ALLEN & OVERY

Continuation Funds for Real Estate Fund Managers

2023

Summary

In the current global economic climate, continuation funds provide an attractive alternative exit opportunity for real estate fund managers looking to create liquidity for investors in their funds.

In a closed-ended real estate fund context, continuation funds historically referred to the extension or roll over of substantially all of a fund's portfolio either in the same vehicle or into a new vehicle. More recently, continuation funds are being used to describe a situation where the manager continues to manage a specific asset or sub-portfolio of assets of an existing fund in a different fund vehicle.

Whilst conflict of interest issues are inherent in continuation funds and arguably the most significant issue to contend with, an agile fund manager can overcome these with a clear and precise strategy.

Other key issues to consider are confidentiality, taxation and handling both negotiations with new or existing investors and the numerous moving parts this type of transaction involves.

Background

The recent rapid increase in borrowing rates means the fund managers of closed-ended real estate funds approaching the end of their terms can be in a difficult situation. The pricing uncertainty for real estate in the current market means assets are difficult to price and as a consequence buyers are hard to find which means assets being held for longer than investors may have expected. In parallel, given these pricing uncertainties, fund managers may be in the position where the second phase of valuation creation of specific assets or sub-portfolios of assets in the portfolios of their existing funds offer better opportunities than those otherwise available in the market. However, regardless of this, some or all investors still want liquidity and the ability to undergo a refinancing, at a fund or portfolio level, to provide such liquidity is likely to be tricky in the current market and/or under current fund terms. The current challenge for some real estate fund managers is therefore to find a way to provide investors with that liquidity without having to dispose of those specific assets or sub-portfolios of assets of the fund in current market conditions.

In this scenario, a continuation fund is a potential solution. Historically, continuation funds have been used more as a tool for a fund manager to continue to manage trophy assets and portfolios with a clear remaining upside, but in the current economic environment, we have seen a significant rise in the number of clients considering continuation funds as an alternative source of liquidity instead.

This growing appetite for continuation funds has led us to set out a guide to help closed-ended real estate fund managers understand what continuation funds can do for them as a liquidity tool, the key issues along the way and how these can be mitigated.

Recap: What are continuation funds?

At its simplest, a continuation fund is an existing or new fund (the **Continuation Fund**) that provides liquidity to some or all of the investors (the **Existing Investors**) in the existing fund (the **Existing Fund**) whilst simultaneously allowing the fund manager of the Existing Fund to continue to manage some or all of the assets of the fund beyond the initially agreed term of the Existing Fund.

The term 'Continuation Fund' is often used interchangeably to refer to two distinct types of structure. Historically, a Continuation Fund would refer to what we would call an 'Extension Fund'. In an Extension Fund we would usually expect the substantive majority of the assets in the Existing Fund to form the portfolio of the Continuation Fund. This was especially true for real estate funds focused on specialty sectors that used a common operator across their assets, thereby resulting in a scenario where the portfolio of investments/ assets had a value as a whole which was greater than the sum of its parts.

Under this structure, the fund manager would seek to extend the term of the Existing Fund (such extended Existing Vehicle being the Continuation Fund) for those Existing Investors which wanted to remain exposed to the underlying assets and would offer those Existing Investors that did not wish to remain exposed to the underlying assets a liquidity event allowing them to exit. The liquidity for the Existing Investors exiting the Existing Fund would be provided either by selling part of the portfolio, a refinancing or through raising new capital from new investors or Existing Investors. However, unless considered in the initial design of the fund, whilst there may be mechanisms for short one or two-year extensions before the end of the life of the fund based on investor consents, further extensions beyond that usually run into the issue of having to get unanimity to a longer extension from the investors in the Existing Fund.

So, where that is an issue, rather than extending the term of the Existing Fund, a new fund vehicle would be set up by the fund manager (such new fund vehicle then being the Continuation Fund), typically based on the terms of the Existing Fund where some of the Existing Investors would 'roll over' into that new Continuation Fund.

