

# Guide to the Formation of Limited Partnerships



Mdina - Malta

**MFSA**

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**MALTA FINANCIAL SERVICES AUTHORITY**

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*The 'Guide to the Formation of Limited Partnerships' is designed to provide a detailed overview of the provisions on limited partnerships under the Tenth Schedule of the Companies Act in Malta. The contents of this Guide are not intended to replace or substitute legal and professional advice. The information contained in this report should in no way be construed as replacing professional advice.*

*Anyone wishing to clarify any matter relating to the content of this Guide may contact the MFSA.*

## ***1 INTRODUCTION***

Commercial partnerships have existed under Maltese Law since Ordinance XIII of 1857. These include the partnership *en commandite*, or Limited Partnership ('LP'),<sup>1</sup> which today is regulated under the Companies Act ('the Act') alongside other structures like the General Partnership and the Limited Liability Company.<sup>2</sup>

While the basic provisions regulating the LP have remained the same over the years, specific provisions regulating the establishment of Collective Investment Schemes ('CISs') as LPs were added to the Act by means of [Act IV of 2003](#). These provisions are contained in Article 66A and the Tenth Schedule to the Act,<sup>3</sup> which modify and adapt the basic provisions related to the LP to specifically cater for CISs. As the LP structure became more popular with fund managers, further amendments to the Schedule were brought in by [Act XX of 2013](#) and [Legal Notice 478 of 2014](#) to optimise the use of the LP as a fund vehicle.

Among the more important features of the Maltese LP is the option to have the investment scheme's capital divided or not divided into shares. This enhances the transparency of the structure thereby increasing its flexibility. Other key changes have substituted the requirement to register the Partnership Deed by the submission of a simple registration form and clarified the instances in which the LP is required to submit accounts further simplifying the compliance framework for LPs.

These new, advantageous features do not alter the basic nature of the LP which, unlike the General Partnership, can continue to contract in its own right with limited liability where limited partners are concerned. Moreover, since limited partners are essentially passive members, the LP structure is particularly suitable for collective investment schemes since it is the general partner who is responsible for the management of the partnership.

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<sup>1</sup> The terms 'partnership *en commandite*' and 'Limited Partnership' may be used interchangeably.

<sup>2</sup> Chapter 386 of the Laws of Malta

<sup>3</sup> The Schedule

## **2 THE LIMITED PARTNERSHIP STRUCTURE**

### **2.1 SCOPE OF THE STRUCTURE**

The framework regulating LPs operating as CISs is incorporated in Schedule X of the Companies Act. This applies to LPs the capital of which may or may not be divided into shares, which in the Partnership Deed expressly limit their object to the collective investment of funds in securities and in other movable and immovable property, or in any of them, with the aim of giving the partners the benefit of the results of the management of these funds. This eliminates any doubt as to whether the LP can also be used as a CIS where the great majority of members are passive investors with limited liability.

### **2.2 USES OF THE STRUCTURE**

The LP has a number of practical uses in ordinary business and in a financial services context. A number of CISs, particularly alternative investment funds, have been established in Malta as LPs. LPs operating as CISs require a licence or other form of recognition from the MFSA in terms of the [Investment Services Act](#).<sup>4</sup>

## **3 LEGAL PERSONALITY**

A LP has a separate legal personality distinct from that of its partners, is the subject of rights and obligations, and is capable of owning and holding property under any title at law and of suing and being sued in its own name. Legal personality continues until such time as the name of the LP is wound up and struck off the register.

The LP may only be bound in favour of third parties by a partner acting under the partnership name and having its representation as stated in the Partnership Deed, Partnership Registration Document or in any manner recognized by law, including by virtue of a power of attorney.

A LP may be designated by any name, provided the word ‘Limited Partnership’ or its abbreviation ‘LP’ or ‘L.P.’ features after its name. Partnership names may be reserved for registration by notice in writing to the Registrar given not more than 3 months before the date of on which the partnership is registered.

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<sup>4</sup> Reference should be made to the *MFSA Guide to the Establishment of Collective Investment Schemes* and *MFSA Guide to the Establishment of Professional Investor Funds*

### 3.1 MEMBERS

A Limited Partnership may consist of one or more General Partners and one or more Limited Partners.

