Voluntary liquidation / dissolution of a Luxembourg (unregulated) commercial company

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The number of companies incorporated in Luxembourg keeps on growing at a steady pace, and for each of them, successful or not, a liquidation may at some stage have to be considered.

Liquidation (or winding up) is a process by which a company's existence is brought to an end, and the law classifies liquidations into two types: voluntary (by way of shareholder(s)' decision) or compulsory (by way of a court order). The purpose of this briefing is to set out the main points to consider in respect of a voluntary dissolution and / or liquidation in relation to an unregulated commercial company.

Compulsory liquidation and dissolution, in the context of a judicial liquidation (*liquidation judiciaire*) or an administrative dissolution without liquidation (*dissolution administrative sans liquidation*) are further detailed in our Restructuring and Insolvency Jurisdiction Guide: Luxembourg.

What is the voluntary liquidation / dissolution process?

A voluntary liquidation may occur for several reasons, among which are the realisation of the company's objects, the sale of its main assets – typically in the context of a divestment event or "exit" – or the arrival of its term.

Formally, the process will involve the prior dissolution of the company and once decided, the company will exist solely for the purpose of its liquidation. The voluntary dissolution of a company can only be decided by its shareholder(s). It is not necessary to make any application to a court for this and there should not be any court involvement during the whole procedure. The end result will be that the company will cease to exist and be removed from the Luxembourg Trade and Companies Register (*Registre de Commerce et des Sociétés de Luxembourg*) (the **RCS**).

A formal three-stage procedure will usually have to be followed from dissolution to liquidation, but alternative ways – with one or two-stage procedures only – have been developed and / or formalised under Luxembourg law and may be used, subject to certain conditions.

Normal liquidation process – three-stage procedure

First stage: dissolution and appointment of the liquidator

Prerequisites

It is generally recommended to have the annual accounts of closed financial years duly approved before a company is put into liquidation. It is also helpful for the liquidator to receive up-to-date interim accounts of the company at the time they are appointed to help separate the periods before and after dissolution and to provide them with as much clarity as possible before they start work.

The dissolution and initiation of liquidation proceedings being a shareholder(s)' decision, as a first step, the management body of the company should convene an extraordinary general meeting of shareholders (an **EGM)** to resolve on the dissolution of the company and the method of liquidation.

It should be kept in mind that the terms of existing (external) financing and security interests would generally include restrictive covenants regarding dissolution / liquidation, therefore a thorough review of such terms will be required prior to any liquidation steps.

Dissolution decision

The EGM must take place in the presence of a Luxembourg notary and should appoint a liquidator. After this meeting, a notary will not be needed.

There is no limitation as to who can act as liquidator and any natural or legal person may be appointed as such. To the extent the liquidator is a legal person, a representative shall be named.

If no liquidator is appointed, the person(s) responsible for the management of the company prior to its entry into liquidation will be deemed to be the liquidator(s) towards third parties.

Ogier's Luxembourg Corporate Services team, Ogier Global, may act as liquidator through one of its subsidiaries.

What happens following the dissolution?

- the mandates of the members of the management body – and of the members of any supervisory body and of the auditors, if any– automatically terminate
- the liquidator represents the company and is responsible for carrying out the company's liquidation
- statute provisions preserve the company's legal existence for the purposes of the liquidation only
- all documents emanating from the dissolved company shall indicate that it is in liquidation

Liquidator's work and duties

As a first step, the liquidator will need to prepare a full inventory of the company's assets and a

balance sheet in order to determine all the assets and liabilities of the company. In this respect, the liquidator will generally rely on the recent interim accounts of the company for the purpose of the initial review of its assets and liabilities.

As a matter of principle, the liquidator should then generally take all steps necessary to carry out its duties with a view to closing the liquidation, which can be summarised as follows:

- to act as the company's legal representative
- to realise any remaining assets of the company
- to pay all debts of the company
- after such payment or the deposit in escrow of the sums necessary for this, to distribute the remaining assets or amounts (if any) to the company's shareholder(s)

During the liquidation procedure, the liquidator will also often have to carry out certain other tasks, such as requesting the release from all securities or other preferential rights, collecting any money still due to the company, informing co-contractors and terminating existing contracts.

The dissolution will also involve certain necessary notifications to the relevant authorities or official bodies such as the Land Registration and Estates Department (*Administration de l'enregistrement et des domaines*), the Joint Centre for Data Processing, Insurance Registration and Collection of Contributions of the Social Security Institutions (*Centre commun de la sécurité sociale*), and the Chamber of Commerce.

In certain instances, it could prove useful to also issue confirmation requests to the company's service providers to ensure that all invoices have been received and / or all liabilities have been discharged or accounted for prior to the close of the liquidation proceedings.

Limited capacity of the company

Through the determination of the method of liquidation, the liquidator is entrusted with important powers to carry out the liquidation process, which may be restricted or extended to a large extent in the company's articles of association or by the EGM appointing the liquidator.

Since the company is deemed to exist for the purpose of liquidation only, it however has a "limited" capacity. It can still, for instance, enter into contracts necessary for the disposal of assets or for terminating its activities, but it should not pursue the business of the company, borrow or issue negotiable instruments, pledge the assets of the company or otherwise contribute them to other companies without the express authorisation of a general meeting of shareholders of the company.

