

When an employee investor thinks that the allocation decision has been finalised

In the absence of instructions from the employee, in accordance with the law,¹ half of the sums allocated under profit-sharing are blocked until retirement (except in one of the six cases of early release set out in Article L224-4 of the Monetary and Financial Code) because they are invested in a collective retirement savings plan (PERCO and henceforth PERE Collectif).

A lot of mediation requests are received about this default allocation and I have observed, over the years, that there are many reasons for such default allocations of the profit-sharing bonus: failure to answer the option form, an answer received after the deadline, an incorrectly filled option form, etc. In this month's feature, I will be presenting the case of an employee who mistakenly thought that she had finalised her allocation decision on her account-keeper's website.

Currently, these requests can be resolved only in equity, on a case-by-case basis, as happened in this case. With the PACTE law,² however, the AMF has recently obtained a solution that grants employees an effective right to correct the consequences of this default allocation to a collective savings plan, to which I will return later.

The facts:

On 12 March 2019, Ms. L decided to choose to receive her entire profit-sharing bonus on her bank account, via her account-keeper's website. On 15 April 2019, she logged on to her personal space to check whether her bonus had been transferred to her account and saw that half of her savings had been placed on her PERCO collective retirement savings plan and the other half on her PEE company savings plan.

She therefore sent a letter of complaint to her account-keeper to cancel the allocation of her bonus. Her account-keeper then informed her that since she had not made her allocation decision, her profit-sharing bonus had been allocated by default.

Ms. L.'s account-keeper informed her that she had not finalised her allocation decision on 12 March 2019 because she did not perform the final "click" needed to confirm her decision. Her request to cancel the allocation decision was refused on the grounds that no change could be taken into account after the 15-day consultation period for the allocation of the profit-sharing bonus. She consequently referred the case to me.

Investigation:

After examining Ms. L.'s request and the appended documents, I questioned the account-keeper by drawing its attention to three points:

- Ms. L had always chosen to receive her profit-sharing bonus on her ordinary account, in the form of a top-up salary;

¹ Article L3324-12 of the French Labour Code : "When the employee [...] does not request for the payment in part or in full of the sums attributed to him/her under a profit-sharing scheme [...] or when the employee does not decide to allocate the sums to one of the plans provided for in Article L. 3323-2, half of the employee's share of the special profit-sharing reserve [...] is allocated to a collective retirement savings fund or a collective company retirement savings fund when such a scheme has been set up in the company. The other half is allocated under the conditions provided by the agreement mentioned in Article L. 3323-1 [...]"

² Order 2019-766 of 24 July 2019, which completes the PACTE law, created Article L224-20 of French Monetary and Financial Code, which provides that: "[...] When a payment corresponding to the sums arising from the profit-sharing bonus is allocated to a collective company retirement savings plan pursuant to the conditions provided in Article L. 3324-12 of the French Labour Code, the holder may, in waiver of Article L. 224-4, request for the liquidation or redemption of the rights corresponding to this payment, within one month as from the notification that the bonus has been allocated to the plan. [...]"

- This was the first time that Ms L was using the account-keeper's platform and, at no time did she receive a message informing her that she had not completed her request. I added that there was also no "Activity history" section on the platform, which would have enabled her to realise that the requested transaction had not been taken into account;
- Ms. L is currently in a very tight financial position.

The account-keeper told me that an email had been sent on 11 March and 27 March 2019 to all employees of Mrs. L's company to remind them that they had to choose a solution within the specified time.

Nevertheless, the account-keeper was able to confirm that Ms. L had not received these e-mails, since she had deleted her electronic address in 2015 and entered it again only on 2 April 2019. The account-keeper also informed me that Ms. L had not provided her mobile telephone number, which meant she was unable to receive reminders by text message.

The account-keeper also admitted that there was no "Activity History" section in the employee personal space to enable employees to check whether the instruction given had been taken into account. It also admitted that there was no alert or "pop-up" message to warn employees who left the account-keeper's web site without completing their entry by asking them if this was intentional.

Recommendation:

Given the good faith of Ms. L who had not received an alert that her allocation decision had not been finalised, the fact that she had always preferred to have her profit-sharing bonus paid directly and given her distressed financial situation, the account-keeper accepted, in equity, to pay her profit-sharing premium immediately.

Lessons to be learned:

For investors:

- For all intents and purposes, it is recommended that you provide and update your contact details in order to receive information and alerts from your account-keeper, regardless of your situation (on holiday, no longer working for the company, etc.).
- If there is an "Activity History" section, it is recommended that you check, whenever possible, that your instruction has been recorded correctly in accordance with your choice.

For professionals:

- It would be good practice to warn employees who have not completed their allocation decision, for example with a "pop-up" window. Moreover, in this special case, after this incident, the account-keeper informed me that it was going to examine whether it could improve the features of its website.
- It is also recommended that account-keeper websites install a section/tab that enables employees to track their ongoing actions.