More recently, the term 'Continuation Fund' has been used to refer to a structure whereby the fund manager continues to manage a certain specific sub-portfolio of assets or a single asset of the Existing Fund in a different new fund vehicle (such fund vehicle being the Continuation Fund). This is achieved through offering either one or more Existing Investor(s) and/or a new investor(s) (the Lead Investor(s)) the opportunity to invest in the Continuation Fund managed by the same fund manager as the Existing Fund in parallel with offering Existing Investors the opportunity to 'roll over' their proportionate investments into the Continuation Fund or be bought out by the Lead Investor(s). The liquidity for Existing Investors exiting the Existing Fund is provided by the Lead Investor(s). During the process, the Lead Investor(s) typically negotiates far greater governance rights that an Existing Investor would have had.

What are the advantages of Continuation Funds for the real estate fund manager?

– Allows the fund manager to create liquidity for some or all of the investors in the Existing Fund.

– Allows the fund manager to continue to receive management fees for managing the relevant investment(s)/asset(s) which it has expertise in. In addition, the fund manager will often receive some carry or performance fee on the 'exit' of the Existing Fund and then may have a second opportunity to earn a carry or performance fee under the terms of the Continuation Fund where further value is created.

– By selecting the Lead Investor(s) carefully, the fund manager has the opportunity to continue to manage the asset with a more aligned investor group and/or the opportunity to modernise the underlying fund documentation (for example to reflect new tax or regulatory changes) or negotiate more bespoke terms.

– In some cases, it provides opportunities to make follow-on investments that would otherwise have been restricted, if not altogether impermissible, in the Existing Fund. For example, this may allow a closed-ended real estate fund to: (a) provide last-mile funding to high-quality development projects and (b) preserve the value of the existing investments by incurring the necessary expenses in connection with the maintenance of the real assets held in its portfolio.

What are the advantages of Continuation Funds for investors?

– Provides Existing Investors that wish to exit with liquidity (and potentially sooner than if they waited for the Existing Fund to complete its end of life liquidation).

– Creates opportunities for: (a) Existing Investors to continue to have exposure to high-quality assets; and (b) new investors to access high-quality assets which the fund manager has experience of managing.

– Provides the Lead Investor(s) with the ability to negotiate stronger governance rights (and potentially other terms such as fees and carry or performance fee) than it would benefit from in a usual closed-ended real estate fund.

– As part of the commercial terms, the fund manager may be required to invest capital into the Continuation Fund and/or to roll over some or all of its carry or performance fee from the Existing Fund into the Continuation Fund which creates greater alignment between the fund manager and investors.

What are the conflicts of interest issues?

What do we mean by conflicts of interest in this context?

A conflict of interest in a Continuation Fund is inherent on account of the fact that the fund manager is acting both for the seller (i.e. the Existing Fund) and the buyer (i.e. the Continuation Fund) to the same transaction and therefore has competing duties to the Existing Fund and the Continuation Fund. These conflicts of interest (and how they can be mitigated) fall into three broad categories – (1) fiduciary duties that arise at common law (or equivalent), (2) conflicts of interest regimes which arise out of the regulatory framework that the fund manager or fund is subject to and (3) contractual duties specific to the particular Existing Fund or Continuation Fund set out in their underlying documents.

(1) Fiduciary Duties

Owing to the relationship between the fund manager and the fund managed by the fund manager, fund managers often owe a common law fiduciary duty to each fund. As a starting point, that duty is one of 'single-minded loyalty' owed by the fund manager to each fund and a breach of fiduciary duty is seen as one of 'disloyalty or infidelity'. That duty can be summarised in two key legal principles: the fund manager must not (at least not without prior authorisation or consent): (a) put itself in a position where its personal interests conflict with (or there is a real possibility of conflict with) its fiduciary duties to a fund as its client (often called the 'no conflicts rule'); and (b) make a profit from its fiduciary office (often called the 'no profit rule').

However, in a commercial context where, for example, a fund manager (as a fiduciary) has multiple clients, this common law concept has to work appropriately in protecting multiple clients of a fiduciary (as principals to whom the fund manager cannot always have complete fidelity, as a matter of commercial reality). Courts in different common law jurisdictions have been called upon to determine the extent to which fiduciary duties can be modified and it is generally recognised that those duties can be modified by express or implied contractual terms agreed by a fund manager and its fund.

(2) Regulatory Conflicts Duties

Similar to the common law fiduciary duties, most regulatory regimes recognise that a fund manager may have multiple clients to whom it would owe duties and those duties may result in conflicts. These regulatory regimes typically impose parallel fiduciary duties which need to be considered alongside those common law duties.

