

**Judgment in a commercial matter VI No. 984/17**

Public hearing of Thursday, ninth November two thousand and seventeen

**Liquidation no. L-10763/2017**

Composition of the court:

Nadine WALCH, deputy presiding judge;  
Joe ZEIMETZ, judge;  
Jackie MORES, judge;  
Claude FEIT, clerk.

[signatures]

**Between:**

**The State Counsel** at the District Court of and in Luxembourg, Cité Judiciaire, Luxembourg,

**Applicant** seeking the dissolution and liquidation of **FENICE SICAV SIF SCA**, a partnership limited by shares (*société en commandite par actions*) in the form of an open-ended investment company – specialised investment fund, pursuant to an application dated 3 October 2017,

represented by the deputy state counsel Pascal COLAS,

**and:**

**FENICE SICAV SIF SCA**, a partnership limited by shares (*société en commandite par actions*) in the form of an open-ended investment company – specialised investment fund, registered in the Luxembourg Trade and Companies Register under number B 161 793, with registered office at 6A, rue Gabriel Lippmann, L-5365 Munsbach,

**defendant** for the purposes of the aforementioned application,

represented by *Maître* Andreas KOMNINOS, barrister, resident in Luxembourg,

**in the presence of:**

the *Commission de Surveillance du Secteur Financier* (the Luxembourg Financial Sector Supervisory Authority), established and having its registered office at 110, route d'Arlon, L-2991 Luxembourg,

represented by Mr Serge EICHER and Mr Laurent GOERGEN, resident for business purposes in Luxembourg.

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**FACTS:**

In an application of 3 October 2017, attached hereto, the State Counsel requested the dissolution and liquidation of the defendant;

The case was heard at the public hearing on 2 November 2017 before the sixth division, sitting in a commercial matter, at which the oral debates took place as follows:

The State Counsel's representative read the application reproduced above and stated his grounds.

The observations of the representatives of the *Commission de Surveillance du Secteur Financier* were heard.

*Maître* Andreas KOMNINOS stated his party's grounds.

The court reserved the case for deliberation and at today's public hearing gave the following

### **judgment:**

In an application dated 3 October 2017, attached hereto, the State Counsel requested the dissolution and placing in liquidation of FENICE SICAV SIF, a partnership limited by shares in the form of an open-ended investment company – specialised investment fund.

The application was served through the clerk's office on 12 October 2017.

In support of the application, the State Counsel's Office stated that, pursuant to article 47 of the Luxembourg Specialised Investment Funds Act of 13 February 2007 (*loi modifiée du 13 février 2007 relative aux fonds d'investissement spécialisés*) (hereinafter "the act of 13 February 2007 as amended"), he had received from the *Commission de Surveillance du Secteur Financier* (hereinafter "the CSSF") a request for the dissolution and liquidation of the partnership limited by shares FENICE SICAV SIF, on the grounds that the decision had been taken on 8 August 2017 to withdraw the fund from the official list of collective investment undertakings in accordance with the provisions of article 43 of the act of 13 February 2007 as amended and no appeal against that decision had been made to the Administrative Court (*Tribunal Administratif*).

In accordance with the request submitted to it by the CSSF, the request of the State Counsel's Office was based on article 47(1) of the act of 13 February 2007 as amended, which provides that "the district court sitting in a commercial matter, acting upon a request presented by the State Counsel's Office acting *ex officio* or at the request of the CSSF, orders the dissolution and liquidation of the specialised investment funds covered by this act whose registration on the list provided for in article 43, paragraph (1) has been definitively refused or withdrawn".

It is established case law that the act of 13 February 2007 as amended applies to the partnership limited by shares FENICE SICAV SIF, that the CSSF's decision of 8 August 2017 to withdraw this fund from the aforementioned official list of specialised investment funds was duly notified to the defendant on 8 August 2017, that the period of one month in which an appeal against that decision could be lodged expired without an appeal having been lodged with the Administrative Court (c.f. certificate from the clerk's office of the Administrative Court dated 21 September 2017), and that the decision to withdraw the company from the official list is therefore final.

