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I. Triggers for Wind up

1. Requirement of the documents

The most common trigger for the decision as to whether to wind up or to prolong a vehicle is simply the requirements set out in the documentation. In PE style funds, the presumption is that the assets will have been sold when value has been maximised through an active strategy and a decision to extend only occurs in exceptional circumstances. This is not the case in all funds. In some of the more institutionalised longer-term funds, an investor decision to wind up or extend the fund is taken a year or two before the end of the fund life. The fund manager will not have sold the assets prior to this as it does not know if the fund is winding up or continuing. If the investor vote is to wind up then a sales programme is agreed. Investors may agree a limited extension with an exit strategy to be put in place so assets are disposed of over a sufficiently extended period so as not to erode value.

Although the requirements of the documents are the most common experience, in practice (particularly during a cyclical downturn), there are a variety of other circumstances that might give rise to either a premature end of a fund or a need to extend beyond the planned life of the fund.

There may also be specific trigger events in the documentation that result in either a change in the fund manager (discussed further below) or a winding up of the fund. These might include key man events, a change in ownership of the manager, a major dispute or the insolvency of the manager.

2. Market timing

In normal circumstances, managers of closed-ended funds would be expected to sell assets when value has been maximised. In many cases, this will be at the top of the market cycle when values of assets are generally at their highest. However, for many closed-ended funds that are 'opportunistic' or 'value-add' in nature for each individual asset there will be a specific business plan in place for maximising value, for example through development or repositioning of the asset. The point at which value is maximised for the asset will not necessarily coincide with the top of the cycle. The fund manager may have completed the work prior to the top of the cycle and may maximise the internal rate of return by selling at that point rather than hanging on for further yield compression or the prospect of further rental value growth. On the other hand, the fund manager may not have finished the works at the top of the cycle and value might be maximised by holding the asset and completing the business plan.

In the face of the prolonged market downturn during the global financial crisis, most closed-ended funds coming to the end of their fixed life were extended rather than wound up to avoid selling assets at the bottom of the market. As the market for the underlying assets has improved, the pressure to extend funds to avoid adverse market timing has reduced.

Debt related issues

Closed-ended funds have often operated with higher levels of gearing than other funds. Debt related issues have been a trigger for funds terminating other than in accordance with the timetable prescribed in the fund documentation. Examples are:

- Leverage accentuating the issues of market timing. As gearing increases gains and losses, in a geared fund it becomes more crucial to achieve the sale when value is maximised (see general comments on market timing above).
- Funds brought to a premature close by the manager, investors or lenders as levels of debt are unsustainable and the fund ceases to be viable.

- Debt terms impose excessive cost in disposing of assets in normal course of events. There have been examples of loans or swaps which have a duration exceeding the length of the fund, resulting in significant break costs if the assets are sold.
- Additional equity required to rectify debt problems, introduced with an extension to the fund and/or other changes to fund terms as a condition.

3. Performance related issues/changes of fund manager

Although changes of fund manager in closed-ended funds have been relatively unusual, there have been examples, either at the instigation of the investors or due to the failure of the manager. Most fund documentation now allows for the removal of the fund manager both for specific cause and 'not for cause'. In the case of a matter arising that might result in a change of fund manager, there are often provisions that allow for a plan to remedy the problem. In some circumstances, this may trigger a discussion as to whether to wind up the fund prematurely. If there is a subsequent change of fund manager, it may be regarded as desirable to extend the life of the fund to give the incoming fund manager time to resolve the problems that provoked the change.

4. Change of strategy

Although fund extensions have generally been associated with unexpected problems, there have been recent cases where both the fund manager and investors have wanted to extend the life of funds to continue to exploit the assets in very successful funds. There have been several cases of funds being extended or converted to a more open-ended structure to allow the assets to be retained. There have also been cases where some investors have been bought out to avoid the necessity of selling assets. Possible options for prolonging a fund's life are discussed further below.

5. Change in law or regulation

As discussed under 'Requirement of the documents' above, there may be specific trigger events in the documentation that result in either a change in the fund manager (discussed further below) or a winding up of the fund. It may also be the case that changes to law or regulation make the fund no longer viable. Examples in the past have included changes to the marketing of unauthorised collective investment schemes in the UK or tax changes.

Options for prolonging the life of a fund

Traditionally fund documents for closed-ended funds provided for a fixed life by which time the assets would have been sold, with the possibility of a relatively short, fixed-term extension. More recently, there have been examples of other options for the end of fund life including:

- a more substantial extension with the possibility of further extensions;
- conversion of the fund into something semi open-ended, for example with periodic liquidity events; and
- conversion to a listed entity via an IPO.

