The Ombudsman's monthly case

Attention: the possible lockup period for your assets placed in an FCPI

Retail private equity funds (FCPI) are collective investment undertakings managed by an asset management company and invested primarily in unlisted innovative companies which, by design, are not liquid. In return for this illiquidity risk as well as the risk of capital loss, subscription to units in an FCPI offers a significant tax advantage on entry upon condition that the holder keep his units for a minimum of five years. However, the investor may find himself in a situation where his assets remain locked up beyond the scheduled period. This is what happened to Mrs. A. who wanted to redeem her units in the FCPI after ten years.

I receive this type of complaint on a regular basis. This mediation case is an interesting example.

The facts:

Mrs. A. subscribed to nine units of FCPI X at her financial institution on 25 October 2007. She informed me that the lifespan of this fund was eight years but that she received a letter in 2015 informing her of its extension, and another in 2016 informing of a second extension until June 2017. She then asked her financial institution, in its capacity as a marketer, to recover the entirety of her investment. However, the latter responded negatively to her request.

In these circumstances, she requested my intervention.

The analysis:

I examined this case in light of the regulation and asked the marketer of this fund about the matter, since the claim was brought before it.

The FCPI's regulatory documentation consisted of an information notice (and now a KIID) that must be given to the investor prior to subscription, and a fund rulebook, available on simple request from the asset management company.

I verified that on the subscription form, of which I had obtained a copy, Mrs. A. acknowledged having read the information contained in the notice, which had been given to her beforehand. I could not, therefore, reproach the marketing institution for any infringement.

I then consulted the information notice and the FCPI X's fund rules. I noticed that this fund had a lifespan of eight years which could be extended twice by one-year periods, by the sole decision of the asset management company, and that redemption requests were not possible during the lifespan of the fund with the exception of three authorised specific cases: death, disability, and unemployment.

Mrs. A did not dispute that she had been informed of the FCPI X's two extensions.

This same documentation also provided for the lock-up of redemptions during the lifespan of the fund, a rule whose purpose is to respect the equal consideration of unitholders.

Hence, the asset management company was entitled, pursuant to its rules, to refuse to comply with a request for a possible redemption during the regulatory lifespan of the fund.

At the time Mrs. A. requested the redemption of her units, though, the maximum lockup period for the FCPI X had been exceeded.

However, an Enforcement Committee decision of 14 December 2012[1] specified that liquidation of the fund that continues beyond the regulatory lifespan of an FCPI does not, in itself, constitute an infringement. In its position-recommendation DOC 2012-11, the AMF, while recalling that the asset management company must implement the required provisions to be able to liquidate the portfolio in good conditions and before the end of the fund's statutory lifespan, states that, in the contrary case, the asset management company is held liable only if it has not acted in the interests of the unitholders.

Examining the relevant evidence in order to determine whether an additional period of time was in the interest of the holders thus became essential. I therefore questioned the marketer, with whom this dispute was pending, to be able to appreciate the diligences of the asset management company, duly recalling that in my capacity as the AMF Ombudsman I have no powers of investigation or enquiry.

In this case, the marketer told me that the asset management company had, since the fund's lifespan had been exceeded; in July 2017, not only stopped collecting management fees, but also made partial repayments to all of the unitholders already amounting to 45% of the initial investment, which could be evidence of a diligent process and, finally, that the asset management company had planned to complete the liquidation of FCPI X in 2018.

The recommendation:

In view of all the elements at my disposal and not having, in my capacity as Ombudsman, any additional powers of investigation, the evidence found in this case led me to consider that, beyond the regulatory duration of the FCPI, the asset management company had implemented the provisions in the interest of all the unitholders during the liquidation of the fund. Only additional investigations, which fall outside the powers of mediation, could highlight breaches in the redemption process and its timing.

The lesson to be learned:

In the context of FCPI subscription, the investor must be aware that the repayment of his investment will be made at maturity or possibly as the portfolio assets are realised and that it is up to the asset management company to implement all the provisions needed to complete the liquidation of the assets within the maximum time period provided for in the fund rulebook. It may happen that this period is exceeded, but that does not in itself constitute an infringement.

[1] Enforcement Committee decision of 14 December 2012 with respect to company X, formerly called INNOVEN PARTENAIRES SA and MESSRS WALTER MEIER, GILLES THOUVENIN et THOMAS DICKER