The regulatory conflicts duties which apply to a particular fund manager or fund will of course depend upon the fund manager and the fund. For the purpose of this paper, we have considered the requirements which would apply to an alternative investment fund manager (**AIFM**) under the European Alternative Investment Fund Managers Directive (**AIFMD**) (and the accompanying Level 2 rules).

Broadly, Article 14 of the AIFMD requires AIFMs to maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the alternative investment fund (**AIF**) it manages and the investors in the AIF as a whole.

The AIFMD in Article 30 of the Level 2 rules sets out that, for the purpose of identifying the types of conflicts of interest that arise in the course of managing an AIF, AIFMs shall take into account, in particular, whether the AIFM, a relevant person or an affiliate:

- is likely to make a financial gain, or avoid a financial loss, at the expense of the AIF or its investors;
- has an interest in the outcome of a service or an activity provided to the AIF or its investors or to a client or of a transaction carried out on behalf of the AIF or a client, which is distinct from the AIF's interest in that outcome;
- has a financial or other incentive to favour:
  (a) the interest of a client or group of clients or another AIF over the interest of the AIF;
  (b) the interest of one investor over the interest of another investor or group of investors in the same AIF;
- carries out the same activities for the AIF and for another AIF or client; or
- receives or will receive from a person other than the AIF or its investors an inducement in relation to collective portfolio management activities provided to the AIF, in the form of monies, goods or services other than the standard commission or fee for that service.

In cases where those steps are not sufficient to ensure, with reasonable confidence, that risks of damage to the investors' interests will be prevented, the AIFM must clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures. The AIFMD Level 2 rules provide further guidance as to what these policies and procedures could look like. In practice, this means that AIFMs would have conflicts of interest policies which they must comply with in both identifying a conflict and then managing that conflict.

(3) Contractual Conflicts Duties

It is typical for the fund documents of a fund to include provisions which seek to fairly deal with conflicts of interest (whether stemming from common law fiduciary duties or regulatory conflicts duties).

Whilst these provisions vary by fund, they usually include prior authorisation through disclosure or approvals. It is common to see: (a) general pre-disclosure to the fund and its investors of the nature of a wide range of potential conflicts which may arise during the life of the fund which the fund agrees that the fund manager may be subject to, (b) mechanisms for the approval by either the investors advisory committee or a specific percentage of investors for specific types of conflicts (for example, related party transactions or services, even where on arm's length) or any material conflicts, (c) the requirement on the fund manager to disclose certain types of conflicts and certain information in relation to those conflicts to investors (for example, amounts paid by the fund for related party services), and (d) approvals built into the fund documents – for example, where fund managers are permitted to retain transaction fees, this is usually pre-built into the fund documents to avoid breaching the 'no profit rule'.

These provisions are partly a pre-emptive step by the fund manager to try and bake into the terms of the fund documents the consents or disclosure required to manage its fiduciary duties or regulatory conflicts of interest (as described above) such that the fund manager has the toolkit to manage its conflicts. Other times, these are negotiated into the fund documents by investors to provide certainty that a particular issue will be treated as a conflict matter and/or specify how they would like a particular conflict to be managed.

How does a fund manager manage these conflicts of interests when establishing a Continuation Fund?

As set out above, the fund manager can try to build into the terms of the fund documents the prior consents and disclosure required to manage conflicts of interest for a future Continuation Fund so that it does not need to get Existing Investors' consents. However, in the context of a proposed Continuation Fund, typically the Existing Fund's documentation would not have contemplated the proposal or the proposal would be different to that contemplated by any prior language so that the prior consent is inoperative.

The fund manager may need to implement a number of internal steps and structures (for example, two teams) to ensure that it can manage the conflicts of interest due to the fact that the fund manager is on both sides of the deal.

However, even with those in place, where the consent of the Existing Investors (either through the investors advisory committee or through an investor vote) is required, the Existing Investors may not be willing to provide their consent since the fact that the fund manager is on both sides of the deal means that the Existing Investors cannot be certain that the terms on which the Continuation Fund is agreeing to purchase investments from the Existing Fund are the best terms available. This issue is exacerbated in the context of illiquid real estate investments where the actual price available in the market can differ and in many cases be lower than the fair market value of the asset(s) being reported to the Existing Investors.