II. Example for Investment Managers regarding End of Fund Life Process

1. Communication, transparency and timeliness

- 1.1 All investors should receive the same level of communication.
- 1.2 All communications should be provided to investors simultaneously.
- 1.3 Both fund manager and investors are obliged to ensure suitably senior management time is given to the end of fund life process.
- 1.4 Where possible, an alternative senior manager (appropriately experienced) is responsible for the extension process rather than the fund manager.
- 1.5 Unless there is very good reason, an investor should have a consistent documented house view shared by all personnel involved.
- 1.6 Fund managers and investors should ensure any consultation process is as transparent as possible.
- 1.7 The fund manager should be prepared to wind up the fund if agreement is not reached.
- 1.8 Investors should have the right to meet without the fund manager to discuss proposals.
- 1.9 Fund managers should provide an extension proposal in a timely manner, no later than one year before fund end but ideally two years to ensure there is sufficient time to fully resolve all issues.
- 1.10 Following a formal proposal, fund managers should allow investors a minimum period of at least eight weeks to consider prior to a formal vote.
- 1.11 Investors should respond fully to any proposals within the timeframe provided.

2. Explicit yet flexible fund documentation

- 2.1 It is the fund manager's responsibility to ensure documentation is fit for purpose.
- 2.2 It is the responsibility of all investors to ensure they fully read all relevant fund documentation and material provided as part of the termination or extension process.
- 2.3 It is incumbent on the fund manager to provide a clear definition of terms, particularly around the areas of liquidity, fees and exit charges.
- 2.4 The overriding assumption on any closed-ended fund is that the fund will wind up within the length of the fund life as stated in the fund documents. Any derogation from this assumption needs to be agreed by investors with dissenting investors given the option to exit.
- 2.5 Documentation should contain a clear timetable for the extension process giving sufficient time for decisions to be made. Details of the information required from the fund manager should also be provided.
- 2.6 At end of fund life, it is recommended an investor advisory committee be put in place, if it does not already exist, to participate in the wind-down or extension process.
- 2.7 Investors should have the right to be represented on an investor advisory committee if so desired. However, the composition of the committee may vary from one fund to
- 2.8 Investors should be offered the opportunity to share legal representation, if it is deemed necessary, at the expense of the fund.
- 2.9 The voting threshold should reflect the nature of the issue being voted on. A 75% threshold is recommended for an extension decision. However, if an investor is entitled to exit then this cannot be prevented unless they concur. A 100% voting threshold is not recommended.
- 2.10 If required, fund documentation should be modernised if the fund is extended beyond its original fund life (excluding any short-term extensions agreed in the original documentation).

3. Recognition and management of conflicts of interest

- 3.1 All conflicts should be declared by the conflicted party at the earliest opportunity.
- 3.2 The fund manager to have a clear business case to match strategy with the proposed extension, showing how investors' interests are enhanced.
- 3.3 Where there is a conflict of interest in the sale process, ensure an independent representative is involved, investor agreement is reached and valuations properly reflect market conditions.
- 3.4 When a portfolio is to be sold and the fund manager potentially retained by the buyer, two deal teams should be created by the fund manager with Chinese walls in place and senior representation on each team.
- 3.5 Avoid allowing the fund manager or any investors having pre-emption rights on any asset.
- 3.6 Where assets are to be sold to an investor(s), ensure investor agreement is reached and valuations properly reflect market conditions.
- 3.7 Consider carefully the appointment of an independent representative who has had any prior professional connection with the Fund and could be seen as an extension of the fund manager.
- 3.8 Investors to approve any independent representative to the board of the general partner, the fund manager's investment committee or the investor advisory committee for the fund.

4. Management decisions: be mindful of fund termination date

- 4.1 Any potential change in fund strategy that may cause a delay in the end of fund life process should be communicated to all investors at the earliest opportunity. Investors should decide if the potential creation of additional value is worth the postponement.
- 4.2 Ensure individual asset plans are completed and maximum value created before the end of the fund's life.
- 4.3 Avoid creating liabilities that run beyond the end of fund life. If this is not possible, ensure appropriate action is taken to make certain the fund is wound up as soon as possible.
- 4.4 In situations where a fund is extended but assets are to be sold to provide liquidity to exiting investors, the fund manager must ensure that it treats both exiting and continuing investors fairly.
- 4.5 During the end of fund life process, asset management and wind up fees should appropriately reflect the amount of work required.