<u>General Partner/s</u>	<u>Limited Partner/s</u>
Any person or body corporate may be a general or limited partner in a LP	
Admitted to the LP as general partner/s in accordance with the Partnership Deed	Admitted to the LP as limited partner/s in accordance with the Partnership Deed
	Upon entering the LP as limited, shall contribute to the capital thereof a specified sum
Responsible for the management of the LP	Not involved in the management of the LP
Jointly and severally liable for all debts of the LP without limitation <sup>5</sup>	Shall not be liable for any debts of the LP beyond the amount so contributed or agreed to be contributed and not yet paid <sup>6</sup>
Shall satisfy the eligibility and other criteria and requirements applicable to them in terms of the <a href="#">Investment Services Act</a> and <a href="#">Investment Services Rules</a> issued by the MFSA as well as those stipulated by the Partnership Deed	Shall satisfy the eligibility and other criteria and requirements applicable to them, if any, in terms of the <a href="#">Investment Services Act</a> and <a href="#">Investment Services Rules</a> issued by the MFSA as well as those stipulated by the Partnership Deed

#### 3.1.1 General Partners

The administration, management and representation of a LP are vested in the general partners. Decisions of the general partners are taken by simple majority or as otherwise stated in the Deed of Partnership.

Given their role, certain restrictions are applicable to general partners. For example, unless allowed in terms of the Partnership Deed, the general partners would need the express consent of the other partners in order to carry on business that may be seen to be in competition with the LP, or be a partner with unlimited liability in another partnership or a director in a company in competition with the LP.

A person ceases to be a general partner of a LP, upon:

1. resignation, retirement, removal or expulsion in accordance with the requirements, if any, of the Partnership Deed;
2. in the case of a natural person upon bankruptcy, death or legal incapacitation or interdiction; or
3. in the case of a general partner which is a body corporate, upon the dissolution thereof.<sup>7</sup>

<sup>5</sup> Subject to the benefit of discussion.

<sup>6</sup> Subject to particular restrictions as expanded below

<sup>7</sup> Cessation shall be evidenced by means of an entry to that effect in the register of partners.

In the event that a person ceases to be a general partner of a LP both the LP and the general partner who has ceased to occupy the post are required to notify the Registrar of Companies within 14 days.

### ***3.1.2 Limited Partners***

Limited partners are not involved in the management and administration of the partnership's business and are not liable for the debt of the LP unless they carry out administrative acts reserved for the general partners. It is only possible for a limited partner to be appointed by power of attorney to carry out specific acts or transactions on behalf of the partnership in specific circumstances.

Both the general partners and the partnership are accountable to the limited partners in a number of ways. Limited partners may:

- (a) inspect the books of the LP;
- (b) examine and inquire about the state and prospects of the business of the LP, and advise the partners thereon;
- (c) request information of all things affecting the LP;
- (d) request a formal account of the affairs of the LP under reasonable circumstances.

A person ceases to be a limited partner of a LP:

- (a) upon a valid assignment of the whole of his interest in the LP; or
- (b) at such time and, or upon the occurrence of such event specified in the Partnership Deed.

Although a member ceases to be a limited partner this does not relieve him of any liability that may arise under the provisions of the Schedule. In the event of death or dissolution or other cessation of a limited partner, the LP shall continue with the heirs or other relevant party.<sup>8</sup>

Subject to the provisions of the Partnership Deed, any number of partners may become limited partners in the LP subject to:<sup>9</sup>

- (a) The provisions of the Partnership Deed and any prior approval by the LP required for such admission in terms of the Partnership Deed and the Schedule;
- (b) An agreement in writing with the LP and/or with such other partners as required by the Partnership Deed.

### ***3.1.3 Powers and Liabilities of the Members***

Any person, including a limited partner, holding himself out as being a general partner shall have unlimited, joint and several liability with the general partners for all the obligations contracted by the LP.

### ***3.1.4 Capital Contribution***

The contribution of a limited partner may be satisfied in cash or other property capable of economic assessment but may not consist of undertakings to perform work or supply services. Where property other than cash is provided, it should be valued at its fair market value at the time of its transfer to the LP.

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<sup>8</sup> Subject to the provisions of the Partnership Deed and/or the Schedule

<sup>9</sup> The particulars of the new limited partners must be entered in the register of partners.

## 3.2 THE PROCESS OF INCORPORATION

### 3.2.1 Documentation Required

#### 3.2.1.1 The Partnership Deed and the Partnership Registration Document

In order to be validly constituted an LP requires:

- (1) a **Partnership Deed** which is entered into and **signed** by the initial partners (at least one general partner and one limited partner);
- (2) a **Partnership Registration Document** is duly **delivered** to the Registrar;<sup>10</sup> and
- (3) a **certificate** of registration is **issued** by the Registrar in respect thereof.