To address this issue, it is increasingly common for the parties to agree to an independent valuation of the portfolio of assets being sold in addition to any consents and disclosures to provide Existing Investors with sufficient comfort to give their consent. At other times, the fund manager may pursue an auction process in order to establish a 'fair' price, with the Continuation Fund being one of several bidders. In that instance, to ensure the integrity of the process and to demonstrate that conflicts are fairly managed, it is key to ensure that there is symmetrical disclosure of information in an indexed data room for all bidders so that all bidders have access to any available information that would impact the price a party bids.

More recently, we have incorporated specific provisions in relation to Continuation Funds into the terms of fund documents at the beginning of the fund's life. Typically, such provisions entitle the fund manager to exercise its discretion to establish a Continuation Fund that will acquire investments from the Existing Fund on fair and reasonable terms within the limits of certain pre-agreed conditions. These conditions are designed towards: (a) achieving a robust (and usually independent) price discovery mechanism that provides sufficient comfort to the Existing Investors that the fund manager is acting in the best interest of the Existing Fund; and (b) establishing the process that needs to be followed for setting up such a Continuation Fund. This is an area of contention for some investors and fund managers may provide that some elements require the approval of the Exiting Fund's investor advisory committee.

In addition to the contractual comfort set out above, some fund managers have taken active steps in seeking to evidence alignment of their interests with the fund and its investors. One such area is the approach taken by the fund manager engaging third-party advisors to review the proposed Continuation Fund arrangements for the Existing Investors (rather than having to each get advice). In certain jurisdictions such as the United States of America, the regulators have proposed requiring fairness opinions from independent third parties, among other things, in an attempt to be prescriptive about the minimum level of protections available to investors in such cases. It has not yet been found that regulators in Europe are adopting this approach towards this issue.

Similarly, the Institutional Limited Partners Association in its recent guidance note on Continuation Funds dated May 2023 (the ILPA 2023 Guidance) recommends that the investors advisory committee and the investors should have access to experienced independent legal and transaction advisors to advise on the terms, valuations and waiver of conflicts of interests in a Continuation Fund transaction.

Key Documents

*Non-disclosure agreement (**NDA**)*

Whilst the Existing Investors are likely to be subject to stringent confidentiality obligations in the fund documents, limiting the scope of information that can be shared by them and to whom they can share that information, this will not be the case for any new investors looking to acquire an interest in the Continuation Fund.

As is the case in a plain vanilla transfer of fund interests among investors, fund managers should consider obtaining equivalent confidentiality undertakings under an NDA from new investors, including any Lead Investor(s), due to the sensitive nature of information regarding the underlying assets that is being shared with the new investors. Fund managers should check that the confidentiality obligations in the Existing Fund's documents allow disclosure of confidential information by the fund manager where the recipient is under an NDA.

Master Framework Agreement

The master framework agreement sets out the steps, terms and conditions for the acquisition of the Existing Fund's asset(s) by the Continuation Fund and, where there is a Lead Investor(s), binds the Lead Investor(s) into the transaction, subject to confidentiality and other asset level conditions such as third party approvals, consent from the Existing Investors and maximum roll-over amount from the Existing Investors. Where the Continuation Fund is an Extension Fund, this may not be necessary, as all these mechanics can be built into the amended constitutional documents of the extended Existing Vehicle as the Continuation Fund.

Typically, the Existing Fund will provide appropriate representations and warranties to the Continuation Fund, although these may be lighter touch than those in a mainstream merger and acquisition deal. Depending on the due diligence findings, these may need to be backed by specific indemnities. In preparing the master framework agreement, the fund manager acting for the Existing Fund needs to carry out a thorough review of the scope and remedies available upon breach of such representations and warranties whilst bearing in mind the scope of the investor giveback, survival and successor fund provisions of the Existing Fund. Given the limited nature of these, where possible, fund managers often consider warranties and indemnities insurance in order to provide sufficient protection to the investors in the Continuation Fund and the ability to wind up the Existing Fund earlier.