III. Guide for the Vehicle Extension Process

Stage	Action	Timing
Pre-Proposal	Initial Investor Consultation	
	<p>Purpose: Investment manager 'listening stage' to gain a broad understanding of investor requirements.</p> <p>May involve 1:1 meetings or a questionnaire</p> <p>No information is imparted by fund manager at this stage</p>	
Stage 1	Fund Manager Straw-man letter proposal	
	<p>Purpose: To provide initial proposal to all investors simultaneously in writing.</p> <p>Information provided:</p> <p>Fund business plan (to extend rather than terminate)</p> <p>Individual asset business plans</p> <p>Financial analysis of performance and returns</p> <p>Fund manager conflicts and risk management</p> <p>Proposed timetable</p>	
Stage 2	Investment Manager Presentation	c. 4 weeks after Stage 1
	<p>Purpose: To present draft proposal to all investors and seek agreement to pursue extension or termination and identify principal areas of conflict between investment manager and investors.</p> <p>If required, the investment manager may propose an investor chairman (may be independent). The appointment should be agreed by investors.</p>	
Stage 3	Provision of Detailed Proposal	c. 2 weeks after Stage 2
	<p>Purpose: To provide additional information in writing once the draft proposal to extend has been accepted.</p> <p>Information provided:</p> <p>Liquidity mechanism</p> <p>Costs for exiting investors</p> <p>Revised fund terms</p> <p>Terms of appointment for Investment Manager</p>	
Stage 4	Investor Meeting	c. 2 weeks after Stage 3

	<p>Purpose: For investors to discuss and negotiate detailed proposal amongst themselves and identify their own conflicts and possible solutions.</p> <p>Investment Manager attends by investor request only, possibly to present detailed proposal.</p> <p>Minute proposals from meeting shared with all investors and investment manager.</p>	
Stages 4b/c/d	Additional Investor Meetings (as required)	
	<p>Purpose: To provide additional occasions for investors to discuss detailed proposal.</p> <p>Fund manager should have the opportunity to respond to each meeting's proposals and provide revised proposals for discussion</p>	
Stage 5	Presentation of Final Proposal	
	<p>Purpose: To present final proposal to investors following investor meetings.</p>	
Stage 6	Vote	At least 8 weeks after Stage 3
	Investors have a minimum 10 days to respond.	

IV. Wind-up process guide for some of the most common vehicles

This section outlines the wind-up process for four common real estate vehicles, namely:

1. Jersey Unit Trust
2. English and Scottish Limited Partnerships
3. German Limited Partnership
4. Luxembourg Special Investment Fund

Jersey Unit Trust

1. Introduction

There is no public register of Jersey Unit Trusts (JUTs) in Jersey and minimal law applies to the creation, operation and termination of a JUT. JUTs are regulated almost exclusively by the terms of their trust instrument and to which regard must be had in determining: the procedure for terminating and thereafter winding-up a JUT; and distributing its assets.

The JUT wind-up process, and therefore the time required to wind-up, will depend on two main factors:

- the number of investors. Is the JUT a single key investor holding vehicle, a joint venture or a club or multiple investor vehicles?
- the number and type of assets held. For property investment vehicles using a JUT, the assets will typically consist of property with some cash/income. There may be complex arrangements in place in relation to past and future liabilities that need to be unwound.

The JUT could be the vehicle, a feeder to a limited partnership that holds the vehicle assets or an asset holding vehicle that has not been sold with the property in it.

It is imperative that any meeting of investors required as part of the termination and wind-up process should be physically held in Jersey so as not to prejudice central management and control of the JUT being exercised offshore, and consequently the income tax transparency and offshore status of the JUT.

2. Triggers to Wind Up

The termination and resulting wind-up of a JUT may occur as a result of any of the circumstances set out in the Triggers section at the front of this report or specified events set out in the trust instrument.

3. Sequence of Steps

The procedure for terminating and winding up a JUT will commonly involve the following steps:

3.1 Step 1 – ‘Decide’ to Terminate

Termination of a JUT commences with either:

- the express decision of the trustee, fund manager or investors when the natural life of the fund has come to an end and the fund manager and investors have not agreed to extend the life of the fund; or
- automatic termination caused by a trigger event.

The wind-up process commences on termination of the JUT and the JUT continues to exist as a matter of law until all its debts (if any) have been discharged and all assets have been distributed to investors. An investors' ‘decision’ must be evidenced as taking place in Jersey, by holding an investors' meeting in Jersey.

The trustee will be independent of the fund manager and it is prudent, from a commercial point of view, to secure the cooperation of the trustee, especially if wind-up and handover procedures in the trust instrument are not clear.

3.2 Step 2 - Pre-dissolution Considerations

If the fund is not to be extended, the best practice recommendations should still be followed as part of the wind-up process. This will include good communication with investors by the fund manager on the processes involved and the timing on the return of capital and final distributions.