The Partnership Deed must be drawn up in writing and contain certain specific details but it is not required to be registered with the Registrar and may remain confidential. The Partnership Registration Document shall on the other hand be delivered for registration and contain the following details:

- (a) name and residence of the general partner/s;
- (b) name of the partnership;
- (c) registered office in Malta;
- (d) business objects;
- (e) whether its capital is or is not divided into shares, and
  - (i) in the case of a Share Capital Limited Partnership with fixed share capital, a statement of the fact that the LP has a fixed share capital, the nominal (authorised) share capital, and where applicable an indication that the capital is or is capable of being divided into different classes of shares;
  - (ii) in the case of a Variable Capital Limited Partnership:
    - i. A statement of the fact that it has a variable share capital, and where applicable an indication that the capital is or is capable of being divided into different classes of shares;
    - ii. That its share capital shall be equal to the value for the time being of the issued share capital and that such share capital shall be divided into a specific number of shares without assigning any nominal value thereto;
    - iii. That the actual value of the paid up share capital shall be at all times equal to the value of the assets of any kind of the LP after the deduction of its liabilities;<sup>11</sup>
  - (iii) in the case of a Multi-Class Limited Partnership, a statement that the different classes of shares into which the capital is or is capable of being divided shall not constitute distinct sub-funds; and
  - (iv) in the case of a Multi-Fund Limited Partnership, a statement that the different classes or groups of classes of shares into which the capital is or is capable of being divided shall constitute distinct sub-funds as may be provided for in the Partnership Deed.<sup>12</sup>

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<sup>10</sup> Signed by the first general partner/s

<sup>11</sup> Provided that when a Variable Capital Limited Partnership is established as a Multi-Fund Limited Partnership and elects to have the assets and liabilities of its sub-funds treated as distinct patrimonies, the Partnership Deed as well as the Partnership Registration Document shall provide that the actual value of the sub-fund shall be at all times equal to the value of the assets of the particular sub-fund after the deduction of the sub-fund's liabilities.

<sup>12</sup> Provided that the initial capital may or may not be organised in one or more sub-funds.

- (f) where applicable in the case of a Multi-Fund Limited Partnership, the election to have the assets and liabilities of each sub-fund treated for all intents and purposes of the law as a patrimony separate from the assets and liabilities of each other sub-fund;
- (g) the period, if any, fixed for the duration of the LP, and where no such period is fixed, a statement to that effect; and
- (h) a declaration that the Partnership Deed has been entered into and signed.

The Partnership Deed shall, also state which of the partners are general partners and which are limited partners.<sup>13</sup> It may also:

- i. specify whether its administration and representation is to be exercised by the general partners jointly or severally and/or
- ii. expressly provide for the extension of the period, if any, fixed for its duration.<sup>14</sup>

### **3.2.2 Registration**

Following the registration of the Partnership Registration Document and the payment of the prescribed fees, a certificate will be issued by the Registrar confirming the registration of the LP which shall be considered to commence business from the date of the certificate. Registration of the LP is a straightforward process and may take as little as a day.

The certificate of registration constitutes conclusive evidence that the requirements of the Schedule in respect of registration have been complied with, and that the LP has come into existence and is duly registered under the Act. Registration is without prejudice to any other licence or other authorisation as may be required<sup>15</sup>.

## **4 TYPES OF LIMITED PARTNERSHIP STRUCTURES**

### **4.1 LIMITED PARTNERSHIPS WITH VARIABLE SHARE CAPITAL**

A LP may be registered with variable share capital; in which case, it is required to add the words “with variable share capital” or by “VC” or “V.C.” to the words “Limited Partnership” or its abbreviation “LP” or “L.P.” appearing after its name.

A Variable Capital Limited Partnership:

- (1) cannot issue partly paid up shares; and
- (2) may purchase or redeem its own shares, directly or indirectly out of its assets, on such terms and in such manner as may be provided by the Partnership Deed.

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<sup>13</sup> In default of this the partnership shall resolve itself in a partnership *en nom collectif*

<sup>14</sup> In this case such matters shall also be stated in the Partnership Registration Document to be delivered to the Registrar for registration.

<sup>15</sup> The carrying out of any licensable activity, such as the establishment of a CIS, would require the issue of a specific licence. The MFSA is however committed to the efficient processing of licence applications and to a fast turnaround of information received during the application stage, in order that licences may be issued in the shortest possible time provided the required standards are met.



Shares of a Variable Capital Limited Partnership which have been purchased or redeemed by the Partnership itself shall be cancelled and the amount of the Partnership's issued share capital shall be reduced by the amount paid by the Partnership for the purchase of the shares without any requirement on the part of the Variable Capital Limited Partnership to create any reserve.

