The Ombudsman's Case of the Month
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Attention : the exit free of charge is the only right open to the holder in the event of a merger of mutual funds

There are several categories of "modifications", in other words, events that may affect more or less radically the life of a UCITS[1], in the form of a SICAV or mutual fund. The AMF's Ombudsman regularly receives claims relating to these modifications and the presentation of this dispute is an opportunity to draw attention to these various events as well as to the nature of the rights of the holders and the manner in which they are informed.

The facts

Mr. P, a unitholder of mutual fund A since 2010, disputes the decision made by the fund's management company to proceed, without the consent of the holders, with the merger by absorption of fund A – a sectoral fund composed mainly of shares of companies interested in the extraction or processing of precious metals - by fund B, consisting of shares issued by food sector companies.

Mr. P thus requested my intervention in order to obtain compensation from the management company for the loss that he considered he had incurred as a result of the unilateral decision to change the direction of fund A, in which he held units, through the merger by absorption process.

The analysis

I asked the management company about the information that the holders of the absorbed fund had received. The company first told me that holders of this fund were specifically notified about this merger by absorption. Indeed, each holder, according to this company, received a letter dated 14 November 2016 announcing that the management company had decided on the merger by absorption of fund A by fund B. This letter also informed holders that did not wish to participate in the transaction of the possibility of requesting the redemption of their units of fund A, free of charge, within thirty days of receipt of such letter and until 28 December 2016. Said merger took place on 12 January 2017.

The management company subsequently told me that Mr. P, in one of the complaint letters that the latter sent to the company, acknowledged that he had been informed of this merger on 1 December 2016 by means of his account-keeper, a letter that Mr. P also communicated to me.

In addition, the management company informed me that it had reminded Mr. P, following his complaint and in a letter dated 7 February 2017, that the purpose of the merger of fund A by fund B was to optimise management of the investment via absorbing this fund, whose assets under management had been eroded significantly, by a larger fund. In the same letter, the latter told Mr. P that he still had the option of exiting the absorbing fund B free of charge.

The recommendation

It should be recalled first that, pursuant to Article 411-15 of the AMF General Regulation, two types of modifications may occur in the life of a UCITS and therefore a mutual fund:

- modifications subject to prior approval by the AMF, and referred to as "changes subject to pre-approval". These may take the form of conversions, mergers, demergers, dissolution and liquidation;

- modifications not subject to approval and called "changes subject to ex-post notifications".

[1] An undertaking for collective investment in transferable securities (UCITS) refers to either an authorised investment company with variable share capital (SICAV) or a mutual fund, in accordance with Directive 2009/65/EC

The modalities for informing holders in the event of changes subject to pre-approval and more particularly of a merger are detailed in AMF instruction No. 2011-19. In this respect, I indicated to Mr. P that, according to Article 13-1 of this same instruction, this request for a change subject to pre-approval was the subject of a request addressed to the AMF. In this case, the AMF granted its approval for the merger by absorption of fund A by fund B on 21 October 2016.

Note that the approval delivered by the AMF relates to compliance of the transaction and the information given to the regulator, and not the advisability of carrying out the modification in question.

Moreover, I also confirmed to Mr. P that, pursuant to regulation, mergers of two funds, once approved by the regulator, are changes subject to pre-approval that are not subject to the holder's consent, but to specific notification to the holders with mention of the possibility of an exit free of charge.

In this particular case, I considered that the fund management company could not be accused of any breach insofar as it provided me with the copy of the prior information dated 14 November, which it had written and sent to account keepers via Euroclear, and even though Mr. P admitted he had been informed by his account keeper on 1 December.

The lesson to be learned

The merger decision, submitted to the regulator for approval, must be brought to the attention of the unitholders prior to its effective date in order to enable them to take their decision to maintain their investment or to disinvest in full knowledge of the facts.

Thus, the holder must remain vigilant with regard to messages addressed to him personally by the management company, via his account-keeper, particularly in the context of a merger between two funds. However, once the approval has been obtained from the regulator, the holder does not have the right to oppose such a merger. This point is especially important to know as certain mergers can lead to a modification of the risk profile or the duration of the investment. Thus, I can only draw attention to the nature of the rights of the holders of absorbed funds; to stay or exit free of charge if the absorbing fund no longer corresponds the expectations of the investor.

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