This checklist is an indication of matters requiring action and/or consideration but is not exhaustive:

- Notifications. Notice of termination will need to be given to investors, service providers (administrator, property manager, investment manager, fiscal agent and managing agent), government authorities (Jersey Financial Services Commission (JFSC)), insurers, lenders and third parties.
- Consents. Has any investor used its interest in the JUT as security which requires the prior consent of the lender before that investor can vote for the JUT's termination? Does the JUT need prior consent from any of its lenders?
- Appointments. No liquidating trustee is required to be appointed.
- Terminations of Service Providers. Do any contracts with services providers automatically terminate? Do they require an ordinary resolution of investors (in Jersey) to terminate, novate or waive notice periods?
- Corporate Authorisations. Are any meetings of investors and the trustee (in Jersey) required? What are the resolution thresholds?
- Valuations. Identify any property assets which have not been sold and obtain independent valuations. Usually these can be prepared by the appointed valuer of the JUT.
- Ascertain Liabilities. Identify current and expected future liabilities, including permitted/revenue expenses, capital/income items and estimated wind-up costs. Check historical documentation to check there are no on-going liabilities. In particular, check that there are no outstanding warranty liabilities on past sales that have not expired and are not insured. Consider establishing a cash pool to provide a prudent reserve for contingent liabilities or obtain an insurance proposal to cover the potential liabilities.

3.3 Step 3 - Realise Assets

Following the decision to terminate, the JUT's assets may be distributed in specie but it is more usual that cash proceeds are distributed from the sale of those assets. Typically, one to two years will be provided for this process and fund managers should comply with the best practice recommendations to ensure investors receive regular updates on the sale process.

If investors have already agreed not to extend the fund, the sales should take place during the given wind-up period. If this does not happen, depending on the wording in the fund documents, the trustee, fund manager or investment advisor could be in breach of their obligations. This is a point that needs to be considered on drafting – what happens if the assets are not or cannot be sold in the given period and the investors have not consented to an extension?

From a tax perspective, extreme care should be taken to ensure that the decision to terminate and sell assets is not seen as taking place prior to any formal meetings in Jersey and therefore on-shore in a tax jurisdiction.

3.4 Step 4 - Discharge Liabilities

It is very important to carefully analyse the accounts of the JUT prior to termination and to ensure there is sufficient assets to discharge present and future liabilities. The estimated costs of winding up a fund i.e. legal and administrative costs should be provided for in the accounts. Doing this in advance can avoid additional delays during the wind-up process. Identified liabilities can be settled, insured or assigned. This will assist in avoiding the trustee requiring a retention to meet liabilities that may arise after the JUT assets have been distributed.

If the JUT to be wound up is a property-owning JUT, it is important to ensure that all property matters have been dealt with and that there are no inherent liabilities which remain in the JUT.

3.5 Step 5 – Filings

There is no Jersey law requirement for any advertisements to be placed with creditors or for any filings to be made. The JFSC should be notified that the JUT has been terminated and wound up.

3.6 Step 6 – Distribute Any Remaining Cash and Income

Once the trustee is satisfied that all liabilities of the JUT have been discharged it will usually hold a final meeting and resolve to distribute any remaining cash/income to investors. This generally takes place one to two years after termination.

3.7 Step 7 – Trustee Indemnity

Under Jersey law, a trustee may require reasonable security for liabilities whether existing, future, contingent or otherwise before distributing the final cash from the JUT. The form of such security is usually an indemnity in favour of the trustee from the investors and could be up to 10 years. This requirement is not going to be acceptable in a fund situation as investors could be numerous and would not be prepared to take on this 'tail liability'.

There are three possible solutions:

1. The trustee accepts there are no on-going liabilities and no indemnity or retention is required. This does sometimes happen.
2. The trustee retains a retention to meet potential liabilities. As these, by their nature, are unknown it is difficult to quantify and a trustee could ask for it to be held for 10 years.
3. The fund manager arranges insurance to cover the risk. This is becoming more popular.

3.8 Step 8 – Finalise Accounts

Subject to the terms of the trust instrument, the trustee will usually prepare closing accounts detailing the JUT's assets and liabilities (if any) at the end of the wind-up process.

English and Scottish Limited Partnerships

1. Introduction

The limited partnership deed should set out the circumstances in which a limited partnership can be terminated, for example a limited partnership may terminate on a set date or after a set term, on the direction of an agreed majority of the limited partners or on the disposal of all limited partnership assets. While a limited partnership may have terminated under the terms of the limited partnership deed, it will not be formally wound up until the termination has been registered at Companies House.

Importantly, the future liability of the partners will remain until the termination has been advertised, both publicly (through the publication of a London or Edinburgh Gazette notice) and privately to any third

parties who may have dealt with the limited partnership in the past. The dissolution of the limited partnership will not extinguish any historic liabilities of the limited partnership.

2. Triggers to Wind-Up

The termination and resulting wind-up of a limited partnership may occur because of any of the circumstances set out in the Triggers section at the front of this report or specified events set out in the limited partnership agreement.

3. Sequence of Steps

The procedure for terminating and winding-up a limited partnership will commonly involve the following steps:

3.1 Step 1 – ‘Decide’ to Terminate

The limited partnership terminates in accordance with the limited partnership deed and although the limited partnership will cease to be a going concern during the wind-up process, it will continue to exist as a matter of law until all its debts have been discharged and the termination has been registered at Companies House.