#### ***4.2 MULTI-CLASS LIMITED PARTNERSHIP***

A Share Capital Limited Partnership may be constituted as a multi-class partnership where in terms of its Partnership Deed its capital is, or is capable of being, divided into different classes of shares, not constituting any distinct sub-fund. In such a case, it may not segregate any of its assets and liabilities.

A Multi-Class Limited Partnership may from time to time create and offer or issue a new class or classes of shares, in accordance with the provisions of the Partnership Deed and subject to the Authority's approval or any other requirements or conditions as may be applicable in terms of the Investment Services Act. Such class or classes of shares shall not constitute a distinct sub-fund or sub-funds of the Limited Partnership and may be denominated in a different currency provided that each class of shares may be denominated only in one currency.

A Multi-Class Limited Partnership having its capital denominated in different currencies may draw up its annual accounts (or other reports) in any one of these currencies.

#### ***4.3 MULTI-FUND LIMITED PARTNERSHIP***

A Share Capital Limited Partnership may be constituted as a multi-fund partnership where in terms of its Partnership Deed its capital is, or is capable of being, divided into different classes of shares, where one class or a group of classes of shares constitute a distinct sub-fund, as may be provided for in the Partnership Deed.<sup>16</sup>

A Multi-Fund Limited Partnership may from time to time create and offer to issue a new class or classes of shares which may constitute a new sub-fund or be comprised in an existing sub-fund or sub-funds of the LP, in accordance with the provisions of the Partnership Deed, and subject to any approval of the competent authority or any other requirements or conditions as may be applicable to such Limited Partnership in terms of the [Investment Services Act](#).

Different classes of shares constituting a sub-fund in a Multi-Fund Limited Partnership may be denominated in a different currency provided that a class of shares may be denominated only in one currency.

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<sup>16</sup> Provided that the initial capital may or may not be organised in one or more sub-funds.

#### ***4.3.1 Segregation of Assets and liabilities of Multi-Fund Limited Partnerships***

A Multi-Fund Limited Partnership may in its Partnership Deed opt to have each sub-fund's assets and liabilities treated separately from the assets and liabilities of each other sub-fund.

Save for such proportion of the liabilities of such a partnership which by virtue of the Partnership Deed, the terms of the offer or the issue of the shares constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein, the liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of action against the other assets of the LP.

Separate records, accounts, statements and other documents as may be necessary to evidence the liabilities and assets of each sub-fund as distinct from the assets and liabilities of other sub-funds in the same LP shall be held.<sup>17</sup>

#### ***4.4 TAX TREATMENT***

Tax neutrality for investors is a key consideration when selecting a fund's jurisdiction of establishment and legal form. In particular, for certain investors such as tax exempt pension funds or investors that can access lower tax rates by being treated as owning a slice of the fund's assets directly, investing in a fund which is treated as tax transparent is crucial and achieves such tax neutrality for them.

Article 66A of the Companies Act provides that a LP which expressly limits its objects to the collective investment of its funds in securities and in other property and which qualifies as a CIS in terms of the [Investment Services Act](#), may opt to have its capital **divided** or **not divided** into shares.<sup>18</sup>

Under Maltese tax law, a CIS established in the form of a LP with capital not divided into shares is deemed to be a transparent vehicle, so that income and capital gains arising from the fund are taxed directly in the hands of investors according to their tax status and retain their character (as income or gains). It is also expected that such an LP would be treated as tax transparent under the tax rules of most other tax authorities.

##### ***4.4.1 US Investors***

It is expected that a LP established in terms of Article 66A would also be treated as fiscally transparent by U.S. Internal Revenue Services. This is based on the understanding that the general partner in a LP has unlimited liability, thus satisfying the essential condition for being classified as a tax transparent partnership under U.S. rules. If tax transparency for U.S. purposes is not desired, the LP also offers the flexibility to elect corporate (non-transparent) tax treatment under the U.S. 'check-the-box' rules.

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<sup>17</sup> This shall be the responsibility of the general partner/s

<sup>18</sup> Article 66A also provides that LPs which qualify as CISs shall only be regulated by the Schedule and that the provisions of Part IV of the Act shall not apply to such partnerships, except as otherwise indicated in the Schedule.

#### 4.4.2 UK Investors

On the basis of correspondence with Her Majesty's Revenue and Customs, the Authority understands that a LP established in terms of Article 66A whose capital is not divided into shares should be considered to be transparent for tax purposes under UK law.

