market fell. Mr X said he yielded to persuasion and invested €10,000 in the fund to "please the bank".

When the investment matured six years later, Mr X was surprised to recoup only €9,650. He complained that he had not been specifically informed that the fund's principal guarantee did not cover the full €10,000 and that he did not receive the regulatory prospectus containing this information until long afterwards.

In consequence, Mr X lodged a complaint. The bank answered that it had explained the characteristics of the fund to him and given him the prospectus; the fund regulations specified that the principal guarantee applied to the original investment, <u>excluding front-end fees</u>. The bank refused to consider Mr X's complaint, so he referred the matter to me for investigation.

The analysis

My view was that if Mr X had read the prospectus, the key issue was <u>whether he had received it before investing</u> and had thus been able make an informed decision.

Given the bank's response to Mr X's complaint, I asked it to send me the investment form on which, it claimed, Mr X had acknowledged receiving the prospectus prior to investing.

After checking its records, the bank responded that it was unable to provide the form and therefore agreed to pay Mr X the €350 he had claimed.

The recommendation

Unlike other cases I often deal with, where the dispute relates to a return at maturity that is well below the investor's expected return, the dispute here related only to whether the correct information on front-end fees had been provided beforehand. That was Mr X's sole claim.

As the amount offered by the bank matched the claim, I recommended that Mr X should accept. He readily did so.

The lesson to be learned

This case highlights the advantages of independent mediation, where each party has to prove that they fulfilled their obligations.

In Mr X’s case, I believe the bank was right to agree to pay compensation, as advised by the ombudsman. Even if the bank had given its client the prospectus before he invested, as it originally claimed, it was unable to provide proof. However, in accordance with regulations and consistent case law, the bank was required to prove that it had duly informed the client by giving him the prospectus and had done so before he invested. Since it was unable to produce the investment form signed by the client, the bank could not prove it had fulfilled its prior notification requirement.

The first lesson to be learned is that investment services providers must always retain proof of having notified their clients in advance.

The second lesson is for clients: investing in a financial product is a decision you have to make for yourself, not to please your banker.

Read more

[The AMF Ombudsman]