3.2 Step 2 – Pre-dissolution Considerations

It is important that the operator/fund manager as liquidating trustee deals with all matters required to be dealt with prior to the dissolution of the limited partnership to ensure that the dissolution is not delayed for any reason. Below is a checklist of matters which the operator/fund manager must consider/action. If the fund is not to be extended, the best practice recommendations should still be followed as part of the wind-up process. This will include good communication with investors by the fund manager on the processes involved and the timing on the return of capital and final distributions.

Once the assets of the limited partnership have been sold, this checklist is an indication of matters requiring action and/or consideration but is not exhaustive in all cases:

- Liquidating Trustee. A liquidating trustee should be appointed to realise the assets of the limited partnership on termination and to distribute the proceeds to the partners in accordance with the limited partnership deed. The limited partnership deed may provide for the operator/fund manager to be appointed. Winding up a collective investment scheme is a regulated activity so the liquidating trustee must hold the relevant permissions.
- Outstanding Liabilities. All outstanding liabilities should be settled.
- Distributions. To the extent possible, distributions of all cash balances in the limited partnership, other than capital contributions, must be completed before any documentation formalising the dissolution is entered into. Distributions should be made in accordance with fund documentation.
- Cash Pool. The liquidating trustee may wish to consider establishing a cash pool to provide a prudent reserve for contingent liabilities. Sometimes the fund documentation will have clawback provisions for unknown liabilities which mean a reserve may not be required.
- Capital Contributions. The limited partners must not be repaid their capital contributions prior to dissolution as that will affect their limited liability status. Usually the capital contribution is a nominal amount and the balance of investment is loan contribution which can be repaid.
- Gazette Notice. The partners will continue to be liable for future debts of the limited partnership until a notice of the dissolution of the limited partnership (the ‘Gazette Notice’) is filed with the Edinburgh or London Gazette. It is also recommended that all third parties who have dealt with the limited partnership in any capacity are notified in writing of the pending dissolution
- Third Party Notices. All third parties with whom the limited partnership has dealt with should be identified so that Third Party Notices can be sent to them.
- Value Added Tax De-registration. This should be dealt with.

3.3 Step 3 – Realise Assets

Following the decision to terminate, the limited partnership's assets may be distributed in specie but it is more usual that cash proceeds are distributed from the sale of those assets. Typically, one to two years will be provided for this process and fund managers should comply with the best practice recommendations to ensure investors receive regular updates on the sale process.

If investors have already agreed not to extend the limited partnership, the sales should take place during the given wind-up period. If this does not happen, depending on the wording in the fund documents, the general partner, fund manager or investment advisor could be in breach of their obligations. This is a point that needs to be considered on drafting – what happens if the assets are not or cannot be sold in the given period and the investors have not consented to an extension?

3.4 Step 4 – Discharge Liabilities

Once terminated, the liabilities of the limited partnership must be confirmed in the closing accounts of the limited partnership, which will be agreed by the general partner and/or the operator/fund manager with the assistance of the limited partnership's auditors.

Creditors of the limited partnership (if any) should be approached. Any outstanding debts of the limited partnership should be settled prior to the dissolution, to reduce the number of contingent liabilities. If the limited partnership is to be wound up before all its debts have been discharged then any debt owed by the limited partnership could be assigned to its general partner. Notice must be given to any debtor of the limited partnership of the assignment of the debt. This is unusual and would normally be dealt with by setting aside a reserve fund to be held by the operator/fund manager, to settle any historic (as opposed to future) liabilities.

If the limited partnership to be wound up is a property owning limited partnership, it is important to ensure that all property matters have been dealt with and that there are no inherent liabilities which remain in the limited partnership. For example, any contractual warranties and environmental reports should be assigned, together with all property assets and rights. Also, check that any historic structuring issues have been dealt with (for example, all nominee companies have been dealt with, any 'resting on contract' legacy issues are clear).

3.5 Step 5 – Board Meetings and Approval of Documents

The general partner will need to hold a board meeting to approve:

- the dissolution itself;
- a letter of notification of the termination of the limited partnership and of direction to the operator/fund manager to act as liquidating trustee of the limited partnership (where relevant) (the 'Letter of Direction');
- notice of termination from the liquidating trustee to the limited partners (the 'Notice of Termination');
- the Gazette Notice;
- the Third-Party Notices;
- the Form LP6;
- the termination of the operator's agreement in accordance with the limited partnership deed (or otherwise); and
- the Deed of Termination (if required).

Once the board meeting has been held:

- The minutes should be signed by the chairman of the meeting.
- The Letter of Direction should be signed by the general partner and sent to the liquidating trustee.
- The liquidating trustee should send the Notice of Termination to the limited partners.
- The Gazette Notice should be signed by the general partner.
- The Form LP6 should be signed by the general partner.
- The Third-Party Notices should be signed by the general partner and sent to the relevant limited partners.