The parliamentary proceedings concerning the Luxembourg Specialised Investment Funds Act of 13 February 2007 as amended state that "articles [46 to 51] are an adopted copy of articles 99(1), 104, 105, 106, 107 and 108 of the Collective Investment Undertakings Act of 20 December 2002, as amended (*loi modifiée du 20 décembre 2002 concernant les OPC*)".

It is established by the parliamentary proceedings relating to the aforementioned article 104 of the act of 20 December 2002, which in fact goes back to article 80 of the Collective Investment Undertakings Act of 30 March 1988, itself taken from article 44 of the Collective Investment Undertakings Act of 25 August 1983, that where the matter comes before the court by means of ordinary referral on the basis of article 104 of the aforementioned act of 20 December 2002, the court in principle does not have the discretion to decide whether or not the collective investment undertaking in question should be placed in liquidation, but must limit itself to verifying that the requirements for implementing the request (that the aforementioned act applies to the company in question and that the decision to withdraw or refuse registration on the official list of collective investment undertakings or specialised investment funds as the case may be is final) are satisfied; it does have discretion to decide on the method of liquidation to be adopted.

According to the reasoning of the drafters of the law, a collective investment undertaking or a specialised investment fund whose approval – i.e. registration on the list of collective investment undertakings or specialised investment funds as the case may be – is refused or withdrawn can submit an administrative appeal against the decision (either to the body that made the decision or to the court) and present its arguments, but as soon as the administrative decision to withdraw the approval becomes final, the fund is no longer able to continue to operate “pursuant to its articles of association” and must therefore be dissolved and liquidated.

Therefore, and since the partnership limited by shares FENICE SICAV SIF has not lodged any objection either as to the regularity of the procedure or the opening of compulsory liquidation proceedings, it is necessary to order the dissolution and compulsory liquidation of the partnership limited by shares FENICE SICAV SIF pursuant to article 47 of the act of 13 February 2007 as amended, and to appoint a supervisory judge and a liquidator, without further analysing the grounds put forward by the CSSF in support of its decision to withdraw registration.

#### Liquidator

In accordance with article 47 of the act of 13 February 2007 as amended, the liquidator may bring and defend any action on behalf of the fund, receive any payments, grant release with or without receipt, realise any transferable securities of the fund and reinvest the proceeds, create or endorse any trade bills and settle or compromise on any disputes. The liquidator may dispose of the fund’s immovable assets by public auction. The liquidator may also, but only with the authorisation of the court, mortgage its assets, pledge them and dispose of its immovable assets by private contract.

Pursuant to article 47(3) of the act of 13 February 2007 as amended, once the judgment placing the fund or undertaking in liquidation has been made, any actions concerning its movable and immovable assets and any measures of execution over the movable and immovable assets may only be brought, pursued or exercised against the liquidator. The judgment placing the fund or undertaking in liquidation brings an end to any attachment or seizure of the movable and immovable assets made at the request of the ordinary, unsecured creditors.

It follows that the fund in liquidation loses the right to administer all its assets; that right is conferred upon the liquidator, who acts in the interest of both the company and the investors and creditors he or she represents and who has the widest powers to perform his or her task.

In the case before the court, the liquidator’s powers will be exercised both in the Grand Duchy of Luxembourg and abroad, since in principle the effects of the rule of the unity and universality of the

compulsory liquidation of a fund having its registered office in Luxembourg apply to all the movable and immovable assets of the company in liquidation, even if those assets are located abroad.

The liquidator may, insofar as he or she deems it necessary, have recourse to the services of any representatives, agents or officers in order *inter alia* to retain and keep the books, registers and archives of the partnership limited by shares FENICE SICAV SIF, to retain and realise the assets, and to take any measures that he or she deems to be in the interest of the liquidation.

The expenses incurred by the liquidator in doing this as well as his or her costs and fees will be payable by the fund in liquidation and treated as administrative costs to be paid out of the assets of the liquidation before any distribution of monies, subject to article 47 (7) of the act of 13 February 2007 as amended.

