AUTORITÉ DES MARCHÉS FINANCIERS

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Employee savings: default investments in PERCO collective retirement savings plans further to the PACTE Law

The mandatory investment of 50% of profit sharing in the PERCO plan, which an account-keeper must carry out if no instructions are received from the employee, can have serious consequences, with the employee's savings remaining blocked until retirement. As mentioned in the Case of the Month in November 2019,[1] there is now a new possibility offered by the PACTE reform for a release of funds by way of derogation.

In the case outlined this month, however, it was only through fairness and by a broad interpretation of this new provision that it was possible to obtain a release of the PERCO funds in this mediation case.

The facts

Mr A. had a PEE company savings plan and a PERCO collective retirement savings plan set up by his former employer for profit sharing and an incentive scheme in respect of the previous year.

On 28 March 2019, the account-keeper institution sent him notice of the profit sharing option, indicating 18 April 2019 as a deadline for reply, by mail to the postal address which had been sent to it at that time by the former employer.

However, Mr A. had changed address since then, without informing either his former employer or the account-keeper institution of this. He was therefore not informed in due time of the need to make a choice regarding the allocation of his profit-sharing bonus, and did not send his allocation decision before the response deadline.

As a consequence, the institution applied the default investment, namely 50% on the PEE plan and 50% on the PERCO.

Noting that there had been no deposit on his bank account, on 18 May Mr A. contacted the institution which informed him of the default investment of his profit-sharing bonus. Mr A. therefore sent a claim to challenge this default investment.

On 2 August 2019, Mr A. requested a redemption on the grounds that his employment contract had ended on 17 May 2019. The institution granted his request, but only for the savings invested on his PEE plan, since Mr A. could not provide evidence of any of the situations referred to by the prevailing legislation to authorise the early release of the PERCO funds. Unlike for the PEE plan, the PERCO funds cannot be released on the grounds of termination of the employment contract. Accordingly, the sums invested in the PERCO are locked in not only for the following five years but until retirement, except in exceptional legal cases giving entitlement to early release.

Mr A. asked me to help him obtain the release of the assets in his PERCO plan.

Investigation

After a careful examination of the evidence provided by Mr A. and of the observations of the institution in question, I asked the latter for details concerning the main channel of communication for the notice of option. The institution informed me that the main channel of communication is postal correspondence. It also specified to me that the saver can, moreover, be notified automatically by email of sending of the option notice, provided that an email address is recorded in its databases, which was not the case for Mr A.

These clarifications certified that the institution had indeed complied with its obligation of information, having only a postal address which had not been updated by Mr A.

Recommendation

As the account-keeper had complied with the regulations, I could not legally hold any regulatory breach against them.

However, to ensure that as many aspects as possible are taken into account to assess retail investors' specific situations as well as possible, I strongly encourage them to inform me of their occupation, their age, and the particular circumstances that led to this situation. In view of this information, I may, in certain specific cases, ask the institution implicated to reconsider its position on the grounds of fairness.

My role as Mediator also enables me to intervene on grounds of fairness, and I can support my position in the light of provisions which have come into effect subsequent to the events, but which are more favourable to the retail investor, and which I therefore recommend interpreting broadly rather than strictly.

Now in this specific case, the recent coming into effect of the PACTE Law of 22 May 2019, and in particular the supplementing official order of 24 July 2019, justified the application of the principle of fairness.

First, I took into consideration the new provisions enacted by this order, according to which the money from profit sharing allocated to a corporate collective retirement savings plan ("PERECO" or "PERCOL"), as a result of a default investment, may be liquidated or redeemed in the month in which notice is served of them.[1] Now, I noted that, as soon as he knew about the default investment, i.e. in May 2019, after making a phone call to the institution, Mr A. reacted immediately by making a claim to customer service. He therefore reacted within the month in which he became aware of the default investment.

Next, I noted that this was the first time that a default investment had been made for him, and that Mr A. had never before voluntarily invested his assets in the PERCO plan, since it corresponded neither to his means nor to his needs.

Lastly, I observed that Mr A. was only 35 years old, and that, after the termination of his contract, he would therefore now have to pay account management charges for his PERCO plan until his retirement, unless there were subsequently another retirement savings scheme. Accordingly, the small amount held on this plan was destined to decrease gradually year after year due to the debiting of account management charges.

The numerous discussions with the institution proved successful, and in light of this last factor the institution agreed to respond favourably to my request and proposed, exceptionally, to release the assets held on the PERCO.

Lesson to be learned

In accordance with the French Labour Code, the institution responsible for managing the employee savings scheme must apply the default allocation for investing the profit-sharing bonus when the retail investor does not send in his/her option form within the specified deadline.

However, mediation resorts to fairness on a case-by-case basis, when circumstances so permit.

To reach the fairest solution in this particular case of default investment, I recommend that, at the very least, the institutions managing employee savings accounts reconsider their position in light of the new provisions enacted by the official order of 24 July 2019 supplementing the PACTE Law, when the conditions therein are complied with. As a result of this new legislation, a right is conferred on the employee to express their real choice within a month of their notification or knowledge (as in the present case) of the default investment on a corporate retirement savings plan, to be able to liquidate or redeem the plan. The text only mentions new corporate retirement savings plans. Only an extensive interpretation of this legislation, which I recommend, therefore allows it to be applied to the backlog of old PERCO plans.

Finally, I would remind investors of the importance of informing institutions whenever they change postal address, by sending them proof of domicile less than three months old, and updating their email address indicated to the account manager, which is too often a business email address, whereas a personal email address limits this type of incident.

[1] Case of the Month, November 2019: When an employee thinks that their allocation decision has been finalised

[2] Official order No. 2019-766 of 24 July 2019, which supplements the PACTE Law, created Art.L224-20 of the Monetary and Financial Code which provides that: "[…] When a payment corresponding to money coming from profit sharing is allocated to a corporate collective retirement savings plan under the conditions provided for in Article L. 3324-12 of the French Labour Code, the account holder may, as an exception to Article L. 224-4, request the liquidation or redemption of the rights corresponding to this payment within a period of one month from the date of notification of its allocation to the plan. […]"

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