3.6 Step 6 – Distributions to Partners

The limited partnership deed will set out the order in which distributions are to be made to the partners and the liquidating trustee will arrange these payments.

3.7 Step 7 – Filing Notices and Form LP6

The Gazette Notice will be sent to the London or Edinburgh Gazette to be published in the next possible publication and a Companies House form LP6 (Form LP6) should be filed at Companies House.

It should be noted that following the filing of the Form LP6 at Companies House, limited partnerships are not removed from the Companies House register. Further, Companies House does not amend its on-line records to show that a limited partnership has been dissolved. However, the paper records at Companies House show that the dissolution has taken place and no third party limited partnership is then able to re-use the limited partnership's name or registration number.

3.8 Step 8 – Operator's/Fund Management Agreements

These agreements will need to be terminated and may in fact terminate automatically on the dissolution of the limited partnership i.e. on the filing of the Form LP6.

3.9 Step 9 – Filing of Accounts

The Regulations provide that final accounts must be prepared and filed for the final accounting period of the limited partnership.

Unless the limited partnership is 'small' or dormant (as defined in the Companies Act) or exempt under Regulation 7 of the Regulations (i.e. it prepares consolidated accounts with the General Partner), it must prepare and file audited accounts at Companies House on its dissolution. If the limited partnership prepares consolidated accounts under Regulation 7, it will still need to have these audited but they will not need to be filed at Companies House.

The limited partnership agreement should be checked for any specific provisions, whether a consolidation exemption applies or not, and the final accounts prepared accordingly.

German Limited Partnership

1. Introduction

In general, a German Limited Partnership set up as a fully regulated closed-end investment limited partnership under the German 'Capital Investment Act' ('Geschlossene Investment-KG' gemäß KAGB) will be terminated as of the set date under the limited partnership agreement or upon a specific majority decision by the shareholders/investors of the German Limited Partnership (limited partnership).

Importantly, the future liability of the partners will remain until the limited partnership is dissolved. The dissolution of the limited partnership will not extinguish any historic liabilities.

2. Triggers to Wind-Up

The termination and resulting wind-up of a limited partnership may occur because of any of the circumstances set out in the Triggers section at the front of this report or specified events set out in the limited partnership agreement.

3. Sequence of Steps

The procedure for terminating and winding up a limited partnership will commonly involve the following steps:

3.1 Step 1 – ‘Decide’ to Terminate

The limited partnership terminates in accordance with a limited partnership agreement and, although the limited partnership will cease to be a going concern during the wind-up process, it will continue to exist as a matter of law until all its debts have been discharged and the set termination has been registered with the local commercial trade register at the seat of the company.

3.2 Step 2 – Pre-dissolution Considerations

Depending on the regulations of the limited partnership agreement, the general partner or the managing limited partner will act as liquidator of the limited partnership. Below is a checklist of matters which the managing limited partner (future ‘liquidator’) must consider.

If the fund is not to be extended according to a specific majority vote of all shareholders/investors, best practice recommendations should still be followed as part of the wind-up process. This will include good communication with investors by the fund manager on the processes involved and the timing on the return of capital and final distributions.

Once the assets of the limited partnership have been fully sold, this checklist is an indication of matters requiring action and/or consideration but is not exhaustive in all cases:

- Liquidator. A liquidator should be appointed to realise the assets of the limited partnership on termination and to distribute the proceeds to the (limited) partners in accordance with the limited partnership agreement. In some cases, the limited partnership agreement will provide for the managing limited partner or the general partner to be appointed as a liquidator.
- Outstanding Liabilities. All outstanding liabilities should be settled.
- Distributions. To the extent possible, distributions of all cash balances will be made to the partners. Distributions should only be made in accordance with the fund documentation. If, for any reason, distributions shall be made differently from the fund documentation, the required majority vote of the partners/investors is required.
- Capital Contributions. The limited partners must not be repaid their capital contributions prior to the dissolution as that may affect their limited liability status. Usually the capital contribution is a nominal amount and the balance of investment is a contribution which can be repaid.
- Deletion from Local Commercial Register. The entering into the liquidation process must be registered with the locally competent German commercial register at the seat of the partnership. The final dissolution, after full payments and discharge of all liabilities (including tax and all others), also must be registered with such a German commercial register.

3.3 Step 3 – Realise Assets

Following the decision to terminate, the limited partnership assets may be distributed in specie (also depending on the terms of the limited partnership agreement) but it is much more usual that cash proceeds are distributed from the sale of those assets. Depending on the type of assets and the (real

estate) market conditions, the sale of the assets can easily take one to two years or even more and fund managers should comply with the best practice recommendations to ensure investors receive regular updates on the sales process. Such updates will, generally, always be provided at an investment committee or shareholder meeting on a regular, mostly yearly, basis. In specific cases, such updates will be given more regularly during the ongoing sales process of the limited partnership assets.

