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Investment fraud

Inexperienced investors who put their savings into a start-up or crypto-currency must assume the risks

Par Romain Dupuis le 22 August 2023

Investing your savings in a start-up or crypto-currency involves risks. If the investment ultimately proves unsuccessful, can the investor complain of a scam in an attempt to recover his or her stake ? In a final decision dated March 21, 2023 (ACPR/206/2023), the Geneva Court of Justice ruled in the negative, rejecting the appeals of some twenty unfortunate investors who felt they had been duped.

A group of companies (called “S”) is developing a payment system that can be used with a loyalty card at various retailers. For every purchase made with the card, the customer receives a percentage in the form of a retrocession. They can then use the accumulated credits at retailers affiliated to the S network.

The group also offers “packs”, i.e. bundles of loyalty cards enabling customers to become “agent-distributors” by promoting the program and sponsoring new members in exchange for commissions. A pack costs up to CHF 5,000.

It is also possible to invest in the group’s shares, or in a “crypto-currency”, which, as we learn from the judgment, was rather another type of financial instrument (unspecified), also “extremely volatile”.

To attract customers, Group S’s managers targeted small retailers and individuals with no experience of finance or new technologies, presenting their loyalty system as a revolutionary idea via their website, brochures and newsletters. They also use influential trade associations to promote their product, notably at conferences.

Twenty or so financially inexperienced individuals (a restaurant owner, a medical assistant, a cab driver, a hypnotherapist, etc.) were convinced and invested substantial amounts – sometimes close to CHF 100,000 – in the various products on offer (packs, shares or crypto-currencies).

Unfortunately for them, the loyalty program, presented as a technological revolution, turned out to be a commercial failure. The packs earned nothing (or almost nothing), and the shares, like the crypto-currency, lost all value. Several of the group’s companies went into liquidation.

Disillusioned, the investors file a criminal complaint against the directors of Groupe S and the

companies (art. 102 CP), claiming to have been the victims of a swindle (art. 146 CP). However, the Geneva Public Prosecutor's Office considered that the constitutive elements had not been met, and issued an order of non-entrée en matière (art. 310 al. 1 let. a CPP).

On appeal, the Court of Justice recalled that swindling presupposes that the perpetrator deceives his victim by using trickery. Deception takes the form, for example, of false statements or concealment of true facts. Cunning, on the other hand, presupposes a structure of lies or fraudulent maneuvers, or at the very least the communication of false information, if verification is not possible or cannot reasonably be demanded.

On the other hand, astuteness is excluded if the victim could have protected himself with a minimum of care, or avoided the error with the minimum of prudence that could be expected of him. His or her degree of experience in the field concerned must be taken into account.

In the case in point, the plaintiffs allege that they were induced to invest in Group S's loyalty program through the acquisition of packs, shares or crypto-currencies, after having been misled by misleading and clever assertions. They accuse the group's managers of having promised them substantial profits, when in reality the prospects of gain were non-existent and the business model was doomed to failure from the outset.

The court disagreed.

It found that the loyalty program promoted by Groupe S was perfectly functional, but that it had simply suffered from a lack of affiliation by retailers and their customers. The group's managers had invested considerable resources in developing their offer, which demonstrated that they did not perceive it as doomed to failure.

In reality – and this is the crux of the Court's reasoning – the plaintiffs could not objectively have been unaware that acquiring a new product, developed by a start-up, involved a certain amount of risk. Moreover, the prospect of obtaining a return on their investment, and quickly at that, was not guaranteed. The success of the loyalty system depended on the size of the network, so there was necessarily an element of uncertainty and risk. The same reasoning applies to the acquisition of group shares and, even more so, to investment in crypto-currency.

In other words, the Court criticizes the plaintiffs, who had no experience in the financial field, for having allowed themselves to be blinded by the prospect of easy gains without exercising the elementary precaution that could be required of them, namely seeking prior advice from professionals in the field. The order of dismissal is therefore confirmed.

The – relatively severe – recitals of this ruling are likely to apply to a broad spectrum of financial investments. They provide a useful reminder to investors – particularly those with no particular knowledge of the financial sector – at a time when the supply of crypto-currencies and other financial technology start-ups is greater than ever, and when the prospects of easy gains are sometimes matched only by the risks of abysmal losses.