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11 March 2022

Not being able to subscribe to a fund does not necessarily imply a refusal to sell

Some funds are strictly reserved for professional clients, and clients who do not meet the subscription conditions required by the fund cannot acquire units, even if they want to. It is this particular case that I will present to you in this month's issue.

The facts

Holding a securities account in the books of institution X, Mr T. wanted to buy units in an alternative investment fund.

However, his account keeper would not allow him to acquire the securities in question, with the institution's online space stating that: "You cannot take a position on this security". After asking the customer service department for an explanation, Mr T. was told that the institution did not allow the subscription of this fund following a decision by the sales department.

Mr T. considered this to be a refusal to sell, adding that neither the sales literature nor the general terms and conditions of his account keeper informed customers that the acquisition of certain securities would be impossible for purely commercial reasons.



Since he was determined to acquire the disputed securities in his securities account, Mr T. referred his dispute to me.

The investigation

After carefully examining Mr T.'s file, I questioned the institution, which gave me its observations

The firm told me that the fund's Key Investor Information Document (KIID) states that it is a professional investment fund. Consequently, only the persons mentioned under the heading "Relevant subscribers" as defined in the prospectus and the subscription form are authorised to acquire units of the fund in question. Mr T. was therefore not entitled to acquire units in this fund, as he did not fall into any of the categories mentioned in the KIID.

The firm therefore decided that Mr T. could not buy units in this fund not because it was refusing to sell them to him, but because of the subscription conditions set by the fund, which were linked to its very nature as a professional investment fund.

Recommendation

After receiving this response, I carried out an in-depth analysis of the case.

First of all, it should be remembered that, in principle, the subscription and acquisition of units or shares in a professional investment fund are reserved for professional clients.^[1]

Professional clients may be professional by nature (financial institutions, insurance companies, institutional investors, etc.), by size (conditions relating to a minimum threshold in terms of turnover, balance sheet and/or an amount of equity capital) or by option, i.e. on request.

It is therefore possible for a non-professional client, such as a private individual, to opt for the status of professional client. The investment service provider must then make an appropriate assessment of the client's skill, experience and knowledge in order to have reasonable assurance that the client is able to make investment decisions and understand the risks involved, since the protection afforded to retail clients will no longer be available.

As part of this assessment, the client must meet at least two of the following three criteria, which the professional must verify:^[2]

- hold a portfolio of financial instruments worth more than €500,000;



- carry out transactions, each of a significant size, in financial instruments, at an average rate of at least 10 per quarter over the last four quarters;
- have held a professional position in the financial sector for at least one year.

Furthermore, retail investors may also subscribe to a professional fund if their initial subscription is €100,000 or more, or if the subscription is made as part of an asset management investment service.^[3]

In this case, after examining the KIID, I noted that the fund in which Mr T. was interested was indeed a professional investment fund and that the prospectus expressly stated that the fund was not open to retail investors. Only investors as defined in Article 423-2 of the AMF's General Regulations could subscribe to it.

However, the evidence in my possession here shows that:

- First of all, Mr T. was not a professional client and had no justification for asking to be treated as a professional client by his account keeper on request.
- Secondly, this was not a subscription under a management mandate, nor a subscription for an amount of €100,000 or more.

I found that Mr T.'s proposed subscription did not meet any of the conditions set out in Article 423-2 of the AMF General Regulation and that, consequently, the fact that he was unable to purchase the fund's units was not the result of a commercial choice made by the institution, but rather based on objective criteria. I therefore gave an unfavourable recommendation to Mr T.'s request.

Lessons to be learned

As illustrated in this case, the acquisition of units in certain funds may be reserved exclusively for professional clients, in particular because of the risks involved.

However, given the vague and, above all, inaccurate response sent to him by the institution prior to the Mediation, Mr T. was right to think that the fact that he was unable to acquire the disputed securities was actually because of the institution's commercial policy.

To avoid misunderstandings of this kind and the risk of unnecessary disputes, it would be advisable for customer services to provide customers who complain about the refusal to



purchase certain products with objective reasons for this impossibility, since in this case the real reasons, of a regulatory nature, were sufficient to fully justify the institution's decision.

Clients are also advised to carefully examine not only the KIID, but also the prospectus of the funds in which they are interested, as these documents specify the nature of the funds and the categories of authorised subscribers.

More generally, this case is a reminder that the purpose of client categorisation is to establish different levels of protection, depending on clients' knowledge of financial instruments and their ability to bear risks.

As mentioned above, a retail client may ask to be treated as a professional client on an optional basis, in particular to obtain more advantageous rates or, as in this case, to have access to certain funds reserved for professionals.


In so doing, the client should be aware that he voluntarily loses part of the protection afforded to a retail client by the rules of good conduct.

[1] Article L. 214-144 of the Monetary and Financial Code.

[2] Article D533-12 of the Monetary and Financial Code

[3] Article 423-2 of the AMF GR

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