3.4 Step 4 – Discharge Liabilities

Once terminated, the liabilities of the limited partnership will be set out in the closing accounts of the limited partnership, which will be agreed with the general partner and/or the liquidator with the assistance and the final confirmation by the limited partnership auditors, to the extent they exist. Creditors of the limited partnership (if any) should be approached. Any outstanding debts of the limited partnership should be settled prior to the dissolution, to reduce the number of contingent liabilities, if feasible.

If the limited partnership to be wound up is a property-owning limited partnership, it is important to ensure that all property matters have been dealt with and that there are no inherent liabilities which remain in the limited partnership. For example, any contractual warranties and environmental reports should be either settled or assigned to another entity, together with all property assets and rights. This, however, may only be executed, generally, if any creditor rights/claims are not limited by such action.

3.5 Step 5 – Shareholder Meetings and Approval of Documents

The fund manager/limited managing partner will need to hold shareholder meetings to approve:

- the liquidation dissolution itself and the appointment of the general partner or managing limited partner as liquidator of the limited partnership, unless already stated specifically in the limited partnership agreement;
- the registration of liquidation of the limited partnership in the locally competent commercial register; and
- the termination of the operator's/manager's agreement in accordance with the limited partnership agreement (or in accordance with all shareholders/investors of the limited partnership, based on a majority vote).

Once the shareholder meeting has been held:

- the minutes should be signed by the chairman of the meeting;
- the minutes should be sent to all shareholders/investors of the limited partnership; and
- the appointment of the liquidator should be sent to the commercial register for registration.

3.6 Step 6 – Distributions to Partners

The limited partnership agreement may set out the order in which distributions are to be made to the partners; the liquidator will arrange for these payments.

3.7 Step 7 – Operator/Fund Management Agreements

This agreement will either need to be terminated or may in certain cases terminate automatically under the dissolution of the limited partnership or prior to that.

3.8 Step 8 – Final Accounting

The final accounts (the 'Accounts') must be prepared and filed for the final accounting period of the limited partnership. Generally, such final accounts will also be published in the German Federal Gazette ('Bundesanzeiger').

If the limited partnership agreement regulates auditing of the (final) accounts of the partnership, such final accounts still must be audited before their publication.

The limited partnership agreement should be checked for any specific provisions, whether consolidation exemption applies or not, and the final accounts prepared accordingly.

Note: When a German closed-end public investment KG is wound up, the liquidator must prepare a winding-up report on a yearly basis and as of the exact day when the total liquidation process is terminated (see Section 161 of the German Capital Investment Code/KAGB). The specific requirements of Section 158 of the German Capital Investment Code must also be complied with.

Generally, the limited partners/investors will not be liable after the termination of the limited partnership for any liabilities of the closed-end investment limited partnership (see Section 161, Subsection 3 of the German Capital Investment Code/KAGB).

Luxembourg Special Investment Fund

1. Introduction

All Luxembourg Investments Funds are regulated vehicles and under the supervision of the Commission de Surveillance du Secteur Financier (CSSF); they must obtain authorisation from the Luxembourg regulator before the investment vehicle is launched.

Historically, two regulated Luxembourg investment vehicles have been used by real estate fund managers: the UCIs Part II under the 2002 Luxembourg Fund Law and the Special Investment Fund (SIF) under the 2007 Luxembourg Fund Law. More recently, limited partnerships have become available and are gaining popularity. This report focuses on the termination process of SIFs during the period 2010 – 2015.

The Offering Memorandum and all the agreements (investment management, depository and central administration agreement) set out the circumstances of terminating a SIF vehicle. There are two types of termination in Luxembourg: voluntary and judiciary termination.

Closed-ended vehicles set a clear date of termination that can be further extended for a short period of time, upon approval by the CSSF. The sale of the assets under management takes place normally before the vehicle is wound up.

The SIF wind-up process, and therefore the time required to wind-up, will depend on two main factors:

- a. the number of (remaining) shareholders of the SIF. SIFs that have only one (remaining) ultimate shareholder/unitholder may be dissolved if the shareholder decides to dissolve. If this is the case, a liquidator is not required; however, the SIF auditor is necessary to issue an independent report on the financial statements of the SIF covering the period from the beginning of the accounting period to the beginning of the liquidation period. The dissolution of the SIF is formalised by a notarial deed. If more than one shareholder exists upon liquidation, a liquidator is appointed, whose main responsibility is to realise the assets and to settle the liabilities.
- b. the number and type of assets held. For property funds using a Luxembourg SIF, the assets will typically consist of property with some cash/income. There may be complex arrangements in place in relation to past and future liabilities that need to be unwound.