Disclosure Memo/Roll over consent

A disclosure memo/roll over consent is an investor circular which sets out the details of the proposed transaction, the terms of the option to participate being made to Existing Investors and, if required, requests for consent from the Existing Investors.

Given the conflicts issues highlighted above, this would usually include a detailed explanation of how the pricing was determined. If an independent valuation was carried out, a copy of the valuation report should be annexed to the memorandum. Similarly, if an auction process was followed, the number of bids received along with details of the offers should be disclosed (including, subject to confidentiality obligations, references to any Existing Investors that formed a part of the bidding group).

If the fund documentation of the Existing Fund sets out specific provisions on Continuation Funds, the fund manager should ensure that this disclosure memo/roll over consent satisfies any consents/documentation/information that the fund manager is required to provide.

Continuation Fund Constitutional Document/Subscription Agreement

In the context of an Extension Fund where the Existing Vehicle is the same vehicle as the Continuation Fund, the constitutional document for the Continuation Fund is usually an amended version of the constitutional document for the Existing Vehicle. This amended version usually includes mechanisms to manage the rollover of Existing Investors such that it is only new investors coming into the Continuation Fund that need to sign up to a subscription agreement.

In the context of other Continuation Funds, the constitutional document of the Continuation Fund will contain the key terms for on-boarding the Lead Investor(s), any other new investors and the Existing Investors that elect to roll over into the Continuation Fund. These will often need to be carefully tailored to the needs of the Lead Investor(s) whilst preserving certain elements for the Existing Fund for the comfort of the Existing Investors. Whilst Continuation Funds are typically bespoke arrangements and thus can really vary, in our experience the key differences in the terms of a Continuation Fund usually arise in the following areas:

(1) Management Fee: Where the Continuation Fund is not looking to acquire any new assets, the management fee charged by the Continuation Fund is typically lower than the management fee charged by the Existing Fund and is tied closely to the cost of investments held. Consequently, where new or follow-on investments are contemplated, this may result in an increase in the management fee charged by the fund manager.

(2) Carry or performance fee waterfall: Given that investors often view Continuation Funds as giving fund managers a second bite of the cherry at earning a carry or performance fee on these assets, the distribution waterfall is often highly structured to contain a multi-tier waterfall featuring both internal rate of return and multiple hurdles/preferred rate of return. In addition, there may be separate hurdle rates for each of the underlying investments/assets depending on the asset profile. Factors that influence the carry or performance fee arrangements also include the performance of the assets already sold and whether the outstanding assets are: (a) yield-generating, such as core and core plus real estate investments; or (b) capital appreciative, such as value-add or opportunistic real estate investments.

(3) Fund manager no-fault removal: Fund manager no-fault removal rights are heavily negotiated in Continuation Funds and we therefore see a wide variety of outcomes from the negotiations. Investors in a Continuation Fund more often seek greater removal rights than those in the Existing Fund and tighter controls over the vesting of carried interest.

(4) Fund life: The term of the Continuation Fund, where it is not looking to make new investments, is usually lower than the Existing Fund. Investors in the Continuation Fund often have more control over extension requests.

(5) Investor influence upon exit: Investors in the Continuation Fund, where it is not making new investments, may seek control over the decision to exit from assets. This could include, depending upon the dynamics of the Lead Investor(s): (a) carrying out a forced sale upon the request of one or more of the investors in the Continuation Fund, (b) providing for a call/put option in favour of one or more investors or (c) simply requiring a prior approval from the investors before exiting an asset.A subscription agreement containing the terms of subscription will also need to be entered into between the Continuation Fund and the investors that will be participating in it.

Side agreement placing restrictions on redemptions

Whilst this note focuses on closed-ended real estate funds, we sometimes see cases where the Existing Fund is open-ended, whereas the Continuation Fund is proposed to be closed-ended. In that scenario, the purpose of establishing the Continuation Fund is often to provide the liquidity needed by the Existing Fund to meet redemption requests. Where that is the case, it may be necessary to obtain a hard commitment from the Existing Investors that elect to participate in the Continuation Fund that they will not put in redemption requests whilst the fund manager is establishing the Continuation Fund.

What are the key tax issues to consider when setting up a Continuation Fund?

It will be important to engage early on the appropriate structuring of the Continuation Fund to ensure that the process does not give rise to unanticipated tax consequences.