As a result of the cessation of the fund's power to deal with its assets, it is also necessary to halt the accrual of interest, with regard to the general body of creditors, from 9 November 2017, the day on which the liquidation proceedings were opened.

#### Lodging of claims

Pursuant to article 47(4) of the act of 13 February 2007 as amended, once the sums necessary to settle the debts have been paid or deposited, the liquidator distributes to the investors the sums or assets to which they are entitled. It must, therefore, be concluded that the investors of the partnership limited by shares FENICE SICAV SIF are not to be considered part of the general body of creditors but "shareholders" who will share in the liquidation surplus.

As such, they are not required to lodge a claim in order to assert their rights.

The creditors of the specialised investment fund must lodge their claims at the clerk's office of the district court of and in Luxembourg, sixth division, by 30 November 2017 at the latest. Article 508 of the Commercial Code will apply to claims lodged after that date.

The claims will be verified, admitted and contested according to the rules applicable to insolvency/bankruptcy, unless the method of liquidation is altered by a subsequent judgment (article 47(1) of the act of 13 February 2007 as amended).

#### Conversion of claims denominated in a currency other than the Euro

Claims denominated in a currency other than the Euro will be converted to Euros at the exchange rate ruling on the date of this liquidation judgment as published by the European Central Bank and all allowed claims will be paid in Euros.

#### Supervisory judge

The liquidation will be overseen by a supervisory judge who will have the widest right of scrutiny and right to information and who will be able to give the liquidator any instructions that the supervisory judge deems to be in the interests of the creditors and investors.

Furthermore, pursuant to paragraph 2 of article 47(1) of the act of 13 February 2007 as amended, it is necessary to rule that the insolvency/bankruptcy liquidation rules are applicable, subject to any exceptions detailed above and those provided for by articles 47 and following of the act of 13 February 2007 as amended, and subject to any changes to the method of liquidation made in a subsequent decision.

Pursuant to the last sentence of paragraph 3 of article 47(1) of the act of 13 February 2007 as amended, this judgment is provisionally enforceable.

**For these reasons:**

the district court of and in Luxembourg, sixth division, sitting in a commercial matter, ruling after hearing all parties, having heard the submissions of the State Counsel:

**rules** that the application is admissible in form;

**declares** that FENICE SICAV SIF, a partnership limited by shares in the form of an open-ended investment company – specialised investment fund, registered in the Luxembourg Trade and Companies Register under number B161793, with registered office at 6A, rue Gabriel Lippmann, L-5365 Munsbach, is dissolved;

**orders** that it be liquidated;

**appoints** Mrs Jackie MORES, judge at the district court of and in Luxembourg, as supervisory judge and *Maître* Cédric SCHIRRER, barrister, resident in Luxembourg, as liquidator;

**declares** that the liquidator represents both the fund and its investors and creditors and that he has the widest powers to perform his task, which he will exercise both in the Grand Duchy of Luxembourg and abroad;

**rules** that interest will cease to accrue on 9 November 2017;

**orders** the creditors to declare the amount of their claims at the clerk's office of the commercial court of and in Luxembourg by 30 November 2017;

**declares** that the legal provisions detailed in this judgment and those relating to insolvency/bankruptcy liquidation are applicable, subject to the exceptions provided for by article 47 of the specialised investment funds act of 13 February 2007 as amended;

**rules** that claims denominated in a currency other than the Euro will be converted to Euros at the exchange rate ruling on the day of the liquidation judgment as published by the European Central Bank and all allowed claims will be paid in Euros;

**orders** that seals will be affixed at the company's registered office and anywhere else that may be necessary, unless the inventory can be completed in a single day, in which case it will be completed without the prior affixing of seals;

**orders** that an extract of this judgment be published in the *Receuil électronique des sociétés et associations* (Electronic Journal of Companies and Associations) and in the newspapers Luxemburger Wort and Tageblatt;

**rules** that this judgment is provisionally enforceable;

**orders** that costs will be paid by the partnership limited by shares in the form of an open-ended investment company – specialised investment fund FENICE SICAV SIF, or by the Treasury if there are no or insufficient assets.

[signatures]