2. Triggers to Wind-Up – Termination Decisions

The termination and resulting wind-up of a limited partnership may occur as a result of any of the circumstances set out in the Triggers section at the front of this report or specified events set out in the offering memorandum.

3. Sequence of Steps

The procedure for terminating and winding-up a SIF will commonly involve the following steps:

3.1 Step 1 – ‘Decide’ to Terminate

A SIF terminates in accordance with the Offering Memorandum and agreement with all services providers. Although the SIF will cease to be a going concern during the winding-up process, it will continue to exist as a matter of company law and remain registered by the CSSF until all its assets have been disposed of and all its debts discharged. Finally, the termination is registered at the CSSF and at the Trade Register (Registre de Commerce des Sociétés).

3.2 Step 2 – Pre-liquidation Considerations

If a SIF is not to be extended at the end of its life, best practice recommendations should still be followed as part of the wind-up process. This will include good communication with investors by the fund manager on the processes involved and the timing on the return of capital and final distributions. It is important that the fund manager deals with all matters required to be dealt with prior to the liquidation of the SIF vehicle to ensure that the liquidation is not delayed for any reason. Initial considerations to follow are:

- a review of NAV and assess value of assets in the context of liquidation;
- an assessment of liquidation costs and the proper recording of NAV;
- analysis of specific transactions close to the liquidation date; and
- analysis of related party transactions and significant redemptions.

3.3 Step 3 – Realise Assets

Following the decision to terminate, the SIF’s assets may be distributed in specie but it is more usual that cash proceeds are distributed from the sale of those assets. Depending on the type of liquidation, typically up to one year will be provided for this process and the liquidator should comply with the best practice recommendations to ensure investors receive regular updates on the sale process.

Once the assets of the fund have been disposed, the following checklist is an indication of matters requiring action and/or consideration but is not an exhaustive in all cases:

- Liquidator. A liquidator should be appointed to realise the assets of the SIF on termination and to distribute the proceeds to the investors in accordance with the offering memorandum. Winding up a collective investment scheme is a regulated activity so the liquidator must hold the relevant permissions.
- Outstanding Liabilities. All outstanding liabilities should be settled.
- Distributions. To the extent possible, distributions of all cash balances in the SIF, other than capital contributions, must be completed before any documentation formalising the liquidation is entered into. Distributions should be made in accordance with fund documentation.
- Contingent Liabilities and Assets. The liquidator may wish to consider establishing an escrow account in order to provide a prudent reserve for contingent assets and liabilities. Sometimes the fund documentation will have clawback provisions for unknown liabilities which mean a reserve may not be required.
- Capital Contributions. Capital contribution to the limited partners takes place upon liquidation.

- Memorial Publication. A notice of the liquidation is filed with the Luxembourg Memorial after the first notarial meeting is held. All third parties who have dealt with the SIF in any capacity are notified in writing of the pending liquidation.
- Third Party Notices. All third parties with whom the UCI has dealt with should be identified so that Third Party Notices can be sent to them.

3.4 Step 4 – Discharge Liabilities

Once terminated, the liabilities of the SIF must be confirmed in the closing accounts of the fund, which will be agreed by the liquidator with the assistance of the SIF's auditors.

Creditors of the SIF (if any) should be approached. Any outstanding debts of the SIF should be settled prior to the liquidation, to reduce the number of contingent liabilities.

If the SIF to be wound up is a property-owning real estate fund, it is important to ensure that all property matters have been dealt with and that there are no inherent liabilities which remain in the fund. For example, any contractual warranties and environmental reports should be assigned, together with all property assets and rights.

3.5 Step 5 – Board Meetings and Approval of Documents

The fund will hold a board meeting to approve:

- the liquidation of the fund; and
- the proposal of an agenda for the extraordinary general meeting (shareholder meeting to be held in front of a notary) to appoint a liquidator and agree the date of the liquidation.
- Once the board meeting has been held and the liquidator is appointed, then the liquidator takes charge of the fund termination process.

3.6 Step 6 – Filing Notices

The minutes of extraordinary general meeting are filed with the Trade Register (RCS).

3.7 Step 7 – Third Party Agreements

The agreements with third parties originally signed by the fund will need to be terminated on the date of liquidation.

3.8 Step 8 – Preparation of the Liquidation Accounts

At the end of the liquidation, the final liquidation accounts are prepared by the liquidator and form part of the overall liquidation report.

3.9 Step 9 – Second Extraordinary General Meeting

During this meeting, the shareholders validate the liquidation report and provide discharge to the liquidator, to the external auditor and to the members of the board. A copy of the minutes of this meeting is filed with the Trade Register and the CSSF.

3.10 Step 10 – Distributions to Investors

The liquidator will determine, according to the law, the order in which distributions are to be made to investors. The liquidator will arrange for these payments to be made.