#### 4.5 ACCOUNTS

Article 30 of the EU Accounting Directive<sup>19</sup> provides that undertakings falling within the parameters prescribed in Article 1 of the Directive publish their duly approved financial statements within a period not exceeding 12 months.

In view of this, the following structures established under the Schedule are required to publish their approved financial statements in the following circumstances:

- (a) where they are set up as an LP or partnership *en nom commandite* with capital divided into shares; or
- (b) where they are set up as an LP or a partnership *en nom commandite* with capital not divided into shares and:
  - (i) all the partners thereof with unlimited liability are LPs with capital divided into shares; and
  - (ii) where all of the direct or indirect partners having otherwise unlimited liability in fact have limited liability by reason of those partners being:
    - (aa) an entity of a type listed in Annex I of the EU Accounting Directive (an 'Annex I entity'); or
    - (bb) an undertaking not governed by the laws of an EU Member State but which has a legal form comparable to that listed in paragraph Annex I of the EU Accounting Directive.

In order to fall outside the scope of the EU Accounting Directive, at least one member of an LP must have unlimited liability. This applies to both direct and indirect members, so liability cannot be fully limited at every level of the LP's chain of ownership.

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<sup>19</sup> [Directive 2013/34/EU of the European Parliament and the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC](#)

## **5 DISSOLUTION**

### **5.1.1 Winding up**

Upon the dissolution and winding up of a LP's affairs is the responsibility of the general partners unless circumstances require that a liquidator be appointed by the Court. Dissolution proceedings may be of a judicial nature initiated by means of a court application, or through the appointment of a liquidator by the partners in accordance with the Partnership Deed or by mutual agreement.

Upon dissolution, the LP shall cease to carry on business except to the extent necessary for its beneficial winding up.

### **5.1.2 Dissolution by the Court**

The Court may order the dissolution of a LP on the application of any partner, creditor or the Registrar if in its opinion:

- (a) the LP is insolvent;
- (b) its business has been suspended for an uninterrupted period of 12 months: unless the LP is of its nature passive;
- (c) the affairs of the LP are being conducted in a manner which is oppressive to any of the limited partners or prejudicial to their interests as limited partners or is calculated to affect adversely the carrying on of its business;
- (d) the affairs of the LP are being conducted in such manner as to defraud creditors or in an unlawful manner;
- (e) there has been persistent default by the LP or by any general partner thereof in complying with the requirements of the Schedule, the Act or any applicable regulation;
- (f) there are grounds of sufficient gravity to warrant the dissolution.

Upon dissolution, no limited partner may withdraw any part of his contribution, or otherwise claim as a creditor of the LP.<sup>20</sup>

Should the assets of the LP be insufficient to meet its liabilities, the persons conducting the winding up may demand from the partners payment of the contribution, if any, due by them, irrespective of the date when it falls due, and, if necessary, they may demand from the partners with unlimited liability the sums required for the payment of the aforesaid liabilities which are not covered by the contributions so demanded as aforesaid and paid.

A Notice of the dissolution is to be filed with the Registrar by the general partners<sup>21</sup> and is then published in the Government Gazette or on the Company Registry website within a period of 14 days from the date of dissolution.

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<sup>20</sup> Except in accordance with the provisions of paragraphs 25 and 31.

<sup>21</sup> Or, where applicable, by the limited partner or other person vested with the ordinary administration.

The dissolution of a LP is deemed to occur upon the earlier of the following:

- (a) the date of the occurrence of the event upon which, under the provisions of the Schedule, the LP is dissolved; or
- (b) the date of the order by the Court of its dissolution.

The Court may, on the application either of the liquidator or other person conducting the winding up, fix a time or times within which creditors are to prove their debts or claims or are to be excluded from the benefit of any distribution made before those debts are proved.

Upon dissolution, the LP's assets are to be distributed in the following order:

- (a) firstly, towards the expenses properly paid incurred in the dissolution, including the liquidator's remuneration;
- (b) secondly, to creditors other than partners, in satisfaction of the LP's debts, according to their priority and rankings as regulated by law;
- (c) thirdly, to limited partners who are creditors and who are not general partners, in satisfaction of the LP's debts, according to their priority and ranking as regulated by law;
- (d) finally, subject to the provisions of the Partnership Deed, to partners as follows:
  - a. limited partners for the return of their contributions or, where appropriate, for the release of their obligations to make contributions;
  - b. limited partners for their share of the profits on their contribution;
  - c. general partners other than for capital and profits;
  - d. general partners in respect of capital;
  - e. general partners in respect of profits.

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