Timing of the liquidation

Luxembourg law does not impose any timing constraints for the liquidator's work, whose duration depends in practice on the degree of complexity of the liquidation operations. For example, for a mere

holding company this first stage could take a day or two. However, for an operating company with a substantial workforce, it could take months or sometimes even years.

Under Luxembourg law, an annual reporting from the liquidator to the shareholder(s) is needed each year to report on the liquidation and explain why it has not been closed.

Interim distributions

At any time through the liquidation proceedings, the liquidator may also make interim distributions or provisional payments – in cash or in specie – to the shareholder(s), provided that all debts must have been settled or provisioned for and there are sufficient reserves to do so. It is also sometimes recommended, at the liquidator's discretion, to keep a certain buffer when any interim distribution is made.

Upon completion of its liquidation work, the liquidator will prepare a liquidator's report summing up all its actions and proposals during the liquidation process and an updated set of interim statements which will serve as final liquidation accounts and reflect any relevant provisions. The liquidator will then ensure the convening of a further shareholder(s)' meeting, which will consider these documents and appoint an auditor.

Second stage: auditor's appointment and mandate

A second general meeting of shareholders of the company shall be convened and held under private seal, to approve the liquidator's report and final liquidation accounts, and to appoint an auditor whose mandate will focus on the examination of the liquidator's report and the final liquidation accounts (with supporting documentation). This is done in order to prepare a corresponding auditor's report for the benefit of the shareholder(s).

There is no limitation as to who can act as auditor either, but this cannot be the appointed liquidator and under certain circumstances an independent auditor will need to be appointed. When the auditor is ready to issue its report, the final shareholder(s)' meeting can be convened by the liquidator.

As for the first stage, Luxembourg law again does not impose any duration or waiting periods here. In practice, the duration of this stage depends on how fast the appointed auditor commences their audit work, and how fast they are able to review, audit and assess the work performed by the liquidator during the first stage, with a view to reporting to the shareholder(s).

The auditor may be mandated to carry out its review in real time (rather than on a deferred basis after completion of the first stage of the liquidation) so that the liquidation proceedings can be further accelerated.

Third stage: close of the liquidation proceedings

The liquidation terminates at a third (and final) general meeting of shareholders of the company under

private seal, where the following decisions will be considered:

- approval of the auditor’s report
- distribution of the liquidation surplus – possibly subject to the receipt of the final taxation from the tax administration
- relevant discharges
- location of the storage of the company's books, records and documents for five years following the close of the liquidation
- decision upon the transfer of the company's assets which have not yet been distributed
- deposit of the funds that could not be returned to creditors or shareholders
- final mandate to the liquidator for the follow up of the provisions and the post-closing operations
- close of the liquidation

Publication of the close of liquidation and passive survival of the company

The close of the liquidation shall be filed as soon as possible with the RCS so that it can be published in the Luxembourg RESA (*Recueil Electronique des Sociétés et Associations*).

A swift filing is important as the company shall be deemed to continue to exist towards third parties and creditors for a period of five years following the date of this publication (this is the so-called "passive survival" of the company).

After this step, the company will be definitively struck off the RCS, and it will not be possible to re-open a closed liquidation even in the case of discovery of assets or liabilities after the close of the liquidation, save in the case of fraud.

Assets or liabilities discovered after the close of the liquidation

From a general perspective and pursuant to Luxembourg civil law, the rules concerning the division of estates, the form of such division, and the resulting obligations between co-heirs shall apply to divisions between shareholders.

The net assets discovered after the close of the liquidation will be transferred by operation of law to the shareholders of the liquidated company (and no separate agreement or decision is required) and will be held as undivided property. In this respect, the rules pertaining to the division of estate shall apply.

If an asset of the liquidated company is discovered during the five year period after the publication of the liquidation, the liquidator will have to resume its activities (as part of the "passive survival" of the company) and shall realise such asset and proceed with the relevant distributions to the (ex) shareholders.

Such transfer by operation of law is limited to net assets only and, in most cases, the shareholders are not personally liable for liabilities discovered after the close of the liquidation.

The shareholders would only be personally liable if they have by law an unlimited liability for example the general partner (*associé commandité*) of a Luxembourg partnership, such as a *société en commandite spéciale* (**SCSp**), *société en commandite simple* (**SCS**), or *a société en commandite par actions* (**SCA**) – in which case such shareholder shall remain liable on an unlimited basis for the debts, liabilities and obligations of the liquidated company.

If a liability is discovered during the five yeas period after the publication of the liquidation, the liquidator shall defend the liquidated company. The action will have to be initiated against the liquidator and not the (ex) shareholders, except if they have an unlimited liability. Following the end of this five year period, any action that creditors may have against the liquidated company – and, by extension, it relevant shareholders being liable for the company's debts on an unlimited basis – will be time-barred (*prescrites*).

After the close of a simplified dissolution (explained below), creditors will have to seek payment directly from the (ex) shareholder due to the universal transfer of assets.

Liquidator's liability

While the liquidator is not personally liable to pay the company's debts with its own assets (but only using the company's assets following their realisation), it is liable, both to third parties as well as to the company for:

- the performance of its mandate
- any misconduct in the management of the liquidation

Importantly, the liquidator cannot be held liable for the payment of debts which were not discovered prior to the close of the liquidation. The liquidator should however be mindful to set aside sufficient amounts or the procurement of insurance policies on behalf of the company in liquidation so it can meet its contingent liabilities that materialise after the close of the liquidation (for example, a liability to indemnify for damage arising from the manifestation of defects throughout a warranty period extending beyond the close of the liquidation) otherwise the liquidator could face liability for mismanagement of the liquidation.

Two-stage liquidation

An alternative liquidation procedure exists (which is not expressly provided for by Luxembourg company law, but is accepted in practice), under which the requirement to have an auditor may be waived by the shareholder(s), formally leading to a liquidation procedure in two steps only. Certain conditions will need to be met in order for this procedure to be available.

Simplified dissolution – one stage only

A simplified dissolution procedure is available by law when the company has only one shareholder. This is in essence a dissolution with immediate effect and without formal liquidation (and consequently without the need to appoint a liquidator). The procedure is straightforward, with the sole shareholder appearing in front of a Luxembourg notary to resolve upon all the required decisions.

The following documents will have to be provided to the Luxembourg notary:

- a power of attorney from the sole shareholder together with the required documents
- an up to date interim balance sheet of the company
- certificates from the Direct Tax Administration (*Administration des contributions directes*), the Land Registration and Estates Department (*Administration de l'enregistrement et des domaines*) (**AED**) and the Joint Centre for Data Processing, Insurance Registration and Collection of Contributions of the Social Security Institutions (*Centre commun de la sécurité sociale*) (**CCSS**).

The certificates evidence that the company is up to date on its relevant payment obligations or, if the company to be dissolved is not subject to VAT and not registered with the social security system, so called "negative certificates" will have to be obtained from the AED and the CCSS.

As a result of the dissolution, all assets and liabilities (even those which are unknown) of the dissolved company are transferred to the sole shareholder under universal title of succession (*transmission universelle de patrimoine*). Importantly, the creditors of the dissolved company may, within 30 days of the publication of the notarial deed, request the President of the competent District Court, sitting as in urgent matters , to order adequate safeguards.

In practice, the Luxembourg notary may sometimes request the payment of a provision by the sole shareholder of the company to be dissolved, prior to enacting the simplified dissolution.

Liquidation of special limited partnerships (*société en commandite spéciale*)

The liquidation process of an SCSp (Luxembourg special limited partnership) will usually differ from the normal liquidation procedure described above. The corporate law flexibility associated with the SCSp indeed also extends to its liquidation.

Partners meeting resolving upon the liquidation

In accordance with the principle of formal parallelism (*principe de parallélisme des formes*), the first meeting of partners resolving upon the liquidation of the SCSp and the appointment of the liquidator

would not be held before a Luxembourg notary to the extent the limited partnership agreement (the **LPA**) establishing the SCSp was not concluded before a Luxembourg notary.

Liquidator(s)

The liquidator(s) are appointed by the partners' meeting in the absence of any agreement to the contrary under the LPA. The liquidator will be the general partner if no liquidator is appointed by such meeting or named under the LPA. It is also possible to provide under the LPA that the general partner – to the exclusion of the other limited partners – has the exclusive right to appoint the liquidator.

Similarly to an ordinary liquidation process, the liquidator will be liable towards the SCSp and third parties for the performance of its mandate and any misconduct in the management of the liquidation.

The liquidation of the SCSp shall be conducted in accordance with the provisions of the LPA or, in the absence of any such provisions, in accordance with the rules applicable to the liquidation of an SCS.

Close of the liquidation

To the extent the LPA does not provide for a specific procedure for the close of the liquidation, it is an accepted practice in Luxembourg that the partners unanimously resolve at the occasion of the first partners' meeting approving the opening of the liquidation, that the termination of the LPA and the close of the liquidation of the SCSp will be effective upon receipt by the partners of a confirmation in writing prepared by the liquidator confirming that the SCSp has no outstanding assets and liabilities (further their realisation and distribution). In such scenario, no further partners' meeting of the SCSp will be required to close the liquidation.

Tax considerations

In relation to a company established in Luxembourg city in 2024, upon liquidation, the company will be considered as having realised all its assets and liabilities at market value, whereby any gains and profits will be subject to corporate income tax and municipal business tax (together the **income tax**) at a combined rate of 24.94%, except in the case of the application of any exemption. However, the distribution of the liquidation proceeds should not be subject to withholding tax.

It should be noted that during the liquidation period the company remains subject to income tax and net wealth tax.

To discuss specific Luxembourg tax considerations in more detail, please contact our Luxembourg Tax team.

How can Ogier help?

If you would like to discuss any of the Luxembourg company liquidation procedures described above, or to learn more about the liquidation process for special limited partnerships, please contact a member of our Luxembourg Corporate team using the contact details provided below.

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Regulatory information can be found under Legal Notice

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