A key focus in this regard is likely to be on transfer taxes (including stamp duties, registration duties and other similar charges) that could arise on the transfer of assets from the Existing Fund to the Continuation Fund. Real estate transfer taxes (RETT) arise in a number of jurisdictions on the transfer of real estate. In some cases (such as the UK), this will apply only on the transfer of a direct interest in land, but in many other cases (including for example Germany), RETT will also arise on the transfer of shares in real estate holding companies as well. It may be possible to achieve some sort of tax neutral 'roll over' in respect of the proportionate interest in the Continuation Fund to be held by Existing Investors, but it is likely to require detailed consideration. Ultimately, it is likely that at least some RETT will be triggered given the change in the ultimate beneficial ownership of the underlying assets. Other tax issues are likely to include VAT on the transfer and the direct corporate tax consequences of the disposal for the Existing Investors, especially those that roll over into the Continuation Fund. If it is not possible to allow them to roll over their interests in the Existing Fund into the Continuation Fund, then any gains triggered on the disposal of the assets by the Existing Fund could result in dry tax charges arising to those investors.

Engagement with Existing Investors

In running a successful Continuation Fund process, the fund manager should engage with Existing Investors early and be as transparent as possible to flush out any issues sooner rather than later and get an initial indication of which investors are likely to want liquidity and which will provide their consent to the Continuation Fund. This is often done by first engaging with the investors advisory committee (which would usually be comprised of representatives of the larger investors) before going out to the wider Existing Investor group. Similarly, as discussed above, the disclosure memo/roll over consent should be suitably comprehensive, in particular in relation to pricing and valuations. The fund manager should strive to ensure that there is no asymmetry of information among the Existing Investors as a failure to disclose this information in an impartial manner could give rise to claims of a breach of fiduciary and other duties by the fund manager. This area can be particularly sensitive where there are dominant investors in the Existing Fund and/or the Lead Investor(s) are Existing Investors.

Lastly, the fund manager should provide sufficient time for the Existing Investors to determine whether they would like to participate in the Continuation Fund (we note that ILPA 2023 Guidance suggests at least 30 calendar days or 20 business days) and should be mindful of any specific notice requirements that have been agreed with a particular investor in their side letter.

Timelines and costs

Although the fund manager sits on both sides of the deal, the timelines for acquiring assets by the Continuation Fund can be very similar to those found in a typical asset deal due to the bespoke nature of these arrangements.
In practice, we would expect a Continuation Fund to take a number of months from start to finish depending upon the number of stakeholders and assets involved (for example, timetables can be longer where there are regulatory approvals for multiple assets or shorter where there are a limited number of stakeholders with a good relationship). This is because the fund manager is required to devise and execute a carefully thought-out strategy encompassing engagement with multiple stakeholders and then co-ordinate an exercise with a large number of moving parts. These include due diligence of the outstanding assets, the preparation and negotiation of the key documents with the Existing Investors and/or the Lead Investor(s) and the co-ordination of consents from investors and potentially third parties such as lenders and regulators.

Allocation of the costs between the Existing Fund and the Continuation Fund is a heaving negotiated point and depends upon the motivation behind the deal – where the transaction is driven by certain Existing Investors requiring liquidity, we would usually see a greater portion of the costs being borne by the exiting Existing Investors. However, where the transaction is driven by the Lead Investor(s), the Continuation Fund is likely to bear more of the costs.

Conclusion

Current market conditions mean that real estate fund managers are having to find new ways to provide liquidity to their investors and the addition of Continuation Funds as an alternative exit route for high-quality investments or investments that have the potential to become high-quality over a period of time is a welcome further potential solution. Whilst the issues highlighted in this paper mean a Continuation Fund will not always be the right option for retaining management of assets, where it is, these issues can be navigated by careful planning and execution by the fund manager making a Continuation Fund an attractive option.

As we have seen, Continuation Funds are highly bespoke products and this article has only touched on some of the preliminary issues that will need to be considered when deciding whether to use a Continuation Fund and how to handle issues that may arise along the way. For more detailed advice on Continuation Funds, please contact any member of the team or your usual A&O contact.

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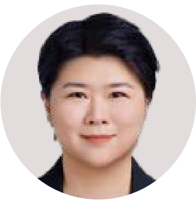

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