

The situation created by Covid-19

The health crisis linked to the spread of Covid-19 and the restrictive measures taken by public authorities to stop the spread of this virus are having a violent impact on all sectors of society.

Brucher Thieltgen & Partners gives you forthwith some answers to urgent questions that arise in various sectors of the economy.

Questions that arise in relation to investment funds

The financial markets, which are known both for their volatility and for being conducive to panic movements uncorrelated to the actual financial health of listed assets, have been plummeting in recent weeks.

Open-ended investment funds are generally obliged (whether daily, monthly or at more extended intervals) to redeem the units of their investors who so request. To this end, the funds calculate their net asset value and, if necessary, sell assets in order to meet redemption requests.

The crisis in the financial markets is jeopardizing the liquidity of these funds at a time when, on the one hand, the assets to be sold have lost value and, on the other hand, redemption requests from anxious investors are increasing.

In the long term, the funds run the risk of customer claims against the CSSF and, for the unluckiest of them, of being liquidated by the courts.

Points of attention and solutions

1. The documents of incorporation and the prospectus of the funds generally contain a clause allowing the fund to temporarily suspend redemptions when, due to political, economic, military or monetary events or circumstances beyond the responsibility and control of the fund, the disposal of the assets of the fund is not reasonably or normally practicable without being seriously detrimental to the interests of the investors.

This clause, which admittedly comes close to the criteria of force majeure, is nevertheless limited by the vague nature of its terms, which leave some legal uncertainty as regards compliance with the conditions for its implementation. In particular, the reference to the interests of investors is problematic, whereas the fund reserves the right to assess these interests.

2. In order to prevent the risk of an untimely liquidation, it may prove useful to refer to the legal concept of *force majeure*, which is well anchored in positive law and whose contours are clearly defined.

The invocation of *force majeure* allows the suspension of an obligation when the impediment is temporary or the dissolution of the contract when the impediment is definitive. For an event to be characterized as such, it must satisfy three cumulative conditions: exteriority, irresistibility and unpredictability.

Only the first of these scenarios seems to be applicable to the hypothesis currently being examined: the coronavirus can never constitute a case of total exoneration from liability, but only induce deferral of the execution of contractual obligations, including the redemption of investors' shares (who bear and accept, in any case, the risk of losing their investment). *Force majeure* is therefore important for funds, not so much from the liability aspect, but essentially from the aspect of the fund's sustainability.

In terms of the criteria of *force majeure*, the externality of the occurrence of the coronavirus seems to be a given. Investment funds are third parties at the advent of the pandemic.

The unpredictability and irresistibility of the crisis are more nuanced criteria.

It is case law that unpredictability cannot be taken into account when the contract was concluded after the spread of an epidemic. The success of the invocation of *force majeure* will therefore always depend on the moment when an investor will have subscribed to the fund.

Apart from the most recent investors, against whom *force majeure* may therefore not be able to be invoked, there remains the third criterion of *force majeure* to be demonstrated, namely that of irresistibility.

In this respect, the public authorities have recently been talking about the existence of a case of *force majeure* caused by the coronavirus which has caused an insurmountable paralysis of the near-global economy.

It remains to be seen what shall be the assessment of the autonomous judiciary power, which will raise the question of the irresistible nature of the crisis not from a health point of view, but from the more pragmatic point of view of the possible predictability of a financial crisis, regardless of its origin, impacting the financial markets and therefore necessarily an investment fund.

In its assessment, the judge will nevertheless have to take into account the contract, *i.e.* in this case the fund's articles of association/management regulations and prospectus, it being understood that specific cases of *force majeure* may always be contractually provided for.

The clause cited under point 1. establishing a right to suspend redemptions in the event of "political, economic, military or monetary events or circumstances beyond the responsibility and control of the fund" may prove useful for this purpose. Even if the clause, in its entirety, is not free from criticism, it does have the merit of providing information on the will of the parties with regard to the definition of cases which could allow a suspension of redemptions.

Taking this will into account, the judge may come to the conclusion that an economic and/or monetary crisis, caused by the coronavirus or by any other cause, constitutes an irresistible and unforeseeable case meeting the criteria of *force majeure*.



3. It will therefore be up to the statutory management body of investment companies, respectively to the management body of management companies of mutual funds, in so far as circumstances make this necessary, to decide on a possible suspension of the right to redeem investors' units.

Their responsibility for deciding on such a measure derives from ordinary company law (article 441-9 of the Law of 10 August 1915 on commercial companies). However, it should be borne in mind that the management body's liability exists only towards the investment fund and not towards its shareholders, unless the latter can demonstrate a loss that is personal and distinct from that linked to the loss of value of the fund's assets. In the present case, we express our reservations to the fact that an investor could demonstrate such harm resulting from the mere fact that his redemption request got suspended.

For further information

Our experts, which remain fully operational during the crisis, are at your disposal for further information.

Do not hesitate to contact in particular :



Me Nicolas Thieltgen – Avocat à la Cour - Partner
nicolas.thieltgen@brucherlaw.lu



Me Brice Hellinckx – Avocat à la Cour – Counsel
brice.hellinckx@brucherlaw.lu



Brucher Thieltgen & Partners · Avocats à la Cour
2, rue Sainte Zithe · B.P. 507 · L-2015 Luxembourg
T : (352) 26 0 27 1 · F : (352) 26 0 27 200
www.